

TERMINATION FOR CAUSE WAS PROPER WHERE EXCUSABLE DELAY WAS NOT PROVEN

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A recent case at the Federal Circuit demonstrates how important it is for a contractor terminated for cause (similar to a termination for default, but in a commercial item contract) to put forth strong evidence that delays in delivery were due to excusable delay, and the termination should be converted to a termination for convenience. *Servant Health, LLC, Transcendence, Inc., Noble Attorney, LLC v. United States, and American Medical Equipment Inc. v. United States*, Fed. Cir. Nos. 2022-2193, 2022-2194 (Fed. Cir. Sept. 30, 2024).

The case concerned four contractors who were awarded nitrile examination gloves by the Department of Veterans Affairs (“VA”) during the COVID 19 global pandemic. None of the contractors delivered gloves that met their delivery schedule and/or specifications. The contracts included the following clauses:

- Termination for Cause, which states that “the government may terminate this contract, or any part hereof for cause in the event of any default by the contractor or if the contractor fails to comply with any contract terms and conditions, or fails to provide the government, upon request, with adequate assurances of future performance.” FAR 52.212-4(m).
- Excusable delay which states that “the Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence, such as acts of God or the public enemy, acts of the Government In either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather and delays of common carriers.” FAR 52.212-4(f).

The VA made it clear in the solicitations that no delivery extensions would be granted including for delays associated with the manufacturer, the supplier, shipping delays, customs, lack of financing and the pandemic.

American Medical Equipment failed to meet the delivery deadline by several days, and the VA terminated its contract for cause.

Servant made a partial delivery on time, but the packaging of the delivered gloves did not match Servant’s submission. The VA terminated its contract for cause.

Noble failed to deliver the gloves that were in its contract, and the VA terminated Noble’s contract for cause.

Transcendence was unable to deliver on time, and its contract was terminated by the VA for cause.

The Federal Circuit upheld the decision of the Court of Federal Claims because the contractors did not show that delays were excusable, there was no abuse of the Contracting Officer's discretion and no government breach, and finally, that the Federal Claims Court impermissibly relied on American Medical's pre-award characteristics.

The Court rejected all of the contractors' excuses and allegations, finding that they had advanced only "unsupported arguments" to support the excusable delay claims. Basically, the court found only generalized (not specific) assertions of reasons for the delay.

The Federal Circuit rejected Noble and Transcendence's arguments that they were permitted to substitute other products for those in their contract. Specifically, the solicitation mentioned "Brand Name or Equal" and therefore the contractors alleged they could substitute products. The Federal Circuit rejected this reasoning, The awards were based on submitted quotes, and these documents must show that the items being quoted meet the technical requirements as awarded. The Federal circuit concluded that the "brand name or equal language only allows substitution at the solicitation (not the post-award delivery) stage.

Finally, the Federal Circuit rejected the arguments that the contracting officer intentionally evaded exercising discretion and breached the duty of good faith and fair dealing. This argument was first brought on appeal, and furthermore, Appellants only offered conclusory statements that their failure to deliver on time was merely a pretext for termination.

Takeaway. When you sign up for a delivery schedule of your product, you had best be able to meet that schedule or be prepared for a termination for cause (or default). If alleging excusable delay, you must be able to document and support what happened, and show why you were compelled to deliver late. And finally, "Brand Name or Equal" applies to the solicitation phase—once you quote an "equal" item and the government accepts your quote, you must then deliver what you quoted.

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