

## GOVERNMENT WAIVER OF DELIVERY DATE

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A government waiver of a delivery date is an important potential defense against a termination for default. This is especially the situation where the contractor has failed to deliver the product in accordance with the contractually required delivery date. An excellent example of waiver is *Conorzio Stabile GMG S.c.ar.l*, ASBCA No. 6253, May 1, 2023 (hereinafter referred to as “CSG”). The Navy awarded a task order to CSG to construct a vestibule and replace doors in Bahrain. Based on two theories, failure to make progress and failure to deliver on time, the Navy terminated the contract for default. CSG sought to have the termination converted to a convenience termination because the Navy had waived the performance date and failed to create a new performance date.

Here is the timeline of the procurement:

July 31, 2018 Navy awarded task order to CSG which specifically identified the delivery date as September 29, 2019. The task order included \$400/day liquidated damages per FAR 52.249-10 (Default, Fixed Price Construction)

July 8, 2019 CSG submits proposal for price reduction and 180 day time extension

Sept. 8, 2019 Navy issues partial notice to proceed, no change to delivery date

Nov. 5, 2019 CSG submits revised proposal for modification for downward price adjustment and a 250 day extension

Jan 5, 2020 Navy sends CSG a cure notice but it is never actually received by CSG

Feb. 11, 2020 Navy issues show cause notice—failure to perform

Feb. 20, 2020 Navy response to CSG show cause response and acknowledged that there had been some government delays. Navy also expressed lack of confidence in CSG plans to rectify the project

Mar. 11, 2020 Navy suspends work per FAR 52.242-14, Suspension of Work

Sept. 20, 2020 Navy terminates the task order for default because of failure to delivery. At the ASBCA, the Navy changed this default ground to failure to make progress

The ASBCA ruled that the Navy could change the basis of the default from failure to deliver to failure to make progress. It noted CSG’s waiver defense, and indicated that the proponent of the affirmative defense of waiver (of delivery date) bears the burden of proof, so CSG had to prove the waiver.

CSG argued that the Navy waived the project completion date. Government waiver occurs when two conditions are met (1) failure to terminate within a reasonable time after default under circumstances indicating forbearance and (2) reliance by the contractor on the failure to terminate and continued performance by the contractor under the contract, with the government’s knowledge and implied or express consent.

The Board noted that even in construction contracts, there are unusual circumstances where the government fails to expressly reserve its right to preserve the default or invoke the liquidated

damages provision (neither of which the Navy did in this case) and where the board has found waiver of the completion date when time is no longer of the essence. The Board held that when the government issued a partial notice to proceed, and left the contract completion date unchanged—without a reservation of rights or assessment of liquidated damages, the Navy had waived the completion date. Also, at that time, the Navy continued to approve CSG’s submittals, showing forbearance, resulting in CSG’s reliance to continue working on the task order. Instead of assessing liquidated damages, issuing a stop work order or terminating for default “the Navy allowed CSG to muddle through for almost six months before” finally ordering a stop work order.

After waiver of the completion date, the government cannot terminate a contract for default based on failure to make progress unless the government and contractor agree on a new completion date or the government unilaterally notifies the contractor of a reasonable new completion date. The Navy never did either of these two things.

Takeaway. Because the government waived the original contract completion date, the Navy could not terminate CSG’s task order for default for failure to make progress without a new completion date to measure the contractor’s failure to make progress. The Board therefore converted the termination for default to a termination for convenience.

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