

Chapter 25
**Contract Terminations
for Default**



2014 Contract Attorneys Deskbook

THIS PAGE INTENTIONALLY LEFT BLANK

CHAPTER 25

CONTRACT TERMINATIONS FOR DEFAULT

I. INTRODUCTION	1
A. Definition.....	1
B. Effect of Default Terminations	1
C. Review of Default Terminations by the Courts and Boards.....	2
II. THE RIGHT TO TERMINATE FOR DEFAULT	2
A. Contractual Rights.....	2
B. Common-Law Doctrine.....	3
III. GROUNDS FOR TERMINATION	3
A. Failure to Deliver or Perform on Time.....	3
B. Failure to Make Progress so as to Endanger Performance	4
C. Failure to Perform Any Other Provision of the Contract	6
D. Other Contract Clauses Providing Independent Basis to Terminate for Default.....	7
E. Common Law Ground – Anticipatory Repudiation.....	7
F. Common Law Ground – Demand for Assurance	9
G. Grounds Unknown at Time of Termination	10
IV. NOTICE REQUIREMENTS	10
A. Cure Notice	10
B. Show Cause Notice	13
V. CONTRACTOR DEFENSES TO A TERMINATION FOR DEFAULT	15
A. Excusable Delay.....	15
B. Waiver	20
VI. THE DECISION TO TERMINATE FOR DEFAULT	24
A. Discretionary Act	24
B. Burden of Proof.....	24

C. Regulatory Guidance	26
VII. RIGHTS AND LIABILITIES ARISING FROM TERMINATIONS FOR DEFAULT	30
A. Contractor Liability.....	30
B. The Government’s Liability	33
VIII. COMMERCIAL ITEM CONTRACTS: “TERMINATION FOR CAUSE”	34
A. Background	34
B. Applicable Rules for Terminations for Cause.....	34
C. Policy	34
D. General Requirements.....	34
IX. MISCELLANEOUS	35
X. CONCLUSION.....	37

CHAPTER 25

CONTRACT TERMINATIONS FOR DEFAULT

I. INTRODUCTION

- A. Definition. A contractor's unexcused present or prospective failure to perform in accordance with the contract's terms, specifications, or delivery schedule constitutes contractual default under government contracts. See FAR 49.401.
- B. Effect of Default Terminations
1. Judges often describe terminations for default as a "contractual death sentence." ENGBCA No. 5959, No. 6005, 94-2 BCA ¶ 26,649.
 2. A termination for default continues to have an on-going negative effect on a contractor beyond the specific contract which was terminated. This is true even when the contractor has appealed and even prevails in challenging the termination.
 - a. Colonial Press Int'l, Inc., B-403632, 2010 CPD ¶ 247 (GAO upheld the exclusion of the defaulted contractor from the competition for the reprocurement contract even though the termination was on appeal).
 - b. Commissioning Solutions Global, LLC, B-403542, 2010 CPD ¶ 272 (GAO went out of its way to find that, in evaluating offers for a contract for dry dock repairs, the Coast Guard properly could have considered the T4D of a prior similar contract in assessing past performance even though the record established that the evaluators did not consider the earlier contract; GAO found that the prior T4D could properly be considered even though it was on appeal and a few weeks later the Coast Guard agreed to convert the T4D to a T4C).
 - c. M. Erdal Kamisli Co. Ltd. (ERKA Co. Ltd.), B-403909.2, B-403909.4, 2011 CPD ¶ 63, at *5 (2011) (holding that the agency could properly consider a prior T4D in rating past performance as an evaluation factor in a new procurement even though the T4D was on appeal; the Army could "properly rely upon its reasonable perception of a contractor's inadequate performance even where the contractor disputes the agency's position").

C. Review of Default Terminations by the Courts and Boards

1. Courts and boards hold the government to a high standard when terminating a contract for default because of the adverse impact such an action has on a contractor. Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987) (“[A] termination for default is a drastic sanction [citation omitted] that should be imposed upon a contractor only for good cause and in the presence of solid evidence.”); Mega Constr. Co. v. United States, 25 Cl. Ct. 735 (1992).
2. Unfortunately, government officials frequently fail to follow prescribed procedures, rendering default terminations subject to reversal on appeal. Prior to issuing a default termination notice, contracting officers must have a valid basis for the termination, must issue proper notices, must account for the contractor’s excusable delay, must act with due diligence, and must make a reasonable determination while exercising independent judgment.
3. Attorneys play a critical role in this process, ensuring that all legal requirements are met and the termination decision receives the care and attention it deserves.
4. Burden of Proof
 - a. It is the government’s burden to prove, by a preponderance of the evidence, that the termination for default was proper. Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987); Walsky Constr. Co., ASBCA No. 41541, 94-1 BCA ¶ 26,264.
 - b. A contractor’s technical default is not determinative of its propriety. The Government must exercise its discretion reasonably to terminate a contract for default. Darwin Constr. Co. v. United States, 811 F.2d 593 (Fed. Cir. 1987).
 - c. Once the government has met its burden of demonstrating the appropriateness of the default, the contractor has the burden of proof that its failure to perform was the result of causes beyond its control and without fault on its part. International Elec. Corp. v. United States, 646 F.2d 496 (Ct. Cl. 1981); Composite Int’l, Inc., ASBCA No. 43359, 93-2 BCA ¶ 25,747.

II. THE RIGHT TO TERMINATE FOR DEFAULT

- A. Contractual Rights. FAR Subpart 49.4

1. The FAR contains various default clauses for use in government contracts that identify the conditions that permit the government to terminate a contract for default. See e.g., FAR 52.249-8 and FAR 52.249-9.
 2. The clauses contain different bases for termination and different notice requirements. For example, the Fixed-Price Supply and Service clause (FAR 52.249-8) is different from the Fixed-Price Construction clause (FAR 52.249-10).
- B. Common-Law Doctrine
1. The standard FAR default clauses provide: “The rights and remedies of the government in this clause are in addition to any other rights and remedies provided by law or under this contract.” See FAR 52.249-8(h) and FAR 52.249-10(d).
 2. Courts commonly cite the above-quoted provision to support termination based on common-law doctrines, such as anticipatory repudiation. Cascade Pac. Int’l v. United States, 773 F.2d 287 (Fed. Cir. 1985); All-State Constr., Inc., ASBCA No. 50586, 06-2 BCA ¶ 33,344 (contractor’s failure to diligently perform pending resolution of a dispute, as required by the Disputes clause, is a material breach for which termination is proper under the government’s common law rights reserved in 52.249-10(d)).

III. GROUNDS FOR TERMINATION

- A. Failure to Deliver or Perform on Time
1. This ground is sometimes referred to as an “(a)(1)(i)” termination because of the FAR provision setting forth this ground. FAR 52.249-8(a)(1)(i); 52.249-10(a).
 2. Generally, time is of the essence in all government contracts containing fixed dates for delivery or performance. DeVito v. United States, 413 F.2d 1147 (Ct. Cl. 1969); Kit Pack Co., ASBCA No. 33135, 89-3 BCA ¶ 22,151; Matrix Res., Inc., ASBCA No. 56430, 11-2 BCA ¶ 34,789 (upholding T4D where after 2 ½ years of extension the contractor demanded another 126 day extension in order to finish); Selva Constr. & Rental Equip. Corp., PSBCA No. 5039, 11-1 BCA ¶ 34,635.
 3. When a contract does not specify delivery dates (or those dates have been waived), actual delivery could constitute the “delivery date” for purposes of the T4D clause. Aerometals, Inc., ASBCA No. 53688, 03-2 BCA ¶ 32,295.
 4. Compliance with specifications

- a. The government is entitled to strict compliance with its specifications. M. Maropakis Carpentry, Inc. v. United States, 84 Fed. Cl. 182, 188 (Fed. Cl. 2008) aff'd, 609 F.3d 1323 (Fed. Cir. 2010); Kurz-Kasch, Inc., ASBCA No. 32486, 88-3 BCA ¶ 21,053.
- b. Exceptions:
 - (1) The courts and boards recognize the common-law principles of **substantial compliance** (supply) and **substantial completion** (construction) to protect the contractor where timely performance departs in minor respects from that required by the contract.
 - (2) **Rule:** If the contractor substantially complies with the contract, the government must give the contractor additional time to correct the defects prior to terminating for default. Radiation Technology, Inc. v. United States, 366 F.2d 1003 (Ct. Cl. 1966); Al Khudhairy Grp., ASBCA No. 56131, 10-2 BCA ¶ 34,530 (even though 95% complete, the board held that because the termination affected only the uncompleted 5% of the work, the doctrine of substantial completion did not apply); FD Constr. Co., ASBCA No. 41441, 91-2 BCA ¶ 23,983 (contractor not protected under doctrine of substantial completion because it abandoned the work and refused to complete administrative items); Selva Constr. & Rental Equip. Corp., PSBCA No. 5039, 11-1 BCA ¶ 34,635 (rejecting defense of substantial completion where contract was not complete after extensions totalling 563 days and building was not available for intended use).

B. Failure to Make Progress so as to Endanger Performance

1. Supply and Service. The default clauses for (i) fixed-price supply and service contracts and (ii) cost-reimbursement contracts provide for termination when the contractor fails to make progress so as to endanger performance. This is sometimes referred to as an “(a)(1)(ii)” termination. FAR 52.249-8(a)(1)(ii); FAR 52.249-6(a).
2. Construction. The default clause for fixed-price construction contracts provides for termination when the contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in the contract. FAR 52.249-10(a).
3. Proof

- a. The government is not required to show that it was impossible for the contractor to complete performance. California Dredging Co., ENGBCA No. 5532, 92-1 BCA ¶ 24,475.
- b. Rather, the contracting officer must have a **reasonable belief** that there is no reasonable likelihood that the contractor can perform the entire contract effort within the time remaining for contract performance. Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987) (upholding the lower court's conversion of the T4D to a T4C where government did not determine whether contractor could complete work within the required time, or determine how long it would take a follow-on contractor to do the work); Edge Constr. Co., Inc. v. United States, 95 Fed. Cl. 407 (2010) (government must demonstrate that the contracting officer included any extensions granted due to unusually severe weather when determining if the contractor could perform within the time remaining); Pipe Tech, Inc., ENGBCA No. 5959, No. 6005, 94-2 BCA ¶ 26,649 (termination improper where 92% of contract performance time remained and procurement contractor fully performed within the time allowed in defaulted contract); Advance Constr. Servs., Inc., ASBCA No. 55232, 11-2 BCA ¶ 34,776 (government not required to wait the full 45 days of the cure notice when it became clear earlier that contractor could not achieve necessary average daily production).
- c. Prior to termination, the contracting officer should analyze progress problems against a specified completion date, adjusted to account for any government-caused delays. Technocratica, ASBCA No. 45077, et al, 94-2 BCA ¶ 26,606 (T4D improper based on "poor progress," not inability to complete contract on time); Environmental Safety Consultants, Inc., ASBCA No. 51722, 11-2 BCA ¶ 34,848 (attempt to terminate for failure to make progress was rejected in absence of effective delivery date).
- d. Factors to consider include, but are not limited to:
 - (1) A comparison of the percentage of work completed and the time remaining before completion is due;
 - (2) The contractor's failure to meet progress milestones;
 - (3) Problems with subcontractors and suppliers;
 - (4) The contractor's financial situation; and
 - (5) The contractor's past performance.

- (6) See McDonnell Douglas Corp. v. United States, 323 F.3d 1006, 1016-1017 (Fed. Cir. 2003); Advance Constr. Servs., Inc., ASBCA No. 55232, 11-2 BCA ¶ 34,776 (measuring progress against the average contractor conceded was required to complete project).

C. Failure to Perform Any Other Provision of the Contract

1. Supply and Service. The default clause in fixed-price supply and service contracts specifically provides this ground for termination. It is sometimes referred to as an “(a)(1)(iii)” termination. FAR 52.249-8(a)(1)(iii).
2. Construction.
 - a. This basis does **not exist** under the construction clauses. See FAR 52.249-10.
 - b. BUT . . . the courts and boards may sustain default terminations of construction contracts on this ground by reasoning that the failure to perform the “other provision” renders the contractor unable to perform the work with the diligence required to insure timely completion (see previous ground for termination at FAR 52.249-10(a)). Engineering Technology Consultants, S.A., ASBCA No. 43454, 94-1 BCA ¶ 26,586 (“The Government, reasonably we conclude, had no alternative but to stop performance based on ETC’s failure to maintain the proper amount of insurance coverage. Under the circumstances ETC was unable to perform and/or prosecute the work with the diligence required to insure completion within the performance period.”).
3. Courts and boards will not sustain a default termination unless that “other provision” of the contract is a “material” or “significant” requirement. Precision Prods., ASBCA No. 25280, 82-2 BCA ¶ 15,981 (noncompliance with first article manufacture requirements not deemed material under facts); Yonir Technologies, Inc., ASBCA No. 56736, 10-1 BCA ¶ 34,417 (noncompliance with first article manufacture requirements deemed material when First Article clause specifies that CO disapproval equals contractor failure to make delivery under Default clause of contract); 5860 Chicago Ridge, LLC v. United States, 104 Fed. Cl. 740 (2012) (the government must prove that the breach is material when relying on its general right to terminate under the standard default clause for violation of any other provision).
4. Examples of “material” or “significant” requirements:

- a. Failure to deliver an agreement with Cisco permitting contractor to perform required maintenance services on Cisco SMARTnet equipment within 5 days as specified in the contract. ZIOS Corp., ASBCA No. 56626, 10-1 BCA ¶ 24,244 (here, the contracting officer offered ZIOS the opportunity to withdraw from the contract when he became concerned about its ability to perform; ZIOS turned down the offer because it wanted the money).
- b. Failure to employ drivers with valid licenses. Maywood Cab Service, Inc., VABCA No. 1210, 77-2 BCA ¶ 12,751.
- c. Failure to obtain (or provide proof of) liability insurance. A-Greater New Jersey Movers, Inc., ASBCA No. 54745, 06-1 BCA ¶ 33,179; UMM, Inc., ENGBCA No. 5330, 87-2 BCA ¶ 19,893 (mowing services contract).
- d. Violation of the Buy American Act. HR Machinists Co., ASBCA No. 38440, 91-1 BCA ¶ 23,373.
- e. Failure to comply with statement of work. 4-D and Chizoma, Inc., ASBCA Nos. 49550, 49598, 00-1 BCA ¶ 30,782 (failure to properly videotape inspection of sewer line).
- f. Failure to retain records under Payrolls and Basic Records Clause justified default under the Davis-Bacon Act. Kirk Bros. Mech. Contractors, Inc. v. Kelso, 16 F.3d 1173 (Fed. Cir. 1994).
- g. Failure to provide a quality control plan. A-Greater New Jersey Movers, Inc., ASBCA No. 54745, 06-1 BCA ¶ 33,179

D. Other Contract Clauses Providing Independent Basis to Terminate for Default

1. Gratuities clause. FAR 52.203-3.
2. Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters. FAR 52.209-5; see Spread Information Sciences, Inc., ASBCA No. 48438, 96-1 BCA ¶ 27,996.
3. Equal Opportunity clause. FAR 52.222-26.
4. Bid Guarantee clause. FAR 52.228-1.
5. Inspection clause. FAR 52.246-2.

E. Common Law Ground – Anticipatory Repudiation

1. Each party to a contract has the common-law right to terminate a contract upon actual or anticipatory repudiation of the contract by the other party. Restatement (Second) of Contracts § 250; Uniform Commercial Code § 2-610; Dingley v. Oler, 117 U.S. 490 (1886); see also, Franconia Associates, et al., v. United States, 536 U.S. 129 (2002) (discussing the difference between an immediate breach and repudiation in the context of a federal housing loan program).
2. This common-law basis for default applies to all government contracts because contract clauses generally do not address or supersede this principle. Cascade Pac. Int'l v. United States, 773 F.2d 287 (Fed. Cir. 1985).
3. **Requirements** for anticipatory repudiation:
 - a. Anticipatory repudiation must be **express**. United States v. DeKonty Corp., 922 F.2d 826 (Fed. Cir. 1991) (must be absolute refusal, distinctly and unequivocally communicated); Marine Constr. Dredging, Inc., ASBCA No. 38412, 95-1 BCA ¶ 27,286 (no repudiation where contractor did not continue performance due to government's failure to issue appropriate instructions).
 - b. Anticipatory repudiation must be **unequivocal** and manifest either a clear intention not to perform or an inability to perform the contract. Ateron Corp., ASBCA No. 46352, 94-3 BCA ¶ 27,229 (contractor's statement that continued contract performance is impossible constituted repudiation). Compare Swiss Prods., Inc., ASBCA No. 40031, 93-3 BCA ¶ 26,163 (contractor's refusal to perform until government provided advance payments constitutes repudiation), with Engineering Professional Servs., Inc., ASBCA No. 39164, 94-2 BCA ¶ 26,762 (no repudiation where contractor's statement that "government financing must be provided to assure contract completion" was not precondition to resumed performance).
4. Abandonment is **actual** repudiation. Compare Ortec Sys., Inc., ASBCA No. 43467, 92-2 BCA ¶ 24,859 (termination proper when work force left site and contractor failed to respond to phone calls), with Western States Mgmt. Servs., Inc., ASBCA No. 40212, 92-1 BCA ¶ 24,714 (no abandonment when contractor was unable to perform by unreasonable start date established after disestablishment of original start date); see Brock v. United States, 2012 WL 2057036 (Fed. Cl. June 7, 2012) (unsuccessfully arguing that agency abandoned the contract at the same time that contractor refused to continue performance).
5. Examples of anticipatory repudiation.

- a. D&M Grading, Inc. v. Dep't of Agriculture, CBCA No. 2625, 12-2 BCA ¶35,021 (contractor's refusal to continue performance of the contract because of disagreement with agency's reasonable interpretation of the scope of the contract was anticipatory repudiation).
- b. Emiabata v. United States, 102 Fed. Cl. 787 (2012) (despite repeated opportunities, mail transportation contractor failed to provide certificates for the necessary liability insurance).
- c. Brock v. United States, 2012 WL 2057036 (Fed. Cl. June 7, 2012) (anticipatory repudiation where contractor refused to continue performance under new delivery schedule, promised litigation, and adopted a "no surrender" position).
- d. Global Constr. Inc. v. Dept. of Veterans Affairs, CBCA 1198, 10-1 BCA ¶ 34,363 (contractor's failure to provide revised schedules and adequate assurances in response to cure notice meant that the contracting officer reasonably believed there was no reasonable possibility that the contractor could complete the work in the time remaining).
- e. Montage, Inc., GAO CAB 2006-2, 10-2 BCA ¶ 34,490 (board held that the contractor for installation of generator anticipatorily repudiated the contract by: (i) refusing to provide contractually required staging plan, (ii) refused to proceed with performance even though the contract contained a contract disputes clause, and (iii) relying on Danzig v. AEC Corp., 224 F.3d 1333 (Fed. Cir. 2000), contractor did not provide adequate assurances in response to justified cure notice).
- f. Free & Ben, Inc., ASBCA No. 56129, 12-1 BCA ¶ 34,966 (contractor anticipatorily repudiated where they could not perform on contract to supply cargo trucks in Iraq due to refusal of government to provide End Use Certificate to Japanese supplier as precondition to export trucks.); Tzell Airtrak Travel Group Corp., ASBCA No. 57313, 11-2 BCA ¶ 34,845 (contractor's repudiation excused where government made material misrepresentation regarding volume of work during contract formation).

F. Common Law Ground – Demand for Assurance

1. Failure by one party to give adequate assurances that it would complete a contract is a valid basis for a default termination under common-law. Restatement (Second) of Contracts § 251; Uniform Commercial Code § 2-609; Global Constr. Inc. v. Dept. of Veterans Affairs, CBCA No. 1198,

10-1 BCA ¶ 34,363 (contractor's failure to provide revised schedules and adequate assurances in response to cure notice meant that the contracting officer reasonably believed there was no reasonable possibility that the contractor could complete the work in the time remaining).

2. This basis for termination applies to government contracts. Danzig v. AEC Corp., 224 F.3d 1333 (Fed. Cir. 2000) (AEC's letter responses and conduct following the Navy's cure notice supported T4D); Eng'r Professional Servs., Inc., ASBCA No. 39164, 94-2 BCA ¶ 26,762; National Union Fire Ins. Co., ASBCA No. 34744, 90-1 BCA ¶ 22,266. But see Ranco Constr., Inc. v. Gen. Servs. Admin., GSBCA No. 11923, 94-2 BCA ¶ 26,678 (board questions whether demand for assurance under UCC § 2-609 applies to construction contracts).
3. The government's "cure notice" may be the equivalent of a demand for assurance. Hannon Elec. Co. v. United States, 31 Fed. Cl. 135 (1994) (contractor's failure to provide adequate assurance in response to cure notice justified default termination); Fairfield Scientific Corp., ASBCA No. 21151, 78-1 BCA ¶ 13082.

G. Grounds Unknown at Time of Termination

1. When a contractor appeals a final decision terminating a contract for default, the government is not bound by the contracting officer's reasons for the termination as stated in the termination notice.
2. If a proper ground for the default termination existed at the time of the termination, regardless of whether the contracting officer relied on or was even aware of that basis, the termination is proper. See Glazer Construction Co. v. United States, 52 Fed. Cl. 513 (2002) (COFC upheld a termination for default based on Davis-Bacon Act violations committed before, but discovered after, the government issued the default termination notice); Kirk Bros. Mech. Contractors, Inc. v. Kelso, 16 F.3d 1173 (Fed. Cir. 1994) (violations of Davis-Bacon Act); Joseph Morton Co. v. United States, 757 F.2d 1273 (Fed. Cir. 1985) (fraud); Quality Granite Constr. Co., ASBCA No. 43846, 93-3 BCA ¶ 26,073 (government not required to give notice to contractor when unaware of basis for termination).

IV. NOTICE REQUIREMENTS

A. Cure Notice

1. Definition.
 - a. Notice issued by the government to inform the contractor that the government considers the contractor's failure a condition that is endangering performance of the contract.

- b. The cure notice specifies a period (typically 10 days) for the contractor to remedy the condition.
 - c. If the condition is not corrected within this period, the cure notice states that the contractor *may* face termination of its contract for default (less definite than a show cause notice – see below).
 - d. Mandatory in some situations.
2. A proper cure notice must inform the contractor in writing:
- a. That the government intends to terminate the contract for default;
 - b. Of the reasons for the termination; and
 - c. That the contractor has a right to cure the specified deficiencies within the cure period (10 days). FAR 49.607(a).
3. To support a default decision, the cure notice must clearly identify the nature and extent of the performance failure. Lanzen Fabricating, Inc., ASBCA No. 40328, 93-3 BCA ¶ 26,079 (show cause notice did not serve as cure notice for purposes of (a)(1)(ii) termination because it didn't specify failures to be cured); Insul-Glass, Inc., GSBCA No. 8223, 89-1 BCA ¶ 21,361 (notice directed contractor to provide acceptable drawings without specifying what the contractor had to do to make the drawings acceptable); but see Genome Communications, ASBCA Nos. 57267, 57285, 11-1 BCA ¶ 34,699 (contractor did not have to comply with directions in a cure notice that attempted to impose obligations beyond the contract requirements).
4. The government must give the contractor a minimum of ten days to cure the deficiency. Red Sea Trading Assoc., ASBCA No. 36360, 91-1 BCA ¶ 23,567 (the ten day period need not be specifically stated in the notice if a minimum of ten days was actually afforded the contractor); NCLN20., Inc. v. United States, 99 Fed. Cl. 734 (2011) (overturning T4D that took place on the second day of the required 10 day cure period); but see Advance Constr. Servs., Inc., ASBCA No. 55232, 11-2 BCA ¶ 34,776 (government not required to wait the full 45 days of the cure notice when it became clear earlier that contractor could not achieve necessary average daily production).
5. Is a cure notice required?
- a. Failure to perform on time. FAR 52.249-8(a)(1)(i).
 - (1) **NO.**

- (2) Sazie Wilson, PSBCA No. 5247, 12-1 BCA ¶34,906 (cure notice not required when T4D is for failure to meet a delivery date as opposed to a T4D for failure to make progress toward meeting a delivery date that has not yet arrived).
 - (3) Delta Indus., DOTCAB No. 2602, 94-1 BCA ¶ 26,318 (government rejected desks that did not meet contract specifications; cure notice not issued by KO)
- b. Failure to make progress. FAR 52.249-8(a)(1)(ii).
- (1) **YES except construction.**
 - (2) Fixed-price supply or service contracts (FAR 52.249-8); fixed-price research and development contracts (FAR 52.249-9); cost-reimbursement contracts (FAR 52.249-6).
 - (3) Construction. FAR 52.249-10(a). May terminate upon written notice. No cure notice required.
- c. Failure to perform any other provision of the contract. FAR 52.249-8(a)(1)(iii)
- (1) **YES except construction.**
 - (2) Fixed-price supply or service contracts (FAR 52.249-8); fixed-price research and development contracts (FAR 52.249-9); cost-reimbursement contracts (FAR 52.249-6).
 - (3) Remember – This is not a ground for T4D in construction contracts.
- d. Other Contract Clauses Providing Independent Basis to T4D
- (1) **DEPENDS** on the clause.
 - (2) See “K” Servs., ASBCA No. 41791, 92-1 BCA ¶ 24,568 (default under FAR 52.209-5 for false certification regarding debarment status of contractor's principal; no cure notice required because false certification cannot be cured)
- e. Anticipatory repudiation.
- (1) **NO.**

- (2) Beeston, Inc., ASBCA No. 38969, 91-3 BCA ¶ 24,241; Scott Aviation, ASBCA No. 40776, 91-3 BCA ¶ 24,123.
- f. Failure to give adequate assurances.
- (1) **SORT OF.**
 - (2) Generally, do not have to give a “cure notice,” but government does have to provide a “demand for assurances.” A cure notice suffices as a demand for assurances.
- g. Grounds unknown at time of termination
- (1) **NO.**
 - (2) Quality Granite Constr. Co., ASBCA No. 43846, 93-3 BCA ¶ 26,073 (government not required to give notice to contractor when unaware of basis for termination)
- h. Fraud – **NO.**
- i. Construction. FAR 52.249-10.
- (1) **NO.**
 - (2) Professional Services Supplier, Inc. v. United States, 45 Fed. Cl. 808, 810 (2000) (no cure notice required before a fixed price construction contract may be terminated for default).
 - (3) Although not required, the government frequently provides the contractor a cure notice prior to terminating these contracts. See Hillebrand Constr. of the Midwest, Inc., ASBCA No. 45853, 95-1 BCA ¶ 27,464 (failure to provide submittals); Engineering Technology Consultants, S.A., ASBCA No. 43454, 94-1 BCA ¶ 26,586 (concerning contractor's failure to provide proof of insurance).

B. Show Cause Notice

1. Definition.

- a. Notice issued by government to inform the contractor that the government intends to terminate for default unless the contractor “shows cause” why the contract should not be terminated. FAR 49.607.

- b. **Not required.** The default clauses do not require the use of a show cause notice. See FAR 52.249-8 (Supply and Service); FAR 52.249-9 (Research and Development); FAR 52.249-10 (Construction); Alberts Assocs., ASBCA No. 45329, 95-1 BCA ¶ 27,480; Sach Sinha and Associates, Inc., ASBCA No. 46916, 96-2 BCA ¶ 28,346.
 - c. **BUT . . .** if a termination for default appears appropriate, the government **should, if practicable**, notify the contractor in writing of the possibility of the termination. FAR 49.402-3(e)(1). The courts and boards may require a “show cause” notice if its use was practicable. Udis v. United States, 7 Cl. Ct. 379 (1985); Enginetics Corp., ASBCA No. 48034, 92-2 BCA ¶ 24,965 (denying government's motion for summary judgment while noting government's failure to issue show cause notice).
 - d. If the government issues a show cause notice, it need not give the contractor ten days to respond. Nisei Constr. Co., Inc., ASBCA Nos. 51464, 51466, 51646, 99-2 BCA ¶ 30,448 (six days was sufficient in construction default case).
2. The show cause notice should:
- a. Call the contractor’s attention to its contractual liabilities if the contract will be terminated for default.
 - b. Request the contractor to show cause why the contract should not be terminated for default.
 - c. State that the failure of the contractor to present an explanation may be taken as an admission that no valid explanation exists.
 - d. The contracting officer is not required to include every subsequently advanced reason for the termination in the show cause notice because the government is under no obligation to issue the notice. Sach Sinha and Associates, Inc., ASBCA No. 46916, 96-2 BCA ¶ 28,346.
3. Why use a show cause notice?
- a. Courts and boards like to see them
 - b. They shock contractor into compliance
 - c. They inform us of contractor's defenses

- d. Can help us avoid waiver (see discussion below)

V. CONTRACTOR DEFENSES TO A TERMINATION FOR DEFAULT

A. Excusable Delay

1. The contractor has the burden to prove that its failure to perform was excusable. Lan-Cay, Inc., ASBCA No. 56140, 12-1 BCA ¶ 34,935.
2. A contractor's failure to deliver or to perform is excused if:
 - a. The failure is beyond the control and without the fault or negligence of the contractor. FAR 52.249-8(c).
 - b. Timely performance was actually prevented by the claimed excuse. Sonora Mfg., ASBCA No. 31587, 91-1 BCA ¶ 23,444; Beekman Indus., ASBCA No. 30280, 87-3 BCA ¶ 20,118.
 - c. The specific period of delay caused by the event. Conquest Constr., Inc., PSBCA No. 2350, 90-1 BCA ¶ 22,605.
 - d. Construction only: The delay arises from unforeseeable causes beyond the control and without the fault or negligence of the contractor. FAR 52.249-10(b)(1); Local Contractors, Inc., ASBCA No. 37108, 1991 WL 517213 (Oct. 11, 1991); Charles H. Siever, ASBCA No. 24814, 83-1 BCA ¶ 16,242.
 - e. Construction only: The contractor, within 10 days from the beginning of any delay (unless extended by the contracting officer), notifies the contracting officer in writing of the causes of delay. FAR 52.249-10(b)(2).
3. The default clauses specifically identify some causes of excusable delay. These include:
 - a. Acts of God (AKA "force majeure") or of the public enemy. See Nogler Tree Farm, AGBCA No. 81-104-1, 81-2 BCA ¶ 15,315 (eruption of Mount St. Helens volcano); Centennial Leasing v. Gen. Servs. Admin., GSBCA No. 12037, 94-1 BCA ¶ 26,398 (death of chief operating officer not an act of God); C-Shore International, Inc. v. Dept. of Agriculture, CBCA 1696, 10-1 BCA ¶ 34, 379 (sought to excuse non-performance on hurricanes Katrina and Rita; board agreed that hurricanes are acts of God but the hurricanes occurred *before* the contracts were awarded and contractor had obligation to take into account the effect of the hurricanes before accepting the contractual commitment).

- b. Acts of the government in either its sovereign or contractual capacity.
 - (1) Sovereign capacity refers to public acts of the government not directed to the contract. Home Entertainment, Inc., ASBCA No. 50791, 99-2 BCA ¶ 30,550 (analysis of “sovereign act” relating to expulsion orders in Panama); Woo Lim Constr. Co., ASBCA No. 13887, 70-2 BCA ¶ 8451 (imposition of security restrictions in a hostile area).
 - (2) Acts of the government in its contractual capacity are most common and include delays caused by such things as defective specifications, unreasonable government inspections and late delivery of government furnished property. See Marine Constr. Dredging, Inc., ASBCA No. 38412, 95-1 BCA ¶ 27,286 (government failed to respond to contractor’s request for directions); John Glenn, ASBCA No. 31260, 91-3 BCA ¶ 24,054 (government issued faulty performance directions); Jean E. Smith, PSBCA No. 5360, 10-2 BCA ¶ 34,546 (contractor refused to wear her badge or leave post office; arrested for criminal trespass but later acquitted; board upheld T4D based on contractor’s inability to perform the contract after being banned from the postal facilities following arrest because contractor precipitated her own arrest by her own conduct).
- c. Fires. Hawk Mfg. Co., GSBCA No. 4025, 74-2 BCA ¶ 10,764 (lack of facilities rather than a plant fire caused contractor's failure to timely deliver).
- d. Floods. Wayne Constr., ENGBCA No. 4942, 91-1 BCA ¶ 23,535 (storm damage to a dike entitled contractor to time extension).
- e. Epidemics and quarantine restrictions. Ace Elecs. Assoc., ASBCA No. 11496, 67-2 BCA ¶ 6456 (denying relief based on allegation that flu epidemic caused a 30% to 40% rate of absenteeism, without showing that it contributed to delay).
- f. Strikes, freight embargoes, and similar work stoppages. Woodington Corp., ASBCA No. 37885, 91-1 BCA ¶ 23,579 (delay not excused where steel strike at U.S. Steel had been ongoing for two months prior to contractor's bid, subcontractor ordered steel after strike ended, and other steel manufacturers were not on strike); but see NTC Group, Inc., ASBCA Nos. 53720, 53721, 53722, 04-2 BCA 32,706 (labor conspiracy, akin to a strike was a valid defense to default termination).

- g. Unusually severe weather. Only unusually severe weather, as compared to the past weather in the area for that season, excuses performance. See Aulson Roofing, Inc., ASBCA No. 37677, 91-2 BCA ¶ 23,720 (contractor not entitled to day for day delay because some rain delay was to be expected); TCH Indus., AGBCA No. 88-224-1, 91-3 BCA ¶ 24,364 (eight inches of snow in northern Idaho in November is neither unusual nor unforeseeable).
- h. Acts of another contractor in performance of a contract for the government (construction contracts). FAR 52.249-10(b)(1)(iii); Modern Home Mfg. Corp., ASBCA No. 6523, 66-1 BCA ¶ 5367 (housing contractor entitled to extension because site not prepared in accordance with contract specifications).
- i. Defaults or delays by subcontractors or suppliers:
 - (1) Generally, problems with subcontractors are not a basis for excusable delay for the prime. Matrix Res. Inc., ASBCA Nos. 56430, 56431, 11-2 BCA ¶ 34,789 (contractor responsible for lack of progress in delivery of product caused by actions of subcontractors); New Era Contract Sales, Inc., ASBCA No. 56661, 11-1 BCA ¶ 34,738 (subcontractor's unwillingness to abide by its quoted price does not excuse contractor from fulfilling its contract to delivery); Ryll Int'l, LLC v. Dep't of Transp., CBCA No. 1143, 11-2 BCA ¶ 34,809 (critical subcontractor's abandonment of work not excusable delay).
 - (2) Construction. If the delay of a subcontractor or supplier at any tier arises from unforeseeable causes beyond the control and without the fault or negligence of both the contractor and the subcontractor or supplier, and the contractor notifies the contracting officer within ten days from the beginning of the delay, it may be excusable. FAR 52.249-10(b).
 - (3) Supply and Services contracts, and cost-reimbursement contracts. FAR 52.249-6(b); FAR 52.249-8(d); FAR 52.249-14(b). The general rule is that if a failure to perform is caused by the default of a subcontractor or supplier at any tier, the default is excusable if:
 - (a) The cause of the default was beyond the control and without the fault or negligence of either the contractor or the subcontractor, See General Injectables & Vaccines, Inc., ASBCA No. 54930,

06-2 BCA ¶ 33,401 (contractor not excused from failure to provide flu vaccine despite worldwide vaccine unavailability because the contractor's supplier—the vaccine manufacturer—caused the unavailability of the vaccine); and

- (b) The subcontracted supplies or services were not obtainable from other sources in time for the contractor to meet the required delivery schedule. Progressive Tool Corp., ASBCA No. 42809, 94-1 BCA ¶ 26,413 (contractor failed to show it made all reasonable attempts to locate an alternate supplier); CM Mach. Prods. Inc., ASBCA No. 43348, 93-2 BCA ¶ 25,748 (default upheld where plating could have been provided by another subcontractor but prime refused to pay higher price).

4. Additional excuses commonly asserted by contractors include:

- a. Material breach of contract by the government. Todd-Grace, Inc., ASBCA No. 34469, 92-1 BCA ¶ 24,742 (breach of implied duty to not interfere with contractor); Bogue Elec. Mfg. Co., ASBCA No. 25184, 86-2 BCA ¶ 18,925 (defective government-furnished equipment); Lan-Cay, Inc., ASBCA No. 56140, 12-1 BCA ¶ 34,935 (contractor unsuccessful in demonstrating overzealous inspection by the government that allegedly led to delay).
- b. Lack of financial capability. Contractors are responsible for having sufficient financial resources to perform a contract.
 - (1) Generally, this is not an excuse. Local Contractors, Inc., ASBCA No. 37108, 1991 WL 517213 (Oct. 11, 1991) (contractor had deteriorating financial base unconnected to the contract); Selpa Constr. & Rental Equip. Corp., PSBCA 5039, 11-1 BCA ¶ 34,635 (financing difficulties did not excuse its delayed performance and contractor could not establish that government contributed to its problems).
 - (2) If the financial difficulties are caused by wrongful acts of the government, however, the delay may be excused. Nexus Constr. Co. Inc., ASBCA No. 31070, 91-3 BCA ¶ 24,303 (default converted because government's refusal to release progress payments constituted material breach of contract); see Lan-Cay, Inc., ASBCA No. 56140, 12-1 BCA ¶ 34,935 (failure of agency to make progress payments was not excusable delay because progress

payments were not required where the contractor had failed to install the required system); Red Sea Eng'rs & Constr., ASBCA No. 57448, 11-2 BCA ¶34,880 (contractor defeated motion for summary judgment in part because of questions as to whether the government had fulfilled its obligations to pay contractor during performance).

- c. Bankruptcy. Although filing a petition of bankruptcy is not an excuse, it precludes termination. Communications Technology Applications, Inc., ASBCA No. 41573, 92-3 BCA ¶ 25,211 (government's right to terminate stayed when bankruptcy filed, not when government notified); See also, Carter Industries, DOTCAB No. 4108, 02-1 BCA 31,738.
 - d. Small business. A-Greater New Jersey Movers, Inc., ASBCA No. 54745, 06-1 BCA ¶ 33,179 ("The Board does not accord special treatment in determining whether the burden of proof has been met to a contractor because of its status as a small business"); Kit Pack Co. Inc., ASBCA No. 33135, 89-3 BCA ¶ 22,151 (no excuse for failure to meet delivery date).
 - e. Impossibility or Commercial impracticability. To establish commercial impracticability, the contractor must show it can perform only at excessive and unreasonable cost – simple economic hardship is not sufficient. Singelton Enterprises v. Dep't of Agriculture, CBCA No. 2136, 12-1 BCA ¶35,005 (rejecting excuse that government specifications were impossible to perform in light of ability of the procurement contractor to complete the work); Montage, Inc., GAO CAB 2006-2, 10-2 BCA ¶34,490 (board held that contractor did not meet the very tough standard for practical impossibility because contractor failed to establish that increased cost made the work commercially senseless); CleanServ Executive Services, Inc., ASBCA No. 47781, 96-1 BCA ¶ 28,027; compare Soletanche Rodio Nicholson (JV), ENG BCA Nos. 5796, 5891, 94-1 BCA ¶ 26,472 (performance that might take 17 years and cost \$400 million, rather than 2 years and \$16.9 million found to be commercial impractical), with CM Mach. Prods., ASBCA No. 43348, 93-2 BCA ¶ 25,748 (no commercial impracticability where costs increased 105%).
5. **Consequence of excusable delay.** If a delay is found to be excusable, the contractor is entitled to additional time and/or money. Batteast Constr. Co. Inc., ASBCA No. 35818, 92-1 BCA ¶ 24,697. **NOTE:** Constructive acceleration of the delivery date often occurs when the contracting officer, using a threat of termination, directs compliance with the contract delivery

or performance date without an extension for the time period attributable to an excusable delay.

B. Waiver

1. Waiver of the right to terminate for default occurs if:

- a. The government fails to terminate a contract within a reasonable period of time after the default under circumstances indicating forbearance, and
- b. Detrimental reliance by the contractor on the failure to terminate and continued performance by him under the contract, with the government's knowledge and implied or express consent.
- c. See DeVito v. United States, 413 F.2d 1147 (Ct. Cl. 1969) (government's delay in terminating fixed-price supply contract and continued acceptance of deliveries after default constituted waiver); S.T. Research Corp., ASBCA No. 39600, 92-2 BCA ¶ 24,838 (KO's encouragement that contractor propose new delivery schedule and continue performance constituted waiver); Motorola Computer Sys., Inc., ASBCA No. 26794, 87-3 BCA ¶ 20,032 (government waived original performance schedule when there were no firm delivery dates or schedule for progress of work; new performance or delivery schedule had to be established to T4D under default clause).

2. Waiver generally does **NOT** apply to **construction** contracts.

- a. Absent government manifestation that a performance date is no longer enforceable, the waiver doctrine generally does not apply to construction contracts. Nisei Constr. Co., Inc., ASBCA Nos. 51464, 51466, 51646, 99-2 BCA ¶ 30,448.
- b. Construction contracts typically include a payment clause entitling the contractor to payment for work performed subsequent to the specified completion date.
- c. Construction contracts also typically include a liquidated damage clause that entitles the government to money for late completion.
- d. As a consequence, detrimental reliance usually cannot be found merely from government forbearance and continued contractor performance. Brent L. Sellick, ASBCA No. 21869, 78-2 BCA ¶ 13,510. But see, B.V. Construction, Inc., ASBCA Nos. 47766, 49337, 50553, 04-1 BCA 32,604 (the lack of a liquidated damages clause coupled with the government's apparent complete lack of

concern over the completion date, caused the ASBCA to find the government elected to waive the right to terminate the contract).

- e. In 2010, in AmeriscoSolutions, Inc., ASBCA No. 56811, 10-2 BCA ¶ 34,606, the board reaffirmed the rule that, barring unusual circumstances, the government cannot waive the delivery date in a construction contract. It distinguished several construction cases in recent years that found waivers. Those cases involved very long delays between the passing of the delivery date and the termination during which the government gave no indication that the date would be enforced. In Amerisco, the Corps of Engineers frequently reminded the contractor that it was in default even while permitting it to work to a new proposed schedule before terminating the contract 84 days after the stated delivery date passed. Board was not troubled by the absence of a liquidated damages provisions.
3. Acceptance of late delivery of an installment does NOT waive timely delivery of future installments.
 - a. If a contract requires multiple deliveries, each successive increment represents a severable obligation to deliver on the contract delivery date.
 - b. Thus, the government may accept late delivery of one or more installments without waiving the delivery date for future installments. Electro-Methods, Inc., ASBCA No. 50215, 99-1 BCA ¶ 30,230; Allstate Leisure Prods., Inc., ASBCA No. 40532, 94-3 BCA ¶ 26,992.
 4. Forbearance = Reasonable Time Period
 - a. Definition. Period of time during which the Government investigates the reasons for the contractor's failure to meet the contract requirements.
 - b. General Rule. The government may "forbear" for a reasonable period after the default occurs before taking some action. Reasonableness depends on the specific facts of each case. American AquaSource, Inc., ASBCA 56677, 10-2 BCA ¶ 34,557 (although government waited 49 days after delivery to terminate, board found the time for terminating is extended when the contractor has abandoned performance or where its situation is such as to render performance unlikely); Progressive Tool Corp., ASBCA No. 42809, 94-1 BCA ¶ 26,413 (although forbearance for 42 days after show cause notice was "somewhat long," T4D

sustained because government did not encourage contractor to continue working and contractor did not perform substantial work during that period); but see DODS, Inc., ASBCA No. 57667, 12-2 BCA ¶35,078 (agency waived delivery date when it did not terminate for 21 months after contractor failed first article test).

- c. Government actions inconsistent with forbearance may waive a delivery date. Applied Cos., ASBCA No. 43210, 94-2 BCA ¶ 26,837 (government waived delivery date for First Article Test Report by seeking information, making progress payments, directing the contractor to rerun tests, and incorporating engineering change proposals into the contract after the delivery date); Kitco, Inc., ASBCA No. 38184, 91-3 BCA ¶ 24,190 (no clear delivery schedule established after partial termination for convenience resulted in waiver of right to terminate for default based on untimely deliveries); Beta Engineering, Inc., ASBCA Nos. 53570, 53571, 02-2 BCA ¶ 31,879 (after contractor missed a First Article Test delivery deadline, the government left itself without an enforceable schedule by failing to terminate, encouraging continued performance, and leaving contractor “in limbo” about a new delivery schedule); but see Tawazuh Commercial & Const. Co., Ltd., ASBCA 55656, 11-2 BCA ¶ 34,781 (Army in Afghanistan did not waive its right to reject clearly defective work merely because it was delayed in performing inspections for several months). Contracting officers should use show cause notices to avoid waiver arguments. Show cause notice is inconsistent with waiver. See Charles H. Siever Co., ASBCA No. 24814, 83-1 BCA ¶ 16,242 (using timely show cause notice preserved right to terminate despite four month forbearance period).

5. Detrimental Reliance

- a. The contractor must show detrimental reliance on the government’s inaction before the government will be deemed to have waived the delivery schedule. Ordnance Parts Eng’g Co., ASBCA No. 44327, 93-2 BCA ¶ 25,690 (no detrimental reliance where contractor repudiated contract).
- b. Where the contractor customarily continued performance after a missed delivery date, a board has found no inducement by the government. Electro-Methods, Inc., ASBCA No. 50215, 99-1 BCA ¶ 30,230.
- c. American AquaSource, Inc., ASBCA No. 56677, 10-2 BCA ¶ 34,557 (nominal surveying fees that the contractor incurred

between the delivery date and the termination were not sufficient to show substantial reliance by the contractor on the government's 49-day delay in terminating).

6. Reestablishing the Delivery Schedule

- a. If government waived, what do we do? The government should reestablish a delivery schedule if it believes it waived the original schedule. FAR 49.402-3(c). Proper reestablishment of a delivery schedule also reestablishes the government's right to terminate for default.
- b. A delivery schedule can be reestablished either bilaterally or unilaterally. Sermor, Inc., ASBCA No. 30576, 94-1 BCA ¶ 26,302 (formal modification not required, but new delivery date must be reasonable and specific).
 - (1) **Bilateral.** A new delivery date established bilaterally is presumed to be reasonable. Trans World Optics, Inc., ASBCA No. 35976, 89-3 BCA ¶ 21,895; Sermor, Inc., ASBCA No. 30576, 94-1 BCA ¶ 26,302 (by agreeing to new delivery schedule, contractor waives excusable delay); Tampa Brass Aluminum Corp., ASBCA No. 41314, 92-2 BCA ¶ 24,865 (termination proper because unreasonable schedule was proposed by the contractor); but see S.T. Research Corp., ASBCA No. 39600, 92-2 BCA ¶ 24,838 (contracting officer requiring proposed schedule within 24 hours from contractor, having technical problems, was not reasonable).
 - (2) **Unilateral.** A new delivery date the government unilaterally establishes must in fact be reasonable in light of the contractor's abilities in order to be enforceable. Rowe, Inc., GSBCA No. 14211, 01-2 BCA 31,630 (The board made an "objective determination" from "the standpoint of the performance capabilities of the contractor at the time the notice [was] given" and found the new delivery date was reasonable); McDonnell Douglas Corp. v. United States, 50 Fed. Cl. 311 (2001) (reestablished schedule was reasonable); Oklahoma Aerotronics, Inc., ASBCA No. 25605, 87-2 BCA ¶ 19,917 (unilateral date for first article delivery unreasonable); Ensil Int'l Corp., ASBCA Nos. 57297, 57445, 12-1 BCA ¶34,942 (although agency may have waived original delivery date, when contractor actually delivered the goods, it effectively established a new enforceable delivery date and was

obligated to provide conforming supplies as of the actual delivery date).

- c. A cure notice, by itself, does not reestablish a waived delivery schedule. Lanzen Fabricating, ASBCA No. 40328, 93-3 BCA ¶ 26,079.

VI. THE DECISION TO TERMINATE FOR DEFAULT

A. Discretionary Act

1. The standard FAR clauses generally grant the government the authority to terminate, which shall be exercised only after review by contracting and technical personnel, and by counsel, to ensure propriety of the proposed action. FAR 49.402-3 (a).
2. Contracting officers must exercise discretion. The default clauses do not **compel** termination; rather, they **permit** termination for default if such action is appropriate in the business judgment of the responsible government officials. Schlesinger v. United States, 182 Ct. Cl. 571, 390 F.2d 702 (1968) (Navy improperly terminated a contract because of pressure from a Congressional committee, rather than its own assessment of the government's and contractor's interests).

B. Burden of Proof

1. The Government has the burden of establishing the propriety of a default termination. Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987).
2. A finding of technical default is not determinative on the issue of the propriety of a default termination. Walsky Constr. Co., ASBCA No. 41541, 94-2 BCA ¶ 26,698.
3. Courts and boards review the KO's actions according to the circumstances as they existed at the time of the default. Local Contractors, Inc., ASBCA No. 37108, 1991 WL 517213 (Oct. 11, 1991).
4. Once the Government establishes that the contractor was in default, the contractor bears the burden of proving that the termination was an abuse of discretion or done in bad faith.
5. Contractors may challenge the default termination decision on the basis that the terminating official abused his discretion or acted in bad faith. Marshall Associated Contractors, Inc., & Columbia Excavating, Inc., (J.V.), IBCA Nos. 1091, 3433, 3435, 01-1 BCA ¶ 31248 (abuse of discretion to terminate for default a contract with defective specifications,

when the procurement contractor received relaxed treatment); Darwin Constr. Co. v. United States, 811 F.2d 593 (Fed. Cir. 1987) (T4D found to be arbitrary and capricious where technical default used as a pretext to get rid of contractor).

a. Abuse of Discretion.

- (1) Abuse of discretion (also referred to as “arbitrary and capricious” conduct) may be ascertained by looking at the following factors:
 - (a) Subjective bad faith on the part of the Government;
 - (b) No reasonable basis for the decision;
 - (c) The degree of discretion entrusted to the deciding official; and
 - (d) Violation of an applicable statute or regulation. United States Fidelity & Guaranty Co. v. U.S., 676 F.2d 622 (Ct. Cl. 1982); Quality Environment Systems, Inc., ASBCA No. 22178, 87-3 BCA ¶ 20,060.
- (2) The contractor bears the burden of showing an abuse of discretion. Walsky Constr. Co., ASBCA No. 41541, 94-1 BCA ¶ 26,264, aff’d on recon., 94-2 BCA ¶ 26,698 (lieutenant colonel’s directive to the contracting officer “tainted the termination”); see also Libertatia Assoc., Inc. v. United States, 46 Fed. Cl. 702 (2000) (once default is established, burden shifts to contractor to show its failure to perform is excusable).
- (3) Recent examples of abuse of discretion: Teresa A. McVicker, P.C., ASBCA No. 57487, 57653, 12-2 BCA 35,127; Ryste & Ricas, Inc., ASBCA No. 51841, 02-2 BCA ¶ 31,883 and Bison Trucking and Equipment Company, ASBCA No. 53390, 01-2 BCA ¶31,654.

b. Bad Faith.

- (1) There is a strong presumption that government officials act conscientiously in the discharge of their duties. Krygoski Constr. Co., Inc. v. United States, 94 F.3d 1537 (Fed. Cir. 1996).

- (2) Contractors asserting that government officials acted in “bad faith” must meet a higher standard of proof. The courts and boards require “clear and convincing evidence”¹ of “malice” or “designedly oppressive conduct” tantamount to some specific intent to injure the plaintiff, to overcome the presumption that public officials act in good faith in the exercise of their powers and responsibilities. See Am-Pro Protective Agency, Inc., v. United States, 281 F.3d 1234 (Fed. Cir. 2002); Kalvar Corp. v. United States, 543 F.2d 1298 (Ct. Cl. 1976); White Buffalo Constr. Inc. v. United States, 101 Fed. Cl. 1 (2011); Apex Int’l Mgmt. Servs., Inc., ASBCA No. 38087, 94-2 BCA ¶ 26,842, aff’d on recon., 94-2 BCA ¶ 26,852 (Navy officials acted in bad faith by “declaring war” against the contractor; contractor entitled to breach damages); Marine Constr. Dredging, Inc., ASBCA No. 38412, 95-1 BCA ¶ 27,286 (although government’s administration of the contract was “seriously flawed,” no bad faith).

C. Regulatory Guidance

The FAR provides detailed procedures which the contracting officer should follow to terminate a contract.

1. Contracting officers should consider **alternatives** to termination. FAR 49.402-4. The following, among others, are available in lieu of termination for default when in the Government's interest:
 - a. Permit the contractor, the surety, or the guarantor, to continue performance under a revised schedule;
 - b. Permit the contractor to continue performance by means of a subcontract or other business arrangement;
 - c. If the requirement no longer exists and the contractor is not liable to the government for damages, execute a no-cost termination.

¹ This “clear and convincing” or “highly probable” (formerly described as “well-nigh irrefragable”) standard was recently articulated by the Federal Circuit in Am-Pro Protective Agency, Inc., v. United States, 281 F.3d 1234, 1243 (Fed. Cir. 2002). For years, contractors alleging bad faith by the government needed “well-nigh irrefragable proof” to overcome the strong presumption that government officials acted in good faith. “In fact, for almost 50 years this court and its predecessor have repeated that we are ‘loath to find to the contrary [of good faith], and it takes, and should take, well-nigh irrefragable proof to induce us to do so.’” Id. at 1239 (quoting Schaefer v. United States, 224 Ct. Cl. 541, 633 F.2d 945, 948-49 (Ct. Cl. 1980)) (also citing Grover v. United States, 200 Ct. Cl. 337, 344 (1973); Kalvar Corp. Inc., v. United States, 543 F.2d 1298, 1302, 211 Ct. Cl. 192 (1976); Torncello v. United States, 231 Ct. Cl. 20, 681 F.2d 756, 770 (Ct. Cl. 1982); T&M Distribs., Inc. v. United States, 185 F.3d 1279, 1285 (Fed. Cir. 1999)).

- d. See ZIOS Corp., ASBCA No. 56626, 10-1 BCA ¶ 34,344 (the contracting officer T4D'd the contract after offering ZIOS the opportunity to withdraw from the contract; ZIOS turned down the offer because it wanted the money); Yonir Tech., Inc., ASBCA No. 56736, 10-1 BCA ¶ 34,417 (contracting officer T4D'd the contract after contractor rejected 3 separate offers to cancel the order at no cost).
2. The FAR provides detailed procedures for terminating a contract for default. FAR 49.402-3. When a default termination is being considered, the government shall decide which termination action to take only after review by contracting and technical personnel, and by counsel, to ensure the propriety of the proposed action. Failure to conduct such a review, while risky, will not automatically overturn a default decision. National Med. Staffing, Inc., ASBCA No. 40391, 92-2 BCA ¶ 24,837.
3. FAR 49.402-3(f) states that the contracting officer shall consider the following factors in determining whether to terminate a contract for default:
 - a. The terms of the contract and applicable laws and regulations.
 - b. The specific failure of the contractor and the excuses for the failure.
 - c. The availability of the supplies or services from other sources.
 - d. The urgency of the need for the supplies or services and the period of time required to obtain them from other sources, as compared with the time delivery could be obtained from the delinquent contractor.
 - e. The degree of essentiality of the contractor in the Government acquisition program and the effect of a termination for default upon the contractor's capability as a supplier under other contracts.
 - f. The effect of a termination for default on the ability of the contractor to liquidate guaranteed loans, progress payments, or advance payments.
 - g. Any other pertinent facts and circumstances.
4. The contracting officer must explain the decision to terminate a contract for default in a memorandum for the contract file. FAR 49.402-5. The memorandum should recount the factors at FAR 49.402-3(f).

5. Failure of the contracting officer to consider factors at FAR 49.402-3(f) may result in a defective termination. See DCX, Inc., 79 F.3d 132 (Fed. Cir. 1996) (although contracting officer's failure to consider one or more FAR 49.402-3(f) factors does not automatically require conversion to termination for convenience, such failure may aid the court or board in determining whether the contracting officer abused his discretion); Phoenix Petroleum Company, ASBCA No. 42763, 96-2 BCA ¶ 28,284 (failure to analyze FAR factors does not entitle contractor to relief; factors are not a prerequisite to a valid termination).
6. Failure to consider all information available prior to issuing a termination notice could be an abuse of discretion. Jamco Constructors, Inc., VABCA No. 3271, 94-1 BCA ¶ 26,405, aff'd on recon., 94-2 BCA ¶ 26,792 (contracting officer abused discretion by failing to reconcile contradictory information and "blindly" accepting technical representative's estimates for completion of the contract by another contractor).
7. Before terminating a contractor for default, the contracting officer should comply with the pertinent notice requirements (cure notice or show cause notice). FAR 49.402-3(c)-(e). Additional notice to the following third parties may be required:
 - a. Surety. If a notice to terminate for default appears imminent, the contracting officer shall provide a written notice to the surety. If the contractor is subsequently terminated, the contracting officer shall send a copy of the notice to the surety. FAR 49.402-3(e)(2).
 - b. Small Business Administration. When the contractor is a small business, send a copy of any required notices to the contracting office's small business specialist and the Small Business Regional Office nearest the contractor. FAR 49.402-3(e)(4).
8. The Default Termination Notice.
 - a. Contents of the termination notice. FAR 49.102; FAR 49.402-3(g). The written notice must clearly state:
 - (1) The contract number and date;
 - (2) The acts or omissions constituting the default;
 - (3) That the contractor's right to proceed further under the contract (or a specified portion of the contract) is terminated;

- (4) That the supplies or services terminated may be purchased against the contractor's account, and that the contractor will be held liable for any excess costs;
 - (5) If the contracting officer has determined that the failure to perform is not excusable, that the notice of termination constitutes such decision, and that the contractor has the right to appeal such decision under the Disputes clause;
 - (6) That the Government reserves all rights and remedies provided by law or under the contract, in addition to charging excess costs; and
 - (7) That the notice constitutes a decision that the contractor is in default as specified and that the contractor has the right to appeal under the Disputes clause. FAR 49.402-3(g).
 - (8) FAR 49.102(a) provides that the notice shall also include any special instructions and the steps the contractor should take to minimize the impact on personnel (including reduction in work force notice of FAR 49.601-2(g)).
- b. A default termination is a final decision that can be appealed. Malone v. United States, 849 F.2d 1441 (Fed. Cir. 1988).
- (1) The termination notification must give notice to the contractor of right to appeal the default termination. Failure to properly advise the contractor of its appeal rights may prevent the “appeals clock” from starting if the contractor can show detrimental reliance. Decker & Co. v. West, 76 F.3d 1573 (Fed. Cir. 1996).
 - (2) When mailed, the notice shall be sent by certified mail, return receipt requested. When hand delivered, a written acknowledgement shall be obtained from the contractor. FAR 49.102(a). A default termination notice is effective when delivered to the contractor. Fred Schwartz, ASBCA No. 20724, 76-1 BCA ¶ 11,916.
9. Contracting officers were required to report terminations for default through their agency channels to the Office of the Undersecretary of Defense. In 2010 this requirement changed to require all termination for cause or default reporting to be accomplished via the Federal Awardee Performance and Integrity Information System.
10. Any termination involving a reduction in employment of 100 or more contractor employees specifically requires congressional notification,

cleared through agency liaison offices before release. DFARS 249.7001; DFARS PGI 249.7001. This notification requirement does not apply for firms performing in Iraq or Afghanistan if the firm is not incorporated in the United States. DoD Class Deviation 2011-O0002. Similar reports are required by the Air Force for terminations with high-level agency interest or litigation potential. See AFFARS MP5349.

VII. RIGHTS AND LIABILITIES ARISING FROM TERMINATIONS FOR DEFAULT

A. Contractor Liability

1. Rule. Upon termination of a contract, the contractor is liable to the government for any **excess costs** incurred in acquiring supplies or services similar to those terminated for default (see FAR 49.402-6) and for any other damages, whether or not repurchase is effected (see FAR 49.402-7). FAR 49.402-2(e).
2. Excess Reprourement Costs
 - a. Under fixed-price supply and service contracts, the government can acquire supplies or services similar to those terminated and the contractor will be liable for any excess costs of those supplies or services. FAR 49.402-6; FAR 52.249-8(b); Ed Grimes, GSBCA No. 7652, 89-1 BCA ¶ 21,528; CDA, Inc. v. Social Security Admin., CBCA No. 1558, 12-1 BCA ¶34,990 (upholding agency's assessment of excess reprourement costs for entire period, including option years, of the follow-on contractor's performance because original contractor had agreed to perform for that duration).
 - b. The government must show that its assessment was proper by establishing the following:
 - (1) The reprocured supplies or services are the same as or similar to those involved in the termination. 5860 Chicago Ridge, LLC v. United States, 104 Fed. Cl. 740 (2012) (agency failed to demonstrate that building it leased as a substitute was comparable and that the amount it sought was the precise amount it had spent in reproUREMENTS); Gordon T. Smart, PSBCA No. 6123, 11-1 BCA ¶ 34,695 (post office failed to put on evidence concerning the replacement contract); Odessa R. Brown, PSBCA No. 5362, et al., 11-1 BCA ¶ 34,724; International Foods Retort Co., ASBCA No. 34954, 92-2 BCA ¶ 24,994.

- (2) The government actually incurred excess costs. Sequal, Inc., ASBCA No. 30838, 88-1 BCA ¶ 20,382; 5860 Chicago Ridge, LLC v. United States, 104 Fed. Cl. 740 (2012) (agency failed to demonstrate that the amount it sought was the precise amount it had spent in reprocurments); and
 - (3) The government acted reasonably to minimize the excess costs resulting from the default. Daubert Chem. Co. Inc., ASBCA No. 46752, 94-2 BCA ¶ 26,741 (government acted reasonably where it reprocured quickly, obtained seven bids, and awarded to lowest bidder).
- c. Mitigation of damages. The government has an affirmative duty to mitigate damages on repurchase. Ronald L. Collier, ASBCA No. 26972, 89-1 BCA ¶ 21,328; Kessler Chem., Inc., ASBCA No. 25293, 81-1 BCA ¶ 14,949.
- (1) If the repurchase is for a quantity of goods in excess of the quantity that was terminated for default, the contracting officer may not charge the defaulting contractor for excess costs beyond the undelivered quantity terminated for default. FAR 49.402-6(a).
 - (2) If a repurchase is for a quantity not in excess of the quantity that was terminated, the government shall repurchase at as reasonable a price as practicable. FAR 49.402-6(b). The KO may use any terms and acquisition method deemed appropriate for the repurchase. 52.249-8(b). See Al Bosgraaf Son's, ASBCA No. 45526, 94-2 BCA ¶ 26,913 (reprocurement by modification of another contract inadequate to mitigate costs); International Technology Corp., B-250377.5, Aug. 18, 1993, 93-2 CPD ¶ 102 (may award a reprocurment contract to the next-low offeror on the original solicitation when there is a short time span between the original competition and default).
 - (3) The government is not required to invite bids on repurchase solicitations from a defaulted contractor. Montage Inc., B-277923.2, Dec. 29, 1997, 97-2 CPD ¶ 176.
- d. When the repurchase is defective, the defaulting contractor may be relieved of liability for excess costs. Ross McDonald Contracting, GmbH, ASBCA No. 38154, 94-1 BCA ¶ 26,316 (government failed to mitigate damages when exercising option on reprocurment contract awarded to next-low offeror on the original

solicitation rather than compete requirement for option year); Astra Prods. Co. Inc. of Tampa, ASBCA No. 24474, 82-1 BCA ¶ 15,497 (recoverable reprocurement costs reduced where government failed to request proposal from next lowest-priced responsible bidder).

- e. The Fulford Doctrine. A contractor may dispute an underlying default termination as part of a timely appeal from a government demand for excess reprocurement costs to avoid the excess costs, even though the contractor failed to appeal the underlying default termination in a timely manner. Fulford Mfg. Co., ASBCA No. 2143, 6 CCF ¶ 61,815 (May 20, 1955); see also Deep Joint Venture, GSBCA No. 14511, 02-2 BCA ¶ 31,914 (GSBCA confirms validity of the Fulford doctrine for post-CDA terminations); D. Moody & Co. v. United States, 5 Cl. Ct. 70 (1984); Kellner Equip., Inc., ASBCA No. 26006, 82-2 BCA ¶ 16,077. While the majority of the existing case law supports and adopts the Fulford Doctrine, those in the field of contractor defense work believe that the Federal Circuit's recent decision in Maropakis may mean an end to the Fulford Doctrine and the beginning of the need to present defenses in anticipation of reprocurement costs and future litigation in order to ensure compliance with the CDA. M. Maropakis Carpentry, Inc. v. United States, 609 F.3d 1323 (Fed. Cir. 2010).

3. Liquidated Damages.

- a. Liquidated damages serve as a contractually agreed upon substitute for actual damages caused by late delivery or late completion of work. The government may recover both liquidated damages and an assessment of excess costs (either for reprocurement or for completion of the work) from a contractor upon terminating a contract for default. FAR 49.402-7.
- b. The common law rule that liquidated damages will not be enforced if they constitute a penalty applies to government acquisitions. Southwest Eng'g Co. v. United States, 341 F.2d 998 (8th Cir. 1965).
- c. A liquidated damages clause will be enforced as reasonable where, at the inception of the contract, the damages are based on a reasonable forecast of possible damages in the event of failure of performance. American Constr. Co., ENGBCA No. 5728, 91-2 BCA ¶ 24,009.
- d. If a contract does not have a liquidated damages clause or if the liquidated damages provision of a contract is unenforceable

because it is punitive, the government may recover actual damages to the extent that they are proved. FAR 52.249-10.

4. Common Law Damages

- a. The government may also recover common law damages, which may be in lieu of or in addition to excess costs assessed under the default termination clause. FAR 52.249-8(h); Cascade Pac. Int'l v. United States, 773 F.2d 287 (Fed. Cir. 1985) (government awarded common law damages after failing to prove excess procurement costs); Hideca Trading, Inc., ASBCA No. 24161, 87-3 BCA ¶ 20,040 (despite failure to procure, government entitled to damages at the difference between the contract price and the market price for oil for the period 60 to 90 days after the default termination).
- b. The government has the burden of proving that the damages are foreseeable, direct, material, or the proximate result of the contractor's breach of contract. ERG Consultants, Inc., VABCA No. 3223, 92-2 BCA ¶ 24,905 (damages must be foreseeable); Gibson Forestry, AGBCA No. 87-325-1, 91-2 BCA ¶ 23,874 (Forest Service unable to recover cost of tree seedlings when contractor did not know that seedlings had three week life expectancy once lifted for planting).

5. Unliquidated advance and progress payments. The government is entitled to repayment by the contractor of advance and progress payments, if any, attributable to the undelivered work. Smith Aircraft Co., ASBCA No. 39316, 90-1 BCA ¶ 22,475.

B. The Government's Liability

1. Bottom Line – Upon termination for default, government only pays for **value it actually received**. Supply contractor possesses biggest risk because not compensated for work-in-progress.
2. Supply – Government is liable only for the contract price for completed **supplies delivered** and accepted. FAR 52.249-8(f).
3. Service or Construction – Government is liable only for the **reasonable value of work done** before termination, whether or not the services or construction have been contractually accepted by the government. Sphinx Int'l, Inc., ASBCA No. 38784, 90-3 BCA ¶ 22,952.
4. Cost-reimbursement contracts – Government is generally liable for all of the reasonable, allowable, and allocable costs incurred by the contractor, whether or not accepted by the government, plus a percentage of the

contract fee. The fee is somewhat limited, however, as the amount of the contract fee payable to the contractor is based on the work accepted by the government, rather than on the amount of work done by the contractor. FAR 52.249-6.

5. The government may also require the contractor to transfer title and deliver to the government its manufacturing materials, for which the government will pay the reasonable value. FAR 52.249-8(e); FAR 52.249-10(a).

VIII. COMMERCIAL ITEM CONTRACTS: “TERMINATION FOR CAUSE”

- A. Background. The Federal Acquisition Streamlining Act, P.L. 103-355, 108 Stat. 3243 (Oct. 13, 1994), established special requirements for the acquisition of commercial items. Congress intended government acquisitions to more closely resemble those customarily used in the commercial market place. FAR 12.201.
- B. Applicable Rules for Terminations for Cause
 1. For commercial items: use clause FAR 52.212-4.
 2. The government can terminate a contract for a commercial item for cause. FAR 12.403 and FAR 52.212-4(m).
 3. FAR 52.212-4 contains concepts that are different from “traditional” termination rules contained in FAR Part 49. Consequently, the requirements of FAR Part 49 do not apply when terminating contracts for commercial items. Contracting officers, however, may continue to follow Part 49 as guidance to the extent that Part 49 does not conflict with FAR 12.403 and FAR 52.212-4. FAR 12.403(a).
- C. Policy. The contracting officer should exercise the government’s right to terminate a contract for a commercial item only when such a termination would be in the best interests of the government. Further, the contracting officer should consult counsel prior to terminating for cause. FAR 12.403(b).
- D. General Requirements. FAR 12.403; FAR 52.212-4.
 1. Grounds. Under the rules, a contractor may be terminated for cause “in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms or conditions, or fails to provide the government, upon request, with adequate assurances of future performance.” FAR 52.212-4(m).
 2. Excusable Delay. Contractors are required to notify contracting officers as soon as reasonably possible after the commencement of excusable

delay. FAR 52.212-4(f). In most situations, this requirement should eliminate the need for a show cause notice prior to terminating a contract. FAR 12.403(c)(1).

3. Rights and Remedies:

- a. The government's rights and remedies after a termination for cause shall include all the remedies available to any buyer in the commercial market place. The government's preferred remedy will be to acquire similar items from another contractor and to charge the defaulted contractor with any excess procurement costs together with any incidental or consequential damages incurred because of the termination. FAR 12.403(c)(2).
- b. In the event of a termination for cause, the Government shall not be liable for supplies or services not accepted. FAR 52.212-4(m).
- c. If a Board determines that the government improperly terminated for cause, such termination will be deemed a termination for convenience. FAR 52.212-4(m).

4. Procedure to terminate for cause.

- a. The CO shall send the contractor written notification that the contract is terminated for cause, reasons for the termination, what remedies the government intends to seek or a date they will notify the contractor of the remedy, and that the notice is a final decision that is appealable under the Disputes clause. FAR 12.403(c)(3).
- b. Contracting officers were required to report terminations for default through their agency channels to the Office of the Undersecretary of Defense. In 2010 this requirement changed to require all termination for cause or default reporting to be accomplished via the Federal Awardee Performance and Integrity Information System.
- c. Any termination involving a reduction in employment of 100 or more contractor employees specifically requires congressional notification, cleared through agency liaison offices before release. DFARS 249.7001; DFARS PGI 249.7001. Similar reports are required by the Air Force for terminations with high-level agency interest or litigation potential. See AFFARS MP5349.

IX. MISCELLANEOUS

- A. Total or partial termination. A default termination may be total or partial. FAR 52.249-8(a)(1).

- B. Severable contract requirements. Where a contract includes severable undertakings, default on one effort may not justify termination of the entire contract. T.C. Sarah C. Bell, ENGBCA No. 5872, 92-3 BCA ¶ 25,076.
- C. Revocation of Acceptance in Order to Terminate.
1. In some circumstances, the government can revoke its acceptance of performance in order to terminate.
 2. American Renovation & Construction Co., ASBCA No. 53723, 10-2 BCA ¶ 34,487 (upheld revocation of work that occurred 25 months previously where government inspector reasonably relied on the contractor's assurance that there were no defects remaining in the work since all visible defects had been corrected); Chilstead Building Co., ASBCA No. 49548, 00-2 BCA ¶31,097 (roofing contractor's representation that it was proceeding in accordance with the drawings followed shortly thereafter by installation of deviant trusses was a gross mistake amounting to fraud despite the government inspector's failure to measure or inspect); Z.A.N. Co., ASBCA No. 25488, 86-1 BCA ¶ 18,612 (delivery of improperly marked watches was a gross mistake amounting to fraud despite the fact that government representatives may not have acted "with a maximum of circumspection"); Massman Constr. Co., ENGBCA No. 3443, 81-2 BCA ¶ 15,212 (contractor's failure to use prequalified weld joints (among other things) was a gross mistake amounting to fraud despite the fact that the government's inspection was "inexcusably bad"); Jo-Bar Mfg. Corp., ASBCA No. 17774, 73-2 BCA ¶ 10, 311 (contractor's determination that aircraft bolts did not have to be heat treated and failure to treat them, coupled with misrepresentation to the government inspector that it had been advised heat treatment was not required was a gross mistake amounting to fraud despite possible lack of in-process inspection by government).
 3. However, acceptance must be revoked within a reasonable time after the mistake is discovered or could have been discovered with ordinary diligence. American Renovation & Construction Co., ASBCA No. 53723, 10-2 BCA ¶ 34,487; Bar Ray Prod., Inc. v. United States, 162 Ct. Cl. 836 (1963).
 4. No precise formula exists to determine the reasonableness of the delay. American Renovation & Construction Co., ASBCA No. 53723, 10-2 BCA ¶ 34,487. The determination must be made on a case-by-case basis. Id.
 5. However, the government's efforts to determine conclusively that the work was defective or to work with the contractor to solve the problem will be taken into consideration in determining the reasonableness of the delay. Perkin-Elmer Corp. v. United States, 47 Fed. Cl. 672 (2000) (revocation of

acceptance more than six years after learning of the defect was unreasonable); Chilstead Building Co. Inc., ASBCA No. 49548, 00-2 BCA ¶31,097 (seven-month delay between discovery of the defects and revocation of acceptance for the Architect-Engineering firm to investigate the cause of the defect was reasonable); Ordnance Parts & Eng'r Co., ASBCA No. 40293, 90-3 BCA ¶ 23,141 (one-year delay between the KO's request for tests and revocation of acceptance where tests took less than two weeks was not "remotely prompt action"); Jung Ah Industrial Co., ASBCA 22632, 79-1 BCA ¶ 13,643, aff'd on recon., 79-2 BCA ¶ 13,916 (10-month delay to test wall paneling to determine if it had been "incombustible treated" was reasonable.

- D. Fiscal Considerations. Funds that have been obligated but have not been disbursed at the time of termination for default and funds recovered as excess costs on a defaulted contract remain available for a replacement contract awarded in a subsequent fiscal year. Funding of Replacement Contracts, B-198074, July 15, 1981, 81-2 CPD ¶ 33; Bureau of Prisons-Disposition of Funds Paid in Settlement of Breach of Contract Action, B-210160, Sep. 28, 1983, 84-1 CPD ¶ 91.
- E. Conversion to Termination for Convenience. All FAR default clauses provide that an erroneous default termination will be converted to a termination for convenience. FAR 52.249-8(g); FAR 52.249-10(c); FAR 52.249-6(b). But see Apex Int'l Mgmt. Servs., Inc., ASBCA No. 38087, 94-2 BCA ¶ 26,842 (board refuses to limit recovery to termination for convenience costs where government officials acted in bad faith; contractor entitled to breach damages)
- F. T4C Proposals Where T4D Appeal Is Pending
1. A contractor, prior to the default being overturned, can submit a termination for convenience settlement proposal to the contracting officer. The proposals will be treated as Contract Disputes Act claims. McDonnell Douglas Corp. v. United States, 37 Fed. Cl. 285 (1997); Balimoy Mfg. Co. of Venice, ASBCA No. 49730, 96-2 BCA ¶ 28,605.
 2. The demand for termination for convenience costs from the contracting officer who terminated the contract for default demonstrates the "impasse" required to convert a proposal into a claim.
 3. An appeal of a convenience settlement proposal will be dismissed without prejudice to reinstatement if the appeal of a default termination is pending. Poly Design, Inc., ASBCA No. 50862, 98-1 BCA ¶ 29,458.

X. CONCLUSION