

CLAIMS, CHANGES, & TERMINATIONS

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Agenda:

- Contract Changes
- Claims Administration and Procedure
- Terminations

Contract Changes

- Administration of Changes
- Cardinal Changes
- Duty to Proceed
- Government Authority
- Constructive Changes

Administration of Changes

- The Standard “Changes” Clauses
- Formal Modifications
 - Mutual Agreement / “Bilateral”
 - Unilateral changes by the Government

Administration of Changes

- Standard “Changes” Clauses
 - 52.243-1 Fixed Price
 - 52.243-2 Cost Reimbursement
 - 52.243-3 Time & Materials / Labor Hours
 - 52.243-4 Construction

Administration of Changes

FAR 52.243-1

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

- (1) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for the Government in accordance with the drawings, designs, or specifications.
- (2) Method of shipment or packing.
- (3) Place of delivery.

Administration of Changes

FAR 52.243-1 (Cont'd)

(b) If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.

- Note: Equitable adjustment of price should include both cost and profit

Administration of Changes

FAR 52.243-1 (Cont'd)

(c) The Contractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.

* * *

(e) Failure to agree to any adjustment shall be a dispute under the Disputes clause. However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

Cardinal Changes

- Changes clause allows changes “within the general scope” of the contract
- Does not allow a “cardinal change”





Cardinal Changes

- Other terms of the Changes Clause may also come into play
- Consider:
 - Nature of the work
 - Relative cost / disruption
 - Terms & Conditions
 - Quantities
 - Schedule

Cardinal Changes

- Cardinal Changes and the duty to proceed
 - 52.233-1 and 52.233-1 (Alt. I)
 - “arising under” vs. “arising under or relating to”

A Contractor's Duty to Proceed

Disputes clause (52.233-1) –

“The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.”

A Contractor's Duty to Proceed

- In early decisions, a “cardinal change” was deemed a material breach, the resulting dispute was not seen as “arising under the contract,” and the contractor was not obligated to perform.
- See *Alliant Techsystems, Inc. v. U.S.*, 178 F.3d 1260, reh’g denied, 186 F.3d 1379 (1999) (change to option delivery schedule rendered exercise ineffective, but contractor was required to perform under Disputes clause because option change was not a cardinal change).
- Many contracts now contain the alternate “all disputes” clause. FAR 52.233-1, Alternate I (disputes “relating to the contract”).

Government Authority

- Know who has authority to direct changes
- FAR 43.102(a)
 - Only contracting officers acting within the scope of their authority are empowered to execute contract modifications Other Government personnel shall not—
 - (1) Execute contract modifications;
 - (2) Act in such a manner as to cause the contractor to believe that they have authority to bind the Government; or
 - (3) Direct or encourage the contractor to perform work that should be the subject of a contract modification.

Constructive Changes

- Where the Government changes the contract but won't admit it
- The challenge is to identify these early and then respond in the right way

Constructive Changes

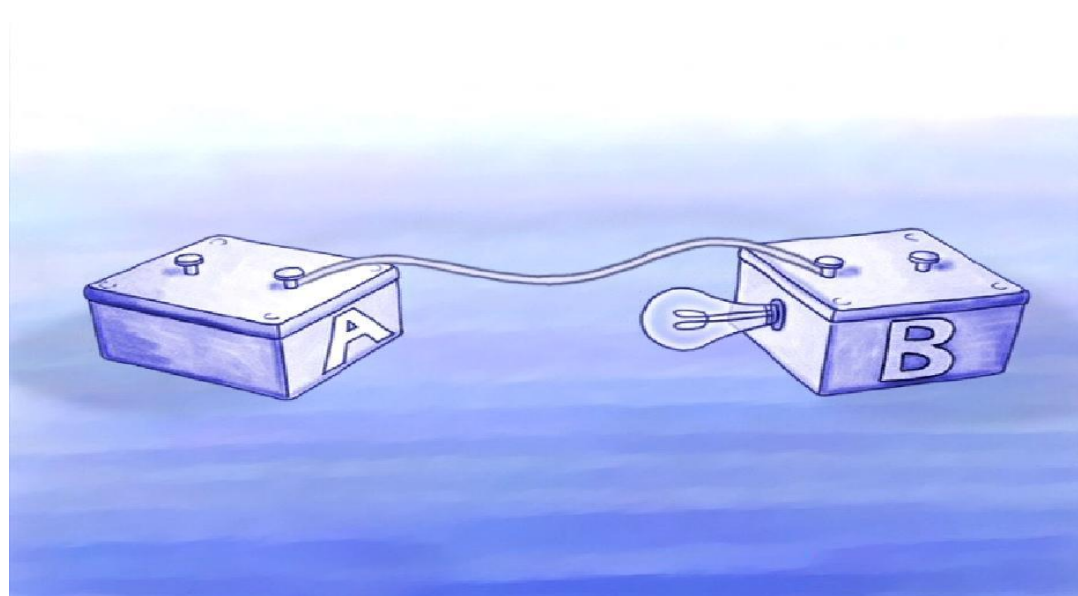
- To protect the company's interests it is critical to:
 - Identify the change promptly
 - Put the Contracting Officer on notice
 - Demand (or reserve right to) more money and time

Constructive Changes

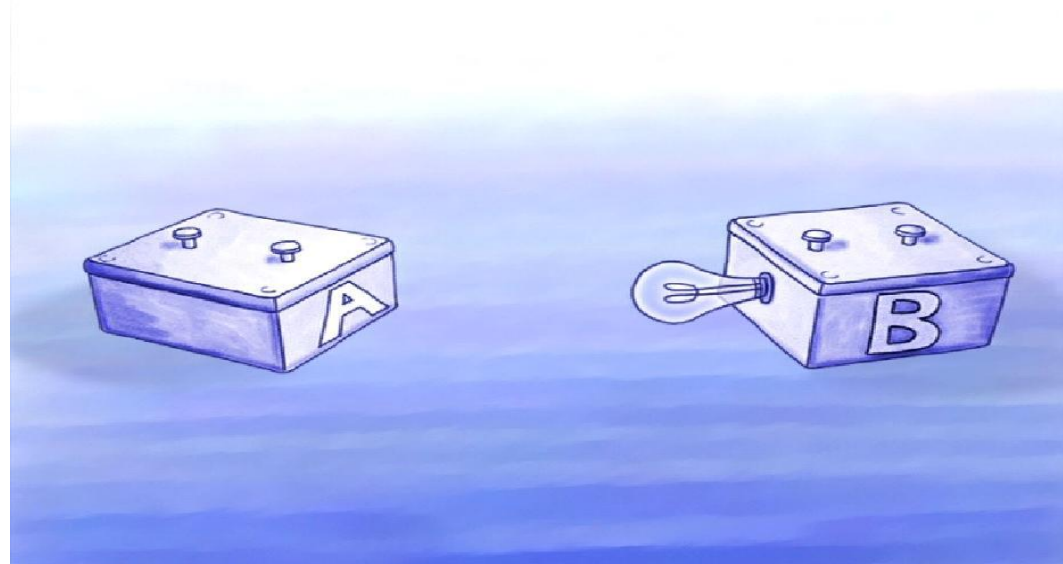
- Four Basic Types:
 - Changes to Express Contract Terms
 - Defective Specifications
 - Interference
 - Failure to Cooperate

Changes to Express Contract Terms

- Government says contract requires Box A and Box B connection



- You say it doesn't



Defective Specifications

- Govt specs tell how to build, but design doesn't work
- Government bears the risk that its specifications are defective, not the Contractor
 - *US v. Spearin*, 248 U.S. 132 (1918) - “[I]f the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications.”
- Note: Contractor can't have known this was a problem before bidding

Defective Specifications

- Before making changes to Government specs (even improvements):
 - Notify the CO
 - Get CO direction
 - Document all communications

Interference

- Where the Government's actions interfere with your ability to perform the contract
- May occur where there are design specs or where there are performance specs

Interference

- Do not just quietly follow the COTR instruction
- Tell the CO of the demand and that it is a change to the contract
- Tell the CO of cost/schedule impacts
- Request formal CO direction before proceeding
- Reserve rights to recovery
- Document all communications

Interference

Other common types of interference:

- Over inspection
- Disruption of work
- Failure to reasonably respond (e.g., approvals)
- Failure to cooperate
 - e.g., fail to disclose relevant information, not providing promised facilities

Constructive Acceleration

- Where you deserve more time to complete performance, but the government won't allow it
- Generally occurs in conjunction with other changes

More Changes

1. Commercial Item Changes
2. Delays
3. Differing Site Conditions
4. Deductive Changes

Commercial Item Changes

- **FAR 52.212-4(c)**
 - Requires all change to be with bilateral agreement
 - What if CO directs unilateral change regardless?

Contract: Delays

- **FAR 52.242-17, *Government Delay***
 - Any CO action or inaction
 - That affects *any* part of Contract performance
 - And increases costs or affects schedule
- Notify the CO within 20 days of CO in/action
- Document everything
- Only get costs + overhead (profit excluded)

Deductive Changes

- Permissible if “in the general scope of the contract”
- downward equitable adjustment to the extent of the savings to the contractor due to the deletion
- Generally priced based on how much the deleted work “would have cost”
- Can be viewed instead as a partial termination for convenience

Documentation of Changes/Delays

- **Key Actions up front:**
 - Timely recognition of the change
 - Prompt notification of Contracting Officer
 - Get CO direction
 - Reserve claims for money and time
 - Document all communications

Documentation of Changes/Delays

- **Support for Recovery**
 - Understand the original contract requirements
 - Document the Government actions / inactions
 - Identify / track the impacts
 - Direct effects
 - Indirect effects

Documentation of Changes/Delays

Example Direct Effects

- Labor / Overhead
- Material
- Subcontractor Costs
- Rework
- Other Costs

Example Indirect Effects

- Delays
- Constructive Acceleration
- Disruption

Documentation of Changes/Delays

Tracking the Costs

- Change Order Accounting Clauses
 - apply to formal changes

- Constructive Changes are harder to track
 - often late recognition
 - consider charge numbers once identified
 - estimates may be needed

- KEY = Early identification and coordination

Agenda:

- Contract Changes
- Claims Administration and Procedure
- Terminations

Presenting an REA

- Request for Equitable Adjustment
 - No prescribed format in FAR
 - Case law provides further guidance
 - Written demand
 - Seeking as a matter of right
 - Payment of money
 - Adjustment of contract terms
 - Other relief
 - REA “Certification” for DoD Contracts
 - DFARS 252.243-7002
 - Short: Good Faith...Accurate...Best of Knowledge/Belief



Presenting a Claim: Basic Elements

- Formal “claim” must be made
 - Written demand
 - Submitted to the Contracting Officer
 - Seeking as a matter of right
 - Payment in a sum certain
 - Adjustment of contract terms
 - Other relief
 - Certification if over \$100K
- A claim is NOT
 - A routine invoice for payment

Presenting a Claim: Basic Elements

- Types of costs
- Actuals vs. Projections
 - Effects of claim may be ongoing
 - Need a cut off date between past and future (project for future)
- Accuracy
 - False Claims Act

Presenting a Claim: Basic Elements

- Request for Contracting Officer’s “final decision” – implied or explicit
 - the government’s decision on a contractor’s claim
 - the government’s claim against a contractor
- Certification if claim exceeds \$100,000
 - Correctable if defective
 - Revisions permitted
 - Authorized signature

Presenting a Claim: Certification

- For claim over \$100K – certification
 - “I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the Contractor.” FAR 52.233-1

Presenting a Claim: Certification

- Potential False Claims Act liability
 - 31 U.S.C. § 3729 – knowingly presenting a false or fraudulent claim for payment or approval (specific intent not required)
 - Preponderance of evidence
 - 41 U.S.C. § 7103(c) – CDA anti-fraud provision for misrepresentation of fact or fraud
 - Preponderance of evidence
 - Forfeiture of Fraudulent Claims Act - 28 U.S.C. § 2514.
 - Clear and convincing evidence
 - See *Daewoo Engineering & Construction Co. v. United States*, 557 F.3d 1332 (Fed. Cir. 2009) – REA without support

Presenting a Claim: Statute of Limitations

- Six years after accrual of claim
 - “‘Accrual of a claim’ means the date when all events that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to accrue some injury must have occurred. However, monetary damages need not have been accrued.” FAR 33.201.

REAs & Claims: Common Elements

- **Objectives:**
 - Create a compelling, believable, and well supported presentation that cannot be undercut by
 - The known facts
 - The facts you don't know but can *anticipate*
- **Entitlement**
 - Description of original requirements and how the Government changed the nature of the work
- **Quantum**
 - Impact of changes, and documentation

REAs & Claims: Common Elements

- Executive Summary
- Contract Requirement
- Government direction, action or inaction that caused you to delay, accelerate, or disrupt performance
- What you did
- What is the cost
- Legal analysis

REAs & Claims: Common Elements

- An indexed and tabbed appendix containing supporting material
 - Citations to relevant Contract clauses
 - Correspondence/communications
 - Evidence of incurred costs
 - Computations, estimates, and projections (if ongoing)
 - Other materials as appropriate



REA and Contract Disputes Act “Claim”: Differences?

- Differences between an REA and a “Claim” under the CDA
 - What are the differences?
 - Why are these differences important?
 - How do these differences impact your approach?

REA vs. Contract Disputes Act Claim

- Key differences between CDA claim and REA
 - Timing of CDA Claim
 - Assertion of claim
 - Government response to claim
 - Appeal of final decision
 - Interest
 - Cost allowability

CDA Claims v. REAs

	<u>CDA Claims</u>	<u>Requests for Equitable Adjustments</u>
<u>Format</u>	<ul style="list-style-type: none"> • Written demand • Seeking relief as a right: sum certain, adjustment of contract terms, or other relief in dispute • Certification required if over \$100k 	<ul style="list-style-type: none"> • Written demand • Seeking payment of money, adjustment of contract terms, or other relief • DoD contracts require a watered-down REA certification.
<u>Timing</u>	<ul style="list-style-type: none"> • Contractor/Govt – Claim within 6 years of accrual • Govt – Final decision within 60 days or set firm date for decision • Contractor – Appeal the Final Decision within 90 days (to Board) or 12 months (to COFC) 	<ul style="list-style-type: none"> • No time limits • <i>[Don't forget to convert the REA into a claim before the 6-year Statute of Limitations expires!]</i>
<u>Interest</u>	<ul style="list-style-type: none"> • Interest begins from date of claim submission. 	<ul style="list-style-type: none"> • No interest.
<u>Cost Allowability</u>	<ul style="list-style-type: none"> • Costs of claim preparation and litigation are generally unallowable. 	<ul style="list-style-type: none"> • Costs of REA preparation and settlement negotiations are allowable as “contract administration” costs.

Claims and Disputes

- The submission of a claim initiates the “disputes” process
- “Disputes clause” implements the Contract Disputes Act by inclusion in contract. Far 52.233-1

Disputes

- Claim must be made by contractor or Government
- Contracting Officer makes final decision on claim
 - Contractor has the right to appeal the final decision
- Contract Disputes Act applies to all disputes arising under or related to a contract

Disputes: Role of Contracting Officer

- Negotiated settlement is encouraged
- Binding authority to settle
 - Before or after appeal to BCA
 - Limited if appeal to Court of Federal Claims
 - No authority to settle or pay fraudulent claim
- Final decision required
 - Within 60 days of claim unless extended for claims over \$100,000
 - If > \$100,000 then within 60 days CO must either
 - Issue decision, or
 - Set a firm date for the decision - must be a “reasonable” time or may be a “deemed denial” allowing appeal

Disputes: Final Decision

- » CO Final Decision – Form and Content
 - Must be in writing
 - Must address substance of claim
 - Must state the reasons for the decisions reached
 - Scope of decision is the basis for the scope of the appeal of the decision
 - Should “inform” the contractor of its rights, e.g., right to appeal decision, 41 U.S.C. § 7103(e)
 - 90 days to BCAs
 - 1 year to Court of Federal Claims
- » CO Final Decision – Final unless appealed

Disputes: Litigation

- Appeal under the disputes clause to the Board of Contract Appeals or to the Court of Federal Claims
- Election binding, subject to consolidation of related claims
- Timing for Appeal
 - 90 days to Board of Contract Appeals
 - 1 year to Court of Federal Claims

Disputes: Board v COFC

- Time to file the appeal (Board 90 days; Court 12 months)
- Availability of fraud counterclaims and Forfeiture of Fraudulent Claims Act (Board No; Court Yes)
 - But beware affirmative defenses at board
- Precedent on relevant issues
- Relative expertise (Boards specialized forums)
- Perceived independence from agency (Court)
- Formality of procedures (Board No; Court Yes)
- Opposing Counsel (Board agency; Court DOJ)
- Cost
- Speed to decision
- Likelihood of using ADR later / simultaneously

COFC v. Boards of Contract Appeals

	<u>Court of Federal Claims</u>	<u>Boards of Contract Appeals</u>
<u>Timeline</u>	<ul style="list-style-type: none"> • 12 months after receipt of final decision 	<ul style="list-style-type: none"> • 90 days after receipt of final decision
<u>Length of cases</u>	<ul style="list-style-type: none"> • Average is 3 years 	<ul style="list-style-type: none"> • Average is 1 year
<u>CO's Ability to Settle</u>	<ul style="list-style-type: none"> • No. 	<ul style="list-style-type: none"> • Yes.
<u>Judges</u>	<ul style="list-style-type: none"> • Article I court • 16 judges, serving 15-year terms, and an additional 10 active senior judges • Single judge decides case 	<ul style="list-style-type: none"> • Article I Tribunal • Experienced judges • Single judge presides over admission of evidence, but decisions made by 3-judge panel
<u>Who Litigates on Behalf of Govt?</u>	<ul style="list-style-type: none"> • Department of Justice 	<ul style="list-style-type: none"> • Agency Lawyers
<u>ADR</u>	<ul style="list-style-type: none"> • Yes, voluntary and several types. 	<ul style="list-style-type: none"> • Yes, voluntary and several types. • Some may aid in ADR before issuance of final decision.

Standard of Review of CO Decision

- Explicitly De Novo at the Court of Federal Claims 41 U.S.C. § 7104(b)
- Parties start with “clean slate” before the Boards
 - 41 U.S.C. § 7103(e) provides that any findings of fact by the CO are not binding in any subsequent proceeding

Review of Board Decisions

- Appeal within 120 days of receipt of decision
41 U.S.C. § 7107(a)(1)
 - Standard of Review
 - Legal issues: de novo
 - Questions of fact:
 - “the decision of the agency board on a question of fact is final and conclusive and may not be set aside unless the decision is -
 - (A) fraudulent, arbitrary, or capricious;
 - (B) so grossly erroneous as to necessarily imply bad faith;
 - or
 - (C) not supported by substantial evidence.”
- 41 U.S.C. § 7107(b)(2)

Review of Court of Federal Claims

- Appeal within 60 days of entry of Court of Federal Claims Judgment - 28 U.S.C. § 2107
- Standard of Review
 - Legal issues: de novo
 - Questions of fact: “clearly erroneous” FRCP 52(a)

Appealing the CO Final Decision

Supreme Court of the United States

(certiorari)

The Court of Appeals for the Federal Circuit

Appeal by contractor or
Government agency head
with approval of Attorney
General

**Board of Contract
Appeals**

ADR

**Court of Federal
Claims**

90 days from
receipt of decision

Only
contractor may
appeal

12 months from
receipt of decision

Contracting Officer's Final Decision

Agenda:

- Contract Changes
- Claims Administration and Procedure
- Terminations

Termination for Convenience

- Not common in the commercial market
- Gives the Government broad authority to terminate without cause
- Limits contractor's recovery to
 - Costs incurred
 - Profit on work performed
 - Costs of preparing termination settlement proposal

Termination for Convenience

- When the government wants – except for bad faith
- No-cost settlement versus termination for convenience where
 - Contractor amenable
 - No government property
 - No debts due the government
- No termination where the price of the undelivered portion is less than \$5,000
- If the same item is under contract with both large and small business, preference for continuing performance with the small business
- Can be partial termination

General Procedure

- Notice of Termination
 - In writing
 - By the Contracting Officer
 - Provide
 - Effective date of termination
 - Scope of termination
 - Any special instructions
- After notice of termination, termination contracting officer responsible

Contractor Obligations Upon Notice

- Stop work as specified in the notice
 - Note that for partial termination, contractor is obligated to continue the unterminated work
- Discontinue placing further orders on the terminated portion of the contract
- Notify subcontractors
 - Provide termination notices
 - Assure that scope of subcontractor termination is consistent with the prime contract termination
- Notify employees

Contractor Obligations Upon Notice

- Notify the TCO of any special circumstances that preclude the stoppage of work
- Continue performance of unterminated portion of the contract
 - Promptly submit REA for impact of termination on unterminated portion of the contract
- Settle outstanding liabilities in connection with termination
- Promptly submit termination settlement proposal

Contractor Obligations Upon Notice

- Inventory
 - Segregate and identify inventory allocable to the terminated subcontract
 - Assess the status of the inventory
 - Title
 - Condition
 - Protect and preserve the inventory pending disposition
 - Prepare inventory schedule and submit to the TCO
 - Dispose of inventory as directed by the TCO

WARN Act

- Covered Employers - 100 or more employees
- Triggering Event – Plant Closing or layoff of 50 or more employees / 33% of workforce at site
- Requirement – 60-day advance notice (or pay in lieu of notice) to impacted employees, bargaining representative, state dislocated worker unit, chief local elected official
- Timing – 90-day rolling period for employee calculation
- Penalties – compensation and benefits for violation period up to 60 days; \$500/day for failure to notify officials
- Exceptions – unforeseen business circumstances; natural disaster
- “Mini WARN Acts” – States have separate WARN requirements

Termination Preparation/Tips

- Work with Government to Minimize Termination Impact
 - Timing of contract termination
 - How much notice will be provided for each phase
 - Government employment of contract employees
 - How many jobs insourced
 - When jobs will be posted
 - Process for application/interview process
- Other Statutory Obligations
 - FLSA/state wage payment laws
 - COBRA notices
 - ADEA/OWBPA requirements

Termination for Convenience – Cost-Reimbursement Contracts

- Recovery of costs incurred in performance
- Continuing costs
- Settlement costs
- Percentage of the fee equal to the percentage of completion of work contemplated under the contract (excluding subcontract effort included in subcontractors' termination proposals), less previous payments for fee.

Termination for Convenience – Commercial Items Contracts

- FAR Part 12.4 / 52.212-4(I)
- Payments to Contractor:
 - “percentage of the contract price reflecting the percentage of work performed prior to the notice of termination”
 - Compare: Part 49 (work delivered and accepted)
 - *TriRAD Techs. Inc.*, ASBCA No. 58855 (Feb. 23, 2015)
 - “Reasonable charges . . . that have resulted from the termination”
 - Does not require compliance with CAS or contract cost principles
 - Can be demonstrated using the contractor’s “standard record keeping system”
 - FAR Part 49 provisions are only “guidance”
- Non-standard termination provisions

Termination for Convenience

- FAR cost principles and case law can inform extent of negotiated settlement (including commercial item contracts, *SWR, Inc.*, ASBCA No. 56708, Dec. 2014)
 - Loss of useful value
 - Initial Costs
 - Subcontractor claims

Terminations for Default

- Grounds for T for D
- Notice rules & responses
- Establishing the record before and after notice
- Potential consequences
- Contractor recovery & potential liability
- Appeals/conversion to T4C

Grounds for Default Termination

- Examples
 - Repudiation
 - Failure to deliver or proceed
 - Severe progress problems
 - Defective product
 - Failure to comply with other contract provisions
- FAR 49.402-3 lists factors agency must consider before termination, but highly discretionary
- Decision will be upheld if basis existed at time of termination even if not listed in termination notice

Cure Notice

- T for D may be improper if written cure notice not issued, or if termination based on ground not mentioned in cure notice
- Cure period of 10 days
- Not required if
 - Performance schedule has expired or fewer than 10 days remain on contract
 - Futile – e.g., repudiation
- Response - cure or give “adequate assurance”
- Gov’t must fully evaluate response

Show Cause & Termination Notices

- Show Cause
 - If T for D is deemed appropriate, show cause notice is encouraged, but not mandatory.
 - No required response period
 - Issuance of show cause notice after due date does not impact gov't's right to T for D for failure to timely deliver
- Termination Notice
 - Grounds for default, liability for excess procurement costs, right to appeal
 - Failure to comply with formal FAR requirement not fatal to T for D unless contractor prejudiced

Establishing the Record

- Before notice
 - Be alert to customer dissatisfaction
 - Diligently address perceived or actual performance issues
 - Fully document delay & performance issues
 - For issues relating to differing contractual interpretations, consider getting legal involved early
- After cure notice
 - Timely, complete response
 - Provide proof deficiency is cured or give “adequate assurance” of performance

Consequences of T for D

- Severe impact
 - Contract harm
 - Gov't not liable for costs of unaccepted work
 - Return progress, partial, or advance payments
 - Excess reprocurement costs
 - Liquidated damages
 - Broader issues - Reputational/past performance, possible debarment
- T for D = species of forfeiture
 - Gov't held to “strict accountability in using this sanction”

Recovery and Potential Liability

- Recovery
 - *Service & construction* - Payment for work properly performed prior to termination
 - *Supplies* – no right to recover cost for supplies not accepted by gov't
 - No recovery for anticipated profit
- Potential liabilities
 - Excess costs of procurement or completion
 - Same or similar supplies, actually incurred excess costs, acted reasonably to minimize excess costs
 - Other rights and remedies provided by law or contract

Appeals and Conversion

- CO can reinstate if doing so would be advantageous to the gov't
- Appeals - COFC or Boards
 - Agency counsel or DoJ? Timing? Process/expense?
- Not arbitrary, based on a judgment on the merits, consideration of the alternatives, free from outside influence
- Conversion to termination for convenience
 - Permits recovery of costs incurred (but still not anticipated profit unless termination was in bad faith)
 - Removes reputational stain

QUESTIONS?

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