

Free research paper on default and dispute

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Introduction

This paper sheds light on procurement and contracting. It contains a description of contracts by the government and the existing terminations when the contractor fails to meet the set contractual obligations. In this case, the focus is on termination for convenience and termination for default. Major reference is on the Federal Acquisition Regulation which includes a description of the procedure to follow in conflict handling. An example is the Krygoski Construction Company Inc. case against the United States in August of 1996, Case No. 95-5136.

Bases for a Termination for Default

On this matters, a default under the Federal Acquisition Regulation is a contractor's unexcused prospective or present failure to perform as provided by the contract's delivery schedules, specifications and terms. The government has the mandate to prove through a preponderance of the credible and reliable evidence that a termination for default is appropriate. The contractor on the other hand has the burden to proof that the failure to perform was due to causes that were beyond their control and that they have no fault on their part.

The Federal Acquisition Regulation provides clauses on the bases for termination. Under this, several grounds on terminating a contract for default are several. The bases include, failure in delivering or to perform in time; failure to make progress resulting to endangering of performance; suspensions, notice of debarments or other determinations of responsibility; and anticipatory repudiation.

Termination for Default and Termination for Convenience

There are various clauses under the Federal Acquisition Regulation for which termination for convenience may be determined. The type and the dollar amount in a given contract determines the proper clause for specific contracts. The contract types from cost reimbursement contracts, fixed-price contracts that are over \$100, 000, fixed-price contracts that are below \$100, 000 to commercial items. Under the termination for convenience, the government has the right to terminate a contract either partly or in whole especially when the termination is within the interest of the government. In this case, the Contracting Officer terminates by delivering a Notice of Termination stopping the Contractor from working as specified in the notice while they take measures to complete the portion of the contract that the Contractor requires of them. They then deliver the complete or partial plans, information drawings and any other property that would have been needed had the performance not be terminated. They also hand in un-fabricated and fabricated parts, supplies, complete work and other materials acquired or produced for the terminated work. The Contractor and Contracting Officer then discuss on a settlement proposal which they may agree upon part or the whole amount to be paid or remaining to be paid following the termination. The contractor has the right to a monetary remedy. Recoverable remedies include the contract price for the completed supplies or the services that have been accepted by the government, reasonable costs incurred following the termination and reasonable settlement costs for the termination. The contractor's recovery never exceeds the total price of the contract. Far still, the contractor misses out on anticipated consequential

damages and profits lost after the termination. Once there are disagreements on the amount the Contracting Officer offers, the Disputes clause allows the Contractor the right to appeal.

On the other hand, the termination for default is different. The government provides a cure notice which is a written notification of failure to progress. In this notice, there is an indication of the termination of the contract on default grounds, reason for the termination and a right to cure the listed deficiencies within a ten day cure period. When the contractor fails in responding with a defense, the contracting officer issues a default termination notice based on her discretion. Upon termination for default, the contractor is liable to the government for excess costs that may be incurred when acquiring services or supplies. It is inclusive of liquidated damages, re-procurement costs, un-liquidated damages and liquidated damages. Liquidated damages in this case refer to the agreed upon damages in lieu of the actual damages while the un-liquidated damages are the progress or advance payments.

The Government's Remedy for Excess Cost of Re-procurement and Liquidated Damages

Liquidated damages are a fixed amount that is usually set forth by the agency when there is an unexcused delay in the contract performance. It estimates in advance reasonable estimate that is bound to affect the government if there is a breach of contract or unexcused delay that results to the work being extended beyond the stipulated contractual date of completion. The establishment of these damages normally minimizes arguments of the actual damages that the government would face. If for any case the liquidated damages are later found to be greater than the actual

damages amount that should have been anticipated, the liquidated damages may in most cases be deemed as a penalty thus they are unenforceable. In general therefore, liquidated damages are usually used in difficulty to come up with an accurate estimate of the harm to the government if late, unexcused performance on the contract occurs. The government will establish these damages prior to solicitation. They are expressed as a daily amount that should be assessed against the contractor for each day when there is delay beyond the date of completion.

Moving on to the excess of re-procurement, this is a primary direct damage. In this case, the government intends to exclude excess costs of re-procurement by proposing to eliminate the primary remedy existing if a breach of the contract was not excluded from the limitation of liability. With this, the government limits the potential cost of the re-procurement as a way in which they manage their potential cost exposure. It is usually more reasonable if the limit on their liability is adequate to drive the correct contract behavior on their part.

Dispute Process under the Contract Dispute Act

This process aims at providing guidance to parties involved in contract disputes, it outlines the appropriate disputes resolution practices while it also provides the measures necessary on minimizing litigation risk. Appropriate following of this procedure facilitates effective resolution of conflict. The Contract Disputes Act (CDA) of 1978 provides the procedures. The Contracting Officer acts as the contract's administrator for the government as well as being the decision maker in reviewing of disputes between the contractor and the government's staff. This officer also has the mandate to

settle, adjust or pay claims of either party. All claims are thus submitted to the Contracting Officer for consideration. Claims over \$100, 000 require certification for validity.

Section 6 (a) of the Contract Dispute Act stipulates that after submission of a certified claim, there should be an issue of a decision that should follow within 60 days especially when the claim is below \$100, 000 and a more reasonable time in case it exceeds \$100, 000. All this must be in writing. The Contracting Officer has the responsibility to inform the contractor on the appropriate time to deliver the decision on the claim put forward. The decision brought on should contain a description of both the dispute and claim, contract provisions' reference, a notice of the rights to make an appeal available for the contractor, a statement describing the areas of disagreement and agreement and also the officer's decision with supportive explanations (FAR 33. 211 (a) (4)). The contractor should be well informed on the fact that the negotiating opportunity and dispute resolution do not end when the claim is submitted. Negotiations with the government should go on while seeking a settlement. The Contracting Officer then makes a decision that is termed final unless the Contractor makes an appeal or files a suit. When the Contractor's claim is submitted to a Contracting Officer, the parties have an option to engage in alternative dispute resolution. If the Contractor is opposed to this, he/she writes to the Officer stating the specific reasons behind the decision. From this point, the government hereby pays interest on any unpaid amount realized but the contract. The Contractor then proceeds with diligence to perform on the contract awaiting the final resolution of any relief request, appeal, claim or actions that may arise under

the contract for which they have to comply with the decision that is made by the Contracting Officer.

The Importance of Acquisition Planning to Cost Containment in Government Contracting

A sound acquisition planning will ensure that the contracting process with the government is conducted in a timely manner in which the regulatory, statutory and policy requirements are all followed to the letter. It also advocates for a reflection on the mission needs that are included in the program. Therefore, the contractors involved in government contracts will be well advised on legal actions to take in case of termination or conflicts in the process of performing a contract. Acquisition planning allows for the government and the contractor to work together in what comes out to be a team approach that includes appropriate representations from every party in the contract that have interest in the requirements. Contracting professionals are thus key elements in ensuring that acquisition planning can be accomplished for every requirement not forgetting to ensure that the acquisition plan demonstrates a reflection of appropriate acquisition streamlining techniques and a rather sound business approach in relation to the purchase of the desired services and goods. Therefore, a more thorough understanding and more aggressive application of cost-containment strategies indicate that they would conceive shift acquisition outcomes that will ultimately bring out a more cost-effective posture.

Recommendations to Improve Government Procurement Procedures

Upon understanding of how critical a Contracting Officer is in the entire process, it would be appropriate if contract management experience becomes a basic and major criterion for which this program officials are selected. Especially in the 21st century, these officers need to be trained further on their mandate in which they have to be representative enough of the involved parties while they make sound decisions.

On the same accord, there should be an increment of evaluations on past performance in dealing with government procurement procedures. This is because, going by the cases that have come up especially in termination either for default or convenience, they have similarities on the root causes. There are decisions that have been made by Contracting Officers that may be recurrent in modern contracts. In essence, there should be a broader reference when it comes to dealing with a contract.

Conclusion

Termination for convenience and default of the government are unavoidable facts in government procurement. Each contractor who takes on any government contract should analyze and be well informed on such implications by closely examining the contract's clauses that deal with possible terminations. A contractor should be sharp to analyze the Contracting Officer's decision and make appeals when there is belief of being unwarranted and unfairness.

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