DEFAULT TERMINATION-THE CORRECT STANDARD OF REVIEW

The Federal Circuit has clarified the government's burden when it terminates a contract for default. In a decision vacating and remanding a Civilian Board of Contract Appeals case, the court held that the government must prove the contractor was in default under a *de novo* standard, regardless of the Contracting Officer's reasoning in the final decision on a claim. *Dept. of Transportation v. Eagle Peak Rock & Paving, Inc.*, No. 2021-1837 (Fed. Circ. June 6, 2023).

Eagle Peak was awarded a $35 million contract to improve roads and trails in Yellowstone National Park by the Department of Transportation. The contract included FAR 52.249-10, a standard FAR termination for default clause clause. Eagle Peak was required to submit a construction schedule, but made several submissions that the agency rejected as noncompliant. In October 2016, the contracting officer issued a cure notice to Eagle Peak. The cure notice explained the Eagle Peak was not prosecuting the work with sufficient diligence to ensure completion within the time specified in the contract. Between October 2016 and January 2017, Eagle Creek submitted five more schedules, all of which the contracting officer rejected. The CO ultimately terminated the contract for default, citing her lack of confidence in Eagle Peak's ability to create a schedule or to complete the project by deadline.

Eagle Peak appealed the default termination to the Civilian Board, and the Board held the default was improper, focusing heavily on what the CO said and considered in determining that timely completion was in sufficient doubt, rather than what the record at the Board showed.

The court noted that the Contract Disputes Act provides that if a contractor challenges the CO's decision, the action "shall proceed *de novo*," based on the evidence before the board and not the CO's reasoning or finding of fact. When a CO defaults a contract, the government bears the burden of proof with respect to whether the termination was justified—and in cases like this (likely to complete on time or not), the government must establish that the CO's decision to terminate was reasonable. If the government proves this, then the contractor bears the burden of proving that its nonperformance was excusable.

The court noted that it had consistently approved default terminations where the CO's logic was not sustainable but where there was another existing ground for default, even where that ground was or was not known to the CO at the time of termination.

The court concluded that the Board's evaluation of the contracting officer's reasoning exceeded the limit scope of the threshold inquiry recognized by this circuit. The Board also failed to separate the threshold analysis from its *de novo* evaluation of the record evidence bearing on whether termination for default was justified. The court vacated and remanded the case.

Takeaway. In a termination for default, the government must prove the contractor was in default under a *de novo* standard, regardless of the Contracting Officer's reasoning in the final decision on a claim of improper termination. The government must produce evidence during the

litigation to prove that, under a *de novo* standard of review, the contractor was actually in default.

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