

## CONCEDING THE GOVERNMENT'S CASE IN TERMINATION FOR DEFAULT

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A government termination for default is a drastic sanction which requires that the government produce solid evidence proving that the termination was reasonable and justified. If the government establishes a prima facie case of the contractor's default, then the contractor bears the burden to show that its default was excusable (due to causes beyond the control and without the fault or negligence of the contractor) or was caused by the government's material breach. Contractors are well advised to take every potential default very seriously, and be fully responsive to any Show Cause or Cure Notice that they might receive. In a recent Armed Services Board of Contract Appeals Case, apparently, the contractor did not take the government's warnings seriously, and admitted its mistake in the subsequent litigation. *Ballistic Recovery Systems, Inc.*, ASBCA No. 61333, Dec. 13, 2018.

*Ballistic* involved a fixed price contract for parachute sleeves issued by the Defense Logistics Agency ("DLA"). The contract required a first article test ("FAT") submission, which must be passed. The Army (which tested the articles) found numerous major deficiencies in the first article, including three significant failure scenarios in the drop test. Any one of these deficiencies would be considered "major defects." *Ballistic* resubmitted the FAT samples a second time, but the Army again found major deficiencies again—any one of which would be sufficient to disapprove the first article.

The government then issued a Show Cause notice to *Ballistic*, stating it was considering terminating the contract for default. *Ballistic's* response did not address any of the major deficiencies cited by DLA/Army. Instead, *Ballistic* referred to an earlier contract for deployment sleeves where its FAT articles had been approved (even though the Contracting Officer had previously denied *Ballistic's* request for a FAT waiver). The Contracting Officer terminated the contract for default as a result of multiple first article tests which failed to conform to the technical data package.

The Board held that the government had established a prima facie case demonstrating that the default was reasonable and justified based on major deficiencies and failures in the drop test. In its pleadings to the Board, *Ballistic* made two errors fatal to its case:

- It admitted that its FAT samples were "non-conforming products"
- It admitted that any one of the major deficiencies cited by the Government would be sufficient to constitute a FAT failure.

The board found the default justified, noting that *Ballistic* had effectively conceded the government's case.

Takeaway. Clearly, FAT samples as well as production items must meet the requirements of the technical data package and the contract. When a FAT is disapproved, a contractor must take necessary steps to obtain approval. Also, when a Show Cause or Cure Notice is received, a contractor must seriously respond to every allegation in that document, explaining why its

performance was excused. And finally, if you are going to litigate a default at a Board or in a court, don't concede the Government's case in your pleadings.

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