Terminations of Government Contracts: Recent Developments

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Repository Citation
Roy S. Mitchell and John H. Tracy, Terminations of Government Contracts: Recent Developments, 14 Wm. & Mary L. Rev. 817 (1973), http://scholarship.law.wm.edu/wmlr/vol14/iss4/4
TERMINATIONS OF GOVERNMENT CONTRACTS: RECENT DEVELOPMENTS*

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For the uninitiated, a government contract can be a complex and unfamiliar document. The novice practitioner may find it difficult to define problems and determine rights and liabilities in an area of law permeated by standard forms, general provisions, special conditions, drawings, schedules, addenda, and amendments, and supplemented by extensive and detailed procurement regulations, numerous circulars, and an ever-increasing volume of case law. This Article will examine one area of government contracting—terminations—in light of cases decided during 1971 and 1972.

In the context of government contracts, "termination" is a word of art. Its precise meaning is dependent upon the facts of the individual case, as well as the type of termination clause relied upon by the government. Termination clauses provide for two distinct contingencies—termination for the default of the contractor and termination for the convenience of the government. Recent cases have been helpful in indicating problems which may arise from the use of these clauses, which are entitled respectively, "Termination for Default—Damages for Delay—Time Extensions"¹ and "Termination for Convenience of the Government."² Almost every government contract includes one of these clauses or a variation thereof.³

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¹ Armed Services Procurement Regulation (hereinafter ASPR) 7-602.5 (Fixed Price Construction Contracts). See Appendix A for a discussion of this clause. The clause is reproduced in its entirety.

² ASPR 7-103.21(b), as amended by ASPR 7-602.29. This clause is reproduced in its entirety in Appendix B.

³ As will be shown, there have been rare instances in which the government has failed to include one of the standard form clauses. Such failure may change substan-
I. Termination for Default

An examination of the cases decided during the past two years discloses that termination for default cases outnumbered termination for convenience cases five to one;\(^4\) furthermore, of the approximately 360 default cases decided in 1971 and 1972, contractors prevailed in only one out of four.\(^5\) An understanding of the rights and obligations of the parties may be helpful in assessing the significance of these figures.

First, it is important to define the nature of a default action. As a general rule, but with recognized exceptions, the contractor bears the risk of his own failure. For example, if a contractor fails to meet a delivery or completion date,\(^6\) delivers nonconforming supplies,\(^7\) or fails to comply with new or established social objectives, he may be placed in default by the government. In fact, any failure on the contractor's part to comply with any contractual requirement is a potential basis for the government to declare the contractor in default. The default action, if taken, terminates the contractor's right to proceed and subjects him to potential liability to the government for excess costs incurred in reprocuring the contract items or services. In some cases, a contractor also may be liable for common law or liquidated damages.

Default actions in supply and services contracts tend to outnumber those in construction contracts,\(^10\) most likely because far more supply

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\(^4\) These figures are based on the research of the authors and include most, if not all, termination cases decided during 1971 and 1972. The number of cases omitted, if any, would not substantially change the ratio. In 1971, 158 cases concerned termination for default and 31 cases involved terminations for convenience. In 1972 (through October 15, 1972), there were approximately 200 cases arising in a default context and 44 involving terminations for convenience. "Cases," as used herein, includes decisions of the Comptroller General, the United States Court of Claims, the various Boards of Contract Appeals, and, to a limited extent, decisions from federal district and appellate courts.

\(^5\) The statistics are based on the authors' research and analyses of the cases.


\(^8\) ASPR 12-804; FPR 1-12.803.2. Two contractors reportedly have been precluded from further government contracts until they comply with equal employment requirements. 14 G.C. ¶ 139.


\(^10\) This conclusion is based upon the authors' research and analyses of the cases. See note 4 supra.
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contracts are awarded; in addition, the highly technical specifications which manufacturers must meet in supply contracts often produce difficulties. Another factor is that services contracts, particularly those for janitorial services, often are performed by individuals or small companies with little or no financial backing and no experience with government requirements. These factors often result in deficient performance culminating in a termination for default.

The standard form contract invariably contains a default clause giving the government the power to declare a contractor in default for his failure to render contractually-required performance, failure to make progress toward performance of the contract, or failure to comply with other contract requirements or clauses. The first two situations present the classic "performance failure" and "progress failure," respectively.

A progress failure has been described as the middle ground between an actual performance failure and a renunciation by the contractor of his contractual obligation. The government can terminate a contract if the contractor has failed to make progress to such a degree that performance of the contract is in jeopardy, the government has given a cure notice (if required), and the contractor has done nothing to remedy the failure within the time allowed after receipt of the cure notice, which in most cases is 10 days. However, a cure notice is not required upon a failure of performance; nor is such notice required if a contractor's actions amount to a repudiation of the contract.

Once a failure of some type has occurred, the burden is on the contractor to interpose a valid defense, such as excusable delay. It is at

11. See note 1 supra.
12. Id.
13. Many of the social-purpose clauses, such as those providing for equal employment or safety standards, declare that a failure to comply will be considered a default. See notes 8 & 9 supra.
14. R. Nash & J. Cimnic, FEDERAL PROCUREMENT LAW 664 (2d ed. 1968); R. Speidel, Default for Failure to Make Progress, Briefing Papers # 64-5, 1 BPC 87.
15. See R. Speidel, supra note 14.
16. See note 1 supra.
17. Id.
18. Id.
19. ASPR 7-602.5 (d) (1):
   (d) The Contractor's right to proceed shall not be so terminated nor the Contractor charged with resulting damage if:
   (1) The delay in the completion of the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including but not restricted to, acts of God, acts of the public
this point that the familiar language "beyond the control and without
the fault or negligence" of the contractor and his subcontractors becomes
important.\textsuperscript{20} Excusable delays must be proven by the contractor.\textsuperscript{21} For
example, if a contractor could not perform because of a flood or fire
and he can demonstrate that he was not responsible, his default may be
excused.\textsuperscript{22} Of course, flood and fire are just two of the many causes
listed in the termination clause;\textsuperscript{23} furthermore, many causes not spe-
cifically listed in the clause may be grounds for excuse.

A repudiation is an unequivocal statement or act of the contractor
indicating that performance will not be forthcoming.\textsuperscript{24} It need not be,
but often is, accompanied by an actual abandonment of the contract.\textsuperscript{25}
However, a repudiation also may be found in an admission of inability
to perform, when such admission is viewed in the context of actual
progress or lack thereof;\textsuperscript{26} this may be the case even though the con-
tractor is making an effort to perform.\textsuperscript{27}

It is important to note that there are differences between the default
clauses in fixed price construction contracts and those in fixed price
supply contracts, and that a cure notice is not specifically required in
the former.\textsuperscript{28} It also should be noted that the rights provided by default
and delay damages clauses are cumulative, supplementing other rights
and remedies of the government.\textsuperscript{29} The right to terminate for default,

\begin{itemize}
\item enemy, acts of the Government in either its sovereign or contractual ca-
pacity, acts of another Contractor in the performance of a contract with the
Government, fires, floods, epidemics, quarantine restrictions, strikes, freight
embargoes, unusually severe weather, or delays of subcontractors or suppliers
arising from unforeseeable causes beyond the control and without the fault
or negligence of both the Contractor and such subcontractors or sup-
pliers. . . .
\end{itemize}

\textsuperscript{20. }Id.
\textsuperscript{21. }Allied Contractors, Inc., IBCA No. 265, 1962 BCA ¶ 3501. See R. Nash & J.
Cibinic, \textit{supra} note 14, at 607.
\textsuperscript{22. }See note 19 \textit{supra}.
\textsuperscript{23. }Id.
\textsuperscript{24. }See, e.g., \textit{Uniform Commercial Code} § 2-610; \textit{Restate-
ment of Contracts} § 310 (1932); S. Williston, \textit{Law of Contracts} § 1300 (3d ed.
1931). However, the doctrine will be discussed and cited only in the context of gov-
ernment contracts.
\textsuperscript{25. }See, e.g., Hydro-Space Systems Corp., ASBCA No. 15275, 71-1 B.C.A. ¶ 8739,
13 G.C. ¶ 274.
\textsuperscript{26. }See, e.g., Charles J. Slicklen Co., GSBCA No. 3566, 72-2 B.C.A. ¶ 9666.
\textsuperscript{27. }Id.
\textsuperscript{28. }See note 1 \textit{supra}.
however, is limited greatly by the excusable delay provision, and the clauses in both types of fixed price contracts contain provisions which convert a default termination to a termination for the convenience of the government if the delay by the contractor was excusable.\textsuperscript{30} Thus, an excusable delay precludes use of the government's right to terminate for default on account of that delay.\textsuperscript{31}

The use of the word "may" in the termination for default clause is of the utmost significance.\textsuperscript{32} As a result of that language, the decision to declare a contractor in default is within the discretion of the contracting officer. If a contractor is technically or even actually in default, it is for the contracting officer, in theory, to determine whether default or continued performance would best meet the government's needs.

Another significant factor in a default termination is waiver. There have been recent decisions dealing with waivers,\textsuperscript{33} as well as with the vexatious question of preproduction article submittals and approvals.\textsuperscript{34} The waiver issue generally revolves around the question of when a waiver occurs. A waiver results in the loss, at least temporarily, of the government's right to terminate for default.\textsuperscript{35} The failure to terminate immediately upon the occurrence of events giving rise to a right to terminate, however, will not in itself constitute a waiver;\textsuperscript{36} nor will the passage of a reasonable amount of time after the right accrues,\textsuperscript{37} since the government is entitled to a reasonable time to decide upon a course of action.\textsuperscript{38} What passage of time will suffice to constitute a waiver is dependent upon the facts of the individual case. Most cases in which a waiver has been found were based on the government's actions in encouraging, or at least permitting, the contractor to continue performance; under such circumstances, the contractor will have incurred additional expenses.\textsuperscript{39} To permit termination after the contractor has relied

\textsuperscript{30} See note 1 supra.
\textsuperscript{31} See note 19 supra.
\textsuperscript{32} ASPR 7-602.5(a): "(a) If the Contractor refuses or fails to prosecute the work . . . the Government may . . . terminate . . ." (emphasis supplied).
\textsuperscript{34} A.C. Ball Co., ASBCA No. 16108, 72-1 B.C.A. ¶ 9347; Mindeco Corp., ASBCA No. 15877, 71-2 B.C.A. ¶ 9083.
\textsuperscript{35} Boston Pneumatics, Inc., GSBCA No. 3198, 72-2 B.C.A. ¶ 9613.
\textsuperscript{36} Temco, Inc., ASBCA No. 13907, 71-1 B.C.A. ¶ 8683.
\textsuperscript{38} Clark Cable Corp., ASBCA No. 17090, 72-1 B.C.A. ¶ 9463.
\textsuperscript{39} Al Greene, Inc., ASBCA No. 15225, 71-1 B.C.A. ¶ 8789.
to his detriment on government action or inaction would be inequitable and could result in severe hardship.\(^{40}\)

As broad and potentially damaging as the termination right may be, it must be exercised or implemented in accordance with established procedures.\(^{41}\) The problem encountered most often in this area involves the requirement of a written notice.\(^{42}\) If the contractor expressly repudiates the contract—for example, by a simple refusal to perform—the government may consider such repudiation to be an anticipatory breach and terminate immediately without regard to any requirement for a 10-day notice.\(^{43}\) Moreover, even if the contractor is willing to perform or to attempt performance while conceding his inability to do so, termination without notice is permissible.\(^{44}\)

The fact that a contractor has been declared in default, however, does not necessarily mean that the government no longer requires the supplies, services, or construction which he was to provide. As a general rule, with certain prescribed exceptions, a contractor will be liable for the assessment of excess costs of reprocurement.\(^{45}\) In order to impose liability, however, the government must comply with certain requirements; for example, the repurchase must be made within a reasonable time after default, at a reasonable repurchase price, and with an attempt to mitigate the contractor’s damages.\(^{46}\) In addition, the government is required\(^{47}\) to reprocure items, services, or supplies which are similar to those which the defaulted contractor was to have provided.\(^{48}\) Upon failure to comply with these requirements, the government loses the right to assess excess costs.\(^{49}\)

If the contracting officer meets these specific requirements, however, he has vast discretion in reprocurement. For example, even though the original contract was procured on an advertised basis, it may be reprocured on a negotiated basis.\(^{50}\) Moreover, although there may have

\(^{40}\) Baifield Indus., Division of A-T-O, Inc., ASBCA Nos. 14582 & 14583, 72-2 B.C.A. ¶ 9676.

\(^{41}\) See note 1 supra.

\(^{42}\) Id.

\(^{43}\) See note 175 infra.

\(^{44}\) Id.

\(^{45}\) See note 1 supra.

\(^{46}\) Beach Architectural Prod., ASBCA No. 16179, 72-1 B.C.A. ¶ 9374.

\(^{47}\) See note 1 supra.


\(^{49}\) American Trans-Coil Corp., ASBCA No. 16651, 72-2 B.C.A. ¶ 9544.

been multiple bidders on the original procurement, the contracting officer may use a sole source basis in reprocurement if he thinks it necessary and can demonstrate that need.\textsuperscript{51} If the items were on an extended delivery schedule under the original contract but have since become urgently needed, they can be reprocured at a premium for accelerated delivery.\textsuperscript{52} The underlying requirement for the contracting officer in making decisions such as these is that the reprocurement costs meet a standard of reasonableness.\textsuperscript{53} As in most areas, the question of what is reasonable conduct in the awarding of a reprocurement contract depends upon the circumstances.\textsuperscript{54} The test usually imposed by the various boards is whether the contractor has been prejudiced by the government's actions in reprocuring the item.\textsuperscript{55}

A difficult area related to terminations for default is the question of damages for breach of contract. Generally, in the absence of a liquidated damages provision, the government must prove the extent of its damages and that they were incurred as a result of the contractor's default.\textsuperscript{56} For purposes of examining the above principles in the light of recent cases, it is possible to distinguish certain problem areas in which terminations for default customarily occur. The subsections as divided below admittedly are somewhat arbitrary but do serve this purpose.\textsuperscript{57}

A. Inspection and Testing

In order to assure itself that it is obtaining the performance for which it bargained, the government usually includes clauses in its contracts which permit it to test and inspect the contractor's performance.\textsuperscript{58} These clauses may specify the time, frequency, location, and method of testing. If the contractor's performance fails to pass these tests and inspections, he has not complied with the contract and may be declared

\textsuperscript{52} Hydro Fitting Mfg. Corp., NASA BCA Nos. 1169-20 & 370-4, 71-2 B.C.A. \textsuperscript{¶} 9042; Gunhill Indus., Inc., ASBCA No. 14662, 71-2 B.C.A. \textsuperscript{¶} 9174; Breed Corp., ASBCA Nos. 15040 & 15130, 72-2 B.C.A. \textsuperscript{¶} 9488.
\textsuperscript{53} American Metal Fabricators Co., ASBCA No. 12986, 71-1 B.C.A. \textsuperscript{¶} 8772, 13 G.C. \textsuperscript{¶} 324.
\textsuperscript{54} Id.
\textsuperscript{55} See, e.g., National Elec. Metal Co., Inc., ASBCA No. 14806, 71-1 B.C.A. \textsuperscript{¶} 8839.
\textsuperscript{56} Atlantic Terminal Co., ASBCA No. 13699, 71-1 B.C.A. \textsuperscript{¶} 8866, 13 G.C. \textsuperscript{¶} 384.
\textsuperscript{57} The basic framework adopted here was used originally by the late Mr. E. K. Gubin, Esquire, of Washington, D.C., who practiced widely in the area of government contracts for many years.
\textsuperscript{58} ASPR 7-103.5 & 7-602 11; FPR 1-7.101.5.
in default. Conversely, if the government exceeds or otherwise exercises improperly its inspection or testing rights, the default action may be overturned.

One of the obvious ways by which a contractor can challenge the validity of the government's test findings is to attack the procedure itself. If the government specifies in its contract the manner in which it intends to test the contractor's performance, it cannot later declare the contractor in default on the basis of tests different from those prescribed.\textsuperscript{59} Similarly, if the government uses equipment that malfunctions\textsuperscript{60} or uses the equipment improperly,\textsuperscript{61} the results are untrustworthy and may not be relied upon to justify a default termination.\textsuperscript{62} In terms of time and location, the government also must comply with the provisions of the contract. If the contract specifies a one-time test at a manufacturer's plant just prior to packaging and shipment, the government does not have the right to declare a default on the basis of subsequent tests at a different location\textsuperscript{63} unless there is a latent defect, fraud, or gross mistake.\textsuperscript{64}

Moreover, the government may not dispense with testing merely because it feels that other factors tend to prove non-conformance. In \textit{Oyai Kogyo Co.},\textsuperscript{65} the government relied on the expiration of the manufacturer's recommended shelf life of the material the contractor had proposed to use. However, the board decided that this factor alone was not enough to justify the default action.\textsuperscript{66} The rationale appeared to be that expiration of the shelf life, in the absence of reliable test data, was not equivalent to a finding that the material was defective. This result may be questioned, however, since most government contracts contain boilerplate provisions which require the contractor to supply "new" material or material of the "most suitable grade for the purpose intended."\textsuperscript{67} Absent other pertinent contract language, a cogent argument could be made that the material supplied by the contractor did not meet this requirement and, consequently, that he was in default.

\textsuperscript{59} Video Research Corp., ASBCA No. 14684, 71-2 B.C.A. § 9006.
\textsuperscript{60} Electro Plastic Fabrics, Inc., ASBCA No. 14761, 71-2 B.C.A. § 9118, on reconsideration, 72-2 B.C.A. § 9519.
\textsuperscript{61} A. C. Ball Co., ASBCA No. 16108, 72-1 B.C.A. § 9347.
\textsuperscript{62} Id.
\textsuperscript{63} Apeco Mossberg Co., GSBCA Nos. 3440 & 3552, 72-1 B.C.A. § 9403, 14 G.C. § 335.
\textsuperscript{64} Cf. Universal Engineered Systems, Inc., IBCA No. 900-4-71, 72-1 B.C.A. § 9355.
\textsuperscript{65} ASBCA No. 14853, 72-1 B.C.A. § 9291.
\textsuperscript{66} Id.
\textsuperscript{67} ASPR 7-602.9.
In those instances in which defaults for failures in the inspection and testing stage have been upheld, recent cases have revealed two recurring problems: first, the contractor could not prove that the government improperly tested his product; second, the contractor completely misread his specifications and failed to understand what was required of him. For example, in Griffolyn Co., the contractor failed to have the contract items tested by an independent firm as required by contract. His tender without satisfying this requirement placed him in default.

Testing specifications may leave the government some latitude in applying the tests. Thus, for example, if the contract provides an allowable range within which the government may test, then a default may be declared if the tests indicate a failure anywhere within that range. Moreover, a contractor’s attempt to prove an improper test often fails with the causation element. Thus, although the government may have acted improperly in performing a test, the default will not be overturned unless the contractor can show a causal relation between the impropriety and the reason for default.

Testing and inspection customarily are completed prior to final acceptance and completion of the contract. Testing is final and conclusive upon the government unless the item inspected contains latent defects, fraud has been committed, or the inspection is vitiated by a gross mistake. The terms of the contract also may be important in determining the effect of inspection or testing. For example, in Cross Aero Corp., the contract called for products of named manufacturers. However, used items were delivered and accepted. Upon discovery of this fact, the government terminated for default, even though payment had been made. The contractor was found to have breached the one-year warranty in the guarantee clause. The board rejected the contractor’s con-

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70. GSBCA No. 3359, 71-2 B.C.A. ¶ 8975.

71. Torque Controls, Inc., GSBCA No. 3486, 72-1 B.C.A. ¶ 9273.

72. In American Trans-Coil Corp., ASBCA No. 16651, 72-2 B.C.A. ¶ 9544, the government’s improper testing did not relate to numerous other product deficiencies which were the bases for default. In Allied Paint Mfg. Co. v. United States, Ct. Cl. No. 210-70 (Commissioner’s Report filed February 24, 1972), a change in the testing procedures did not cause the default.

73. See note 64 supra.

74. ASBCA No. 14801, 71-2 B.C.A. ¶ 9075, 14 G.C. ¶ 74.
tention that the contract was complete with delivery, acceptance, and payment and that, therefore, the right to terminate for default did not exist. According to the terms of the guarantee clause, the contractor's warranty obligation did not expire until one year after delivery of the defective goods. Nothing in that clause provided that payment released the contractor from its obligation or that the government had to defer payment to the end of the guarantee period in order to preserve its rights. Accordingly, final inspection and acceptance did not foreclose the government's rights to terminate for default for latent defects or mistakes.

B. Defective Specifications

Although the avenues of attack upon the government's inspection and testing procedures are limited, the voluminous specifications in government contracts often provide grounds for overturning a termination for default. For example, if a contractor is declared in default for a failure to perform or a failure to make progress, and that failure has been caused by defective or inadequate design specifications, the termination is improper. This rule was first articulated by the Supreme Court in United States v. Spearin, which held that the inclusion of design specifications in a contract constituted an implied warranty that compliance with such specifications would constitute satisfactory performance. In Universal Engineered Systems, Inc., for example, a termination was caused by the failure of the government to coordinate different activities in the procurement program. The government declared the contractor in default, even though his equipment met the specifications supplied by the government. Upon a finding that the source of the government's dissatisfaction was equipment other than that supplied by the contractor, the default was overturned.

Default cases involving defective specifications are not as common as might be expected; however, an examination of the cases indicates that an allegation of such a defect often proves successful for the con-

76. 248 U.S. 132 (1918).
77. Id.
78. IBCA No. 900-4-71, 72-1 B.C.A. ¶ 9355.
79. Such cases generally arise as constructive change claims for additional money the contractor expended in attempting to comply with the specifications.
tractor. In Cayuga Machine & Fabricating Co., for example, a prime contractor supplied the subcontractor with mixed design-performance specifications which required that certain motors be used in the work. When used, they did not meet the contract requirements. In deciding the dispute, the board held that to require the subcontractor to tailor the brand name motors to achieve the necessary standards would entail research and development efforts beyond his capabilities. Since the specification was defective, the default was held improper.

If specifications are misleading or ambiguous, a default will not be upheld. Moreover, an assessment of excess costs cannot be based on ambiguous specifications if the contractor's reasonable interpretation differed from that of the government. However, if the contractor participated in the preparation and drafting of the specifications, subsequent performance problems arising from ambiguities and uncertainties are not sufficient to vitiate the default.

The government has the right to demand strict compliance with its specifications and to obtain the product for which it contracted. A contractor cannot unilaterally determine what will or will not serve the government's interest. If performance is possible, the contractor must perform in accordance with the specifications, unless there has been a waiver or the parties have agreed to modify the contract. In Valk Manufacturing Co., the contractor failed to take notice of a change in specifications. The contractor had numerous previous contracts under

80. Of the 12 cases the authors classified as being in the defective specifications category, the contractor was successful in six.


82. For those unfamiliar with the unusual procedures which can be employed by the AEC in its contracts, the prime contractor may be an agent of the government under a contract management program and subcontractors may have the right of direct appeal to the AEC BCA.


88. In Philip Bradley & Sons, AGBCA No. 314, 71-2 B.C.A. ¶ 9002, the contractor contended that the machinery specified by the government was unsatisfactory. After default, the contractor was liable for the excess reprocurement costs of obtaining a machine larger than the one he was to supply, since the contract provided that the government could obtain either.

89. ASBCA No. 16547, 72-1 B.C.A. ¶ 9465.
which he could supply the basic item using one of two methods. In the instant contract, however, one of the alternative methods of performance had been deleted; unfortunately, the deleted method was the one with which the contractor had produced the tendered goods. The case is significant in illustrating the danger of a contractor's reliance on extra-contractual matters. Except in very limited circumstances, a contractor must look to the contract to determine his obligation. To rely on previous conduct when government needs and standards are constantly changing is an extremely dangerous course of action.

Evidence of the success or failure of other contractors using the same or similar specifications often is introduced by both the government and contractors to prove the workability of specifications. The contractor, of course, will attempt to utilize the difficulties encountered by other contractors to show impossibility of performance or that the specifications are defective or ambiguous; the government, on the other hand, will point to the performance of other contractors under similar circumstances to justify its default actions. The most effective means of attacking such evidence is to prove that there is some substantial difference between the two sets of specifications. For example, the contractor may be able to show that the government granted waivers to other contractors whose specifications the government is holding out as similar. However, this type of proof is not as accessible to the contractor as it is to the government unless information filters throughout the industry, the problem becomes public knowledge, or the contractor's attorney pursues discovery vigorously.

C. Impossibility of Performance

Cases involving impossibility of performance often relate to problems of defective specifications. However, in the impossibility cases, performance of the work either is actually impossible or would result in the economic demise of the contractor. Thus, there may be either practical or commercial impossibility. Both situations were confronted in the five cases dealing with impossibility that were decided during 1971 and 1972.

In Crescent Precision Products, the government imposed an additional performance requirement after the award of the contract. The

91. See, e.g., Environmental Enterprises Inc., GSBCA No. 3086, 71-1 B.C.A. ¶ 8720.
92. ASBCA No. 14770, 71-2 B.C.A. ¶ 9160.
effect of the added requirement was to render impossible the contractor's compliance with an existing and unchanged specification. It was held that the contractor's inability to perform was excusable.

Even if technical problems are not present, a default may be excused if it is commercially impracticable for the contractor to perform, so long as he has not assumed that risk. Three decisions during 1972 dealt with this problem. Each involved a finding that the costs of performance or the level of effort required by the contractor would be so great that to require him to perform would result in his financial ruin. The doctrine of commercial impracticability was explained in one of these decisions as follows:

In addition, the unrebutted expert testimony which appears in the record demands a finding that it was practically impossible to perform the specification imposed on the appellant because of the extreme and unreasonable difficulty and expense required to comply therewith. This result is known by various doctrinal names, of which legal impossibility and commercial impracticability are the more common. The doctrine does not require literal impossibility but rather is grounded upon the assumption that in legal contemplation something is impracticable when it can only be done at an excessive and unreasonable cost. To sustain a claim of impracticability of performance it is incumbent to show that production in accordance with the specification is either beyond the state of the existing art or else can only be achieved through expenditures so unreasonable as to warrant a conclusion of commercial impracticability.

In a situation where unanticipated costs or effort result from the actions of the government, excuse from performance clearly is equitable. However, even if the element of affirmative fault or blame is lacking, performance may be excused. Thus, a finding that neither party anticipated the degree of difficulty or risk inherent in the contract could lead to the conclusion that the actual expenditures of time and money required to perform would defeat the purpose of the contract or undermine the quid pro quo of the bargain between the parties, and that

requiring the contractor to perform would severely damage or even ruin his business. It follows that a default in such a case should be overturned. As with defective specifications, a failure to prove impossibility of performance often results from a paucity of evidence, or from a showing by the government that another contractor has performed under similar circumstances or with similar specifications. Moreover, an allegation of impossibility may fail if the contractor cannot show that he has made a reasonable effort to comply with the specifications.

Another significant recent case on impossibility is *Bethlehem Corporation v. United States*, decided by the United States Court of Claims. The case is noteworthy as a reaffirmation of the rule that a contractor can assume the risk that performance of the work is impossible. In *Bethlehem*, the contractor played a significant role in the preparation of the specifications. In fact, the actual contract contained temperature requirements less stringent than the government originally contemplated, the contractor having indicated that performance to the more stringent requirements likely would be impossible. The contract therefore set forth the lesser performance criteria, and the contractor was held to have assumed the risk of being unable to perform; accordingly, he could not interpose impossibility as a defense. The significance of the case is clear. A contractor should be fully knowledgeable about the risks inherent in his contract, whether the specifications are of the design or performance type. Furthermore, he should be aware whether he has assumed the risk of noncompliance with the specifications.

D. Financial Incapacity

As a general rule, a contractor bears the burden of financing his contract and maintaining the capital to perform. The only exception to this rule occurs when the government is responsible for the contractor's financial difficulties; in such case, a failure to perform is ex-
cusable. For example, in *R-D Mounts, Inc.*, the government's improper termination of other unrelated contracts had a disastrous effect on the contractor's performance. The appeal from a termination for default was sustained because the contractor was able to prove not only the impropriety of the government's actions but, more importantly, the cause and effect relationship between the earlier terminations and the contractor's subsequent inability to perform. However, the burden of showing such a relationship rests with the contractor, and in similar cases during the past year, contractors were unsuccessful in asserting financial problems as an excusable cause of delay.

*Amexicana Corp.* presented the related and provocative issue of progress payments. Most government contracts contain a progress payment clause through which percentage payments based on monthly progress are made to the contractor. Most contractors rely on such progress payments to finance the performance of contracts. However, unless the clause specifically provides otherwise, it is within the discretion of the government to make such payments. A provision that the government *may* make progress payments does not obligate it to do so. This interpretation contributed to the failure of the contractor's appeal in *Amexicana*, where it was held that the financial difficulties encountered by the contractor did not excuse his default. The related issue of the amount of progress payments was presented in *Steenberg Construction Co.* There, the board held that the contractor's financial problems and subsequent abandonment of the contract were inexcusable. Although the progress payments were based on underestimates of the work, the board reasoned that the payments were subject to later adjustment to reflect the actual amount of work performed.


103. H&S 'Oil Co., ASBCA No. 16321, 72-2 B.C.A. ¶ 9520 (prospective loss by contractor); Davro Instrument Corp., ASBCA Nos. 16183 & 16710, 72-1 B.C.A. ¶ 9360 (economically unfeasible performance); Central Fire Truck Corp., ASBCA No. 12715, 71-2 B.C.A. ¶ 8946 (lack of knowledge by both contractor and government that contractor's line of credit would be impaired); Hydro-Space Systems Corp., ASBCA No. 15275, B.C.A. ¶ 8739, 13 G.C. ¶ 274 (financial difficulty caused by government's tight money policy); Larry K. Holladay & Jack Drake, DOT CAB No. 70-29, 71-1 B.C.A. ¶ 8610, reconsideration denied, 71-1 B.C.A. ¶ 8661 (inability of contractor to obtain supplies on credit because of dissolution of partnership). See also Ram Mach. Co., ASBCA No. 16318, 72-1 B.C.A. ¶ 9439.

104. ASBCA No. 14417, 71-1 B.C.A. ¶ 8886, reconsideration denied, 71-2 B.C.A. ¶ 8990, 12 G.C. ¶ 300.

105. IBCA No. 520-10-65, 72-1 B.C.A. ¶ 9459, 14 G.C. ¶ 360.
cases indicate the difficulties inherent in basing an appeal from a default termination on financial incapacity.

E. Government Actions and Inactions

A distinction must be drawn between actions of the government which are discretionary in nature and those which it must take. Still other government actions need not be undertaken, but must be taken properly if undertaken at all. As to discretionary actions, the government will be subject to a requirement of good faith. As will be demonstrated, the determination whether the government has acted properly under the circumstances may be difficult.

Improper or unfair action by the government generally results in the vitiation of a default; in such a case, either the termination for default will be converted into one for the convenience of the government or an assessment of excess costs will be disallowed. Many cases involve contracts which have been administered poorly by the government. For example, where work was placed under a government hold order, the government could not later claim that the contractor was in default for delay.106

Miller Lumber Co.107 and Dr. Theodore J. Wang108 involved notice problems. In Miller Lumber, the government received the contractor's shipment of supplies, but failed to keep it intact. It also failed to give the contractor notice of alleged shortages. In this situation the contractor not only was powerless to take corrective action, but also was unable to verify the need for such action in the first instance. As a result of these lapses of government administration, an allegation of the contractor's default was held improper. Similarly, in Wang, the termination was deemed premature because the contractor neither was advised of the defects claimed by the government nor afforded an opportunity to correct them.109

In Ted C. Frome,110 the government desired to substitute a contractor who would guarantee that performance would be made either within the original time for performance or within that time as extended because of excusable delays. The contract with Frome was terminated for default before he officially received a time extension to which he

106. Delta Eng'r & Sales, Inc., ASBCA No. 16326, 72-1 B.C.A. ¶ 9373.
107. ASBCA No. 15908, 72-1 B.C.A. ¶ 9208.
108. PSBCA No. 504, 72-1 B.C.A. ¶ 9473.
110. AGBCA No. 246, 71-1 B.C.A. ¶ 8611.
was entitled. The default was overruled, and the contract was deemed terminated for the convenience of the government. The government originally might have terminated the contract with From'e for convenience, stating as a reason its desire to retain another contractor, since a shorter performance time would be in the best interest of the government. However, under these circumstances, it was improper to invoke the default termination clause.

Occasionally, a contractor cannot demonstrate that a particular act of the government has been serious enough to invalidate a default termination. However, the boards generally have been willing to examine the government's conduct throughout the performance of a contract in order to ascertain whether the aggregate of its actions has affected the contractor's ability to perform.\(^{111}\) Several instances of such misconduct or faulty administration recently have been found by the boards.\(^{112}\) However, contractors cannot always expect to escape default penalties because of the government's actions or inactions. For example, in *Aerospace Support Equipment, Inc.*,\(^{113}\) the board found that the government was negligent for not maintaining adequate surveillance of the original contractor's performance and in actually delaying nine months before terminating the contract. However, these two facts were considered insufficient to overturn the default, since the contractor's successor in interest (a third party had acquired the original contractor) had disavowed the contract by admitting its inability to perform. The board, applying the recognized test used in such situations, determined that the contractor had not been prejudiced by the government's delay.

*Waite Transport, Inc.*\(^{114}\) and *Chester Morton Electronics, Inc.*,\(^{115}\) although factually and legally distinct, contain a common element relating to the exercise of discretion by a contracting officer with regard

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112. In Aircraft Eng'r Corp., ASBCA No. 14911, 71-2 B.C.A. \$ 8955, the government failed to respond to requests for design review and approval which had to be obtained before the commencement of production; in Cryenco, ASBCA No. 15944, 72-2 B.C.A. \$ 9718, the contracting officer required performance in accordance with his erroneous interpretation of the specifications; and, in Hempstead Maintenance Service, Inc., GSBCA No. 3127, 71-1 B.C.A. \$ 8809, 13 G.C. \$ 325, the default was overturned because the government did not disclose certain information about non-apparent conditions, which non-disclosure substantially increased the contractor's difficulty of performance.
113. ASBCA No. 13579, 71-1 B.C.A. \$ 8904.
114. PSBCA No. 17, 72-1 B.C.A. \$ 9472.
115. ASBCA No. 14904, 72-1 B.C.A. \$ 9185.
to government actions. In *Waite*, the contracting officer's decision to discontinue postal service was, by express contract provision, within his sole discretion. Considering the difficulty of proving an abuse of discretion, dismissal of *Waite*'s appeal is understandable. Late delivery of the contract items justified the default in *Morton*. It was immaterial that the contractor apparently could have proved that the government's need for the items no longer existed. Since the contractor was in default, there was no necessity for the contracting officer to resort to a termination for the convenience of the government.¹¹⁶

Other cases in which the propriety of the government's conduct was in issue have been decided in favor of the government either on the basis that, as a matter of fact, there had been no impropriety, or that, although there had been impropriety, it did not relate causally to the default.¹¹⁷ For example, in *Doyle Shirt Manufacturing Co. v. United States*,¹¹⁸ the government had accepted deliveries of contract items which did not meet all the specifications, but subsequently rejected shipments with the same defect. The Court of Claims held that acceptance of the earlier shipments neither estopped the government nor constituted a waiver of its rights to insist on strict compliance with the specifications for later deliveries. Thus, the contractor's reliance on the government's actions was unjustified.

Another facet of government action involves sureties on government contracts. There is an old epigram to the effect that sureties are favored by the law. However, sureties on government contracts rarely are


¹¹⁷ Those cases in which the boards found, either expressly or impliedly, that the government acted properly are as follows: Allied Paint Mfg. Co. v. United States, Ct. Cl. No. 210-70 (Commissioner's Report filed February 24, 1972) (government's demand for 125 percent of estimated quantities was not improper); Systems Design, Inc., ASBCA No. 16993, 72-2 B.C.A. ¶ 9695 (government not required to accept less than entire manuscript called for by contract); Guenther Systems, Inc, ASBCA No. 14187, 72-2 B.C.A. ¶ 9595 (default of entire contract for late delivery on two of five installments); Airosol Co., GSBCA No. 3546, 72-2 B.C.A. ¶ 9534 (government not obligated to accept contractor's conforming supplies after the contract had been terminated because of the delivery of non-conforming supplies).

Two cases may be classified within the category of lack of causation. In Winchester Screw Prods., Inc., ASBCA Nos. 15695 & 16011, 72-2 B.C.A. ¶ 9538, the government's non-delivery of equipment was found not causally related to the contractor's own performance failure. In Thomas E. Spicknall, Inc. v. United States, Ct. Cl. Nos. 275-67 & 207-70 (Commissioner's Report filed October 3, 1972), the government's change in the payment medium was found not to have caused the default; however, it may have been a breach of contract.

successful against the government because of a lack of privity. The
favoritism, if it does exist, generally is restricted to the surety-contractor
(principal) relationship. Thus, in United States v. Continental Casualty
Co., \(^{119}\) it was held that the government did not act improperly in not
terminating a contract upon receipt of a notice that funds should be
preserved for the benefit of the surety because the contractor was in
danger of default. The court held that the government cannot be forced
into making a default decision by reason of a surety’s notice.\(^ {120}\) Also,
in Royal Indemnity Co. v. United States, \(^ {121}\) the making of progress
payments to the contractor over the surety’s objection was held insuffi-
cient action to make the government liable upon the contractor’s de-
fault, since evidence was lacking that the funds were used for anything
other than the prosecution of the work.

F. Substantial Performance

It should be axiomatic that if the government terminates for default
after a contractor has completed or substantially completed its contract
work in proper fashion, the termination should be of no effect. In Fish-
erman’s Boat Shop, Inc., \(^ {122}\) this principle was followed. Although the
contractor had not fully performed, the board held that the final design
report submitted to the government indicated a strong likelihood that
satisfactory performance of the contract would be forthcoming. The
same result was reached in Pacific Coast Refrigeration, Inc.\(^ {123}\) Since
only two minor items of work remained to be performed, the board did
not order the improper default termination converted to a termination
for convenience. Moreover, even though a default termination may be
proper, the contractor may be entitled to some consideration. In two
cases involving the same contractor,\(^ {124}\) the board ruled that default
terminations were justified, but that the contractor was entitled to com-
pensation for the goods and services provided before termination.

\(^ {120}\) Government agencies have deferred to external influence in other respects,
however, and terminated contracts for the convenience of the government. See John
Reiner & Co. v. United States, 325 F.2d 438 (Ct. Cl. 1963), cert. denied, 377 U.S. 931
(1964) (to avoid a dispute with the Comptroller General); Schlesinger v. United
States, 390 F.2d 702 (Ct. Cl. 1967) (as a result of Congressional hearings).
\(^ {122}\) ASBCA Nos. 15159, 15206, 72-1 B.C.A. ¶ 9416.
\(^ {123}\) ASBCA No. 14546, 71-2 B.C.A. ¶ 9146.
\(^ {124}\) Ventilation Cleaning Eng’r, Inc., ASBCA Nos. 16678, 16774, 72-2 B.C.A. ¶ 9537;
Ventilation Cleaning Eng’r, Inc., ASBCA No. 14747, 72-1 B.C.A. ¶ 9244.
However, even though a contractor has substantially performed, the government retains the right to demand strict compliance with specifications. Although defects in the work of the contractor in Levelator Corp. of America\textsuperscript{125} were quite minor, he failed to take steps to correct those defects within the reasonable, though short, time period which was allotted to him for that purpose. In the absence of a waiver of specifications or some benefit gained by the government, it has the right to insist on the bargained-for performance. In Levelator, the contractor simply did not supply the required items, although those which he did supply admittedly were very close to what was required. In G.A. Karnavas Painting Co.,\textsuperscript{126} the contractor did not make reasonable progress on a punch list. Although he had performed most of the work, his failure to perform the corrective work was held to justify a default termination.

G. Contractor Fault or Default

The most commonly appealed question in cases involving terminations for default is whether the contractor's performance failures were substantial enough to justify the government's action in invoking the termination clause.\textsuperscript{127} During 1971 and 1972, contractors were successful in only three of the 78 cases involving this issue.\textsuperscript{128}

In 1967, the Court of Claims in Schweigert, Inc. v. United States,\textsuperscript{129} held that a delay by a second tier subcontractor which was not caused by the fault or negligence of—and was beyond the control of—the prime contractor and his immediate subcontractor, was an excusable cause of delay. The boards generally follow this rule,\textsuperscript{130} although its application

\textsuperscript{125} VACAB Nos. 738 & 762, 71-1 B.C.A. ¶ 8721.

\textsuperscript{126} VACAB No. 922, 72-1 B.C.A. ¶ 9369.

\textsuperscript{127} During 1971 and 1972, approximately 78 cases involved this issue.

\textsuperscript{128} These figures are based upon the research of the authors. See note 4 supra.

\textsuperscript{129} 388 F.2d 697 (Ct. Cl. 1967).


The Schweigert doctrine was not followed in Glover & Miller, Inc., IBCA No. 752-12-68, 69-2 B.C.A. ¶ 7988 (first tier subcontractor's employee negligently handled order for materials to be placed with manufacturer); Robert D. Farquhar Constr. Corp., GSBCA No. 2879, 69-2 B.C.A. ¶ 7905 (no proof that delay was caused by late delivery from lower tier subcontractor); Circleville Metals Works, ASBCA No. 13177, 69-1 B.C.A.
is dependent upon the particular facts and circumstances of the cases; the only recent case decided on this issue adopted the rationale of Schweigert. However, this defense apparently is no longer available to contractors, since the government in 1968 rewrote the contract clauses in an administrative effort to overrule Schweigert. The result is that only those contractors operating under the old clause can avail themselves of the Schweigert defense. Apparently, the amended language has accomplished its objective.

Levelator Corp. of America fairly and logically applied a broad concept of excusable delay. The contractor was a small manufacturer whose plant facilities were adequate for normal operations only if those operations were premised upon careful plant production management. The contract in issue was with the Veteran's Administration and provided for the supply of certain surgical instruments. A fire destroyed the packaging materials in which the supplies were to be shipped, forcing the contractor to stop work and await the arrival of replacement packaging materials. In the interim, plant operations were rescheduled to utilize the same production area for the completion of a government defense contract. However, because of changes in the specifications of the defense contract, completion of that contract required more time than anticipated. When the replacement shipping materials were received, the contractor was unable to resume and complete the V.A. contract immediately, and the V.A. terminated the contract for default.

Since the destruction of the packaging materials had been an excusable cause of delay, the board held that the government must consider the individual contractor's capabilities under the actual conditions encountered during performance. In this light, the contractor's decision to utilize its facilities to work on the other government contract was not unreasonable at the time it was made. The contractor had not anticipated the changes in specifications and attendant delays in per-

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132. 10 G.C. ¶ 505.
forming the defense contract or the direct impact those changes and delays would have on his ability to make timely delivery on the V.A. contract; more importantly, the rescheduling was a direct result of a fire, one of the specified excusable delays under the V.A.'s default clause.

Thus, *Levelator* stands for the proposition that all events flowing reasonably and directly from an excusable delay fall under the umbrella of the excusable delay. However, a caveat should be added in such a case—the contractor should give the government reasonable notice of its planned activities. A constant flow of information will place the government on notice of the actual status of performance, and it will be more difficult for the government later to issue a default termination. It would be even more difficult for the government to justify a subsequent default decision if it had raised no objection to a proposal for an alternative course of action.

Many unsuccessful appeals stem from problems with subcontractors and suppliers. As a general rule, a contractor bears the responsibility of performing necessary work or supplying necessary items. If a subcontractor or supplier is to be retained to do part of the work, the contractor bears the risk of such party's failure to perform. Consequently, the failure to enter into a binding agreement with the subcontractor cannot be interpreted as an excusable cause of delay. It follows that the inability of a supplier to furnish materials does not excuse the prime contractor's delay or default. However, if the contractor can show that at no time during the performance of the contract could the required materials or an acceptable substitute have been procured, it is possible that the delay may be excused under the impossibility doctrine. Similarly, if the government has directed the use of a sole

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136. See, e.g., Almac Scientific Co., ASBCA No. 16806, 72-2 B.C.A. ¶ 9678 (failure of supplier to use specified material is not excusable); Gard Indus. Inc., GSBCA Nos. 3614 & 3615, 72-2 B.C.A. ¶ 9593 (delivery of non-conforming items not excused by supplier's failure); Breed Corp., ASBCA Nos. 15040 & 15130, 72-2 B.C.A. ¶ 9488; Guenther Systems, Inc., ASBCA No. 14032, 72-1 B.C.A. ¶ 9443, 14 G.C. ¶ 366 (subcontractor problems and late delivery); Monldey Corp., ASBCA No. 13071, 72-1 B.C.A. ¶ 9361 (contractor obligated to find own source of supply); Franklin E. Penny Co., ASBCA No. 15229, 71-2 B.C.A. ¶ 9159 (refusal of supplier to accept order, delay by second supplier); Atlas Mfg. Co., ASBCA No. 15177, 71-2 B.C.A. ¶ 9026 (unexplained late delivery of supplies); Elber Tile & Binder Co., GSBCA No. 3188, 71-1 B.C.A. ¶ 8759 (inability of contractor's supplier to furnish materials).

However, if the supplier is a second tier subcontractor, the *Schweigert* doctrine may be applicable. See notes 129-33 *supra* & accompanying text.

137. See notes 92-100 *supra* & accompanying text.
source, recent authority indicates that the latter's default may not be imputed to the contractor. However, if the contractor or first tier subcontractor has the right to avail himself of priority order ratings, the fact that suppliers or second tier subcontractors have been subjected to strikes, for example, does not excuse a failure to deliver if it can be shown that the contractor could have eliminated the cause of delay. A contractor cannot simply "sit out" a cause of delay without availing itself of contract rights, such as a priority rating.

It is also necessary to examine the type of evidence which is required to overturn a default termination. The boards have long held, and properly so, that an allegation of excusable delay is insufficient if merely contained in a letter, pleading, or similar document, without more to support such an allegation. Mere statements, accusations, and denunciations are not substitutes for proof. Consequently, many terminations are upheld for lack of proof of the alleged excuse.

Pervading the entire area of government contracts is the problem of determining rules of law or rules of conduct applicable to various parties. Video Engineering Co. illustrates the manner in which one principle may apply to a contractor, while a different principle is applicable to the government under similar circumstances. On appeal, the contractor maintained that his bid had been signed without authority.


142. K & M Constr., ENG BCA No. 2998, 72-1 B.C.A. ¶ 9366 (lack of proof that government animosities caused default); Ubique, Ltd., DOT CAB Nos. 71-28 & 71-28A, 72-1 B.C.A. ¶ 9340, 14 G.C. ¶ 313 (claim of unrealistic performance schedule unsupported); Karlton Instruments, Inc., GSBCA No. 3293, 71-2 B.C.A. ¶ 9179, reconsideration denied, 72-1 B.C.A. ¶ 9311 (failure to raise new matter on reconsideration); Dee-Lite Indus., Inc., GSBCA No. 3088, 71-1 B.C.A. ¶ 8788, on reconsideration, 72-1 B.C.A. ¶ 9258; Essex Electro Eng'r., Inc., ASBCA No. 13566, 71-1 B.C.A. ¶ 8740 (no proof that effort on defaulted contract was diverted to others).

143. DOT CAB No. 72-5, 72-1 B.C.A. ¶ 9432, 14 G.C. ¶ 362.
The evidence indicated that the company executive who signed the bid previously had signed other bids and was known by the government personnel involved. In effect, his position, title, and activities all indicated that he had authority to submit a bid on behalf of the contractor. Consequently, the board held that the executive had apparent authority to act as he did; whether he had actual authority was immaterial. However, had the government been in the contractor’s position, the result would have been different. If a government representative or agent purports to settle claims or order changes and it is later discovered that the representative involved did not have actual authority, the government is not bound.\textsuperscript{144} Thus, actions taken by government representatives who do not have actual authority are not binding on the government, even though the representatives may have apparent authority. The application of different principles of law to different parties is an anomaly peculiar to government contracting; accordingly, the burden is on the contractor to investigate and determine the actual authority of those with whom he deals on government work.\textsuperscript{145} Disclaimers by government representatives such as “This action is subject to review and approval by higher authority” should put contractors on notice.\textsuperscript{146}

Another pitfall for contractors lies in the area of accord and satisfaction. In \textit{Allied Paint Manufacturing Co.},\textsuperscript{147} the contract had been modified because of time extensions granted the contractor for certain delaying events; however, the contractor had failed to assert an additional cause of delay. When he subsequently attempted to claim additional time, the government refused to grant a further extension. The board upheld the government’s action, holding that the contractor was precluded from asserting his claim. Thus, if a contractor has a claim and signs a release or modification without reserving further rights, he may be said to have foreclosed the opportunity to submit a later claim. If a contractor has multiple causes of delay, or even one cause of delay the full impact of which he has not calculated, and the government has recognized to some extent that he is entitled to additional time, the contractor should not sign a modification or supplemental agreement unless he has reserved his rights to claim additional time or is satisfied that the time granted is sufficient.

\textsuperscript{144} Johnson, Drake & Piper, Inc., & D.R. Kincaid, Ltd., ASBCA Nos. 9824 & 10199, 65-2 B.C.A. ¶ 4868.
\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} ENG BCA Nos. 2962 & 3043, 71-1 B.C.A. ¶ 8765, 13 G.C. ¶ 183.
Similarly, a lack of clearly-defined contractual standards was disastrous in *Best Chemical Sales*,\(^{148}\) where the contractor's appeal suffered one crucial weakness. The failure to perform, the contractor alleged, resulted from actions of the Department of Agriculture, an agency not a party to the contract. That department had objected to the manner in which the contractor labeled his product and, upon the contractor's refusal to revise the label, had refused to allow shipment. The contractor attempted to explain his failure to deliver on the ground that the action of the Department of Agriculture prevented performance. However, it was found that the contractor had agreed to comply with whatever contract labeling requirements might be imposed on his product. Whether the contractor anticipated such a requirement is not as significant as his refusal to perform in the face of contract requirements. The result is analogous to the situation that arises when a contractor agrees to comply with industry association codes or wages and safety laws.

In *Aireborne Security, Inc.*,\(^{149}\) when the contractor determined that he would be unable to provide the bond and insurance required before performance could begin, he returned the contract documents to the agency and insisted that he was not subject to a binding contract. However, such pre-performance requirements are not conditions precedent to the formation of a contract. The contract comes into existence when the contracting officer accepts the bid and mails the contract to the contractor. The attempted revocation or rescission of the contract in this instance was held ineffective.

In *Affiliated Metal Products Co.*,\(^{150}\) the contractor advised the contracting officer that, because of certain losses, he was reluctant to take further risks without knowing whether the items to be produced would be acceptable. The contracting officer determined that the problems encountered were caused by shortcomings in the contractor's manufacturing method and sources of supply. Based on this analysis, the contracting officer invoked the default termination clause for non-performance. The board disregarded the contractor's contention that the government's failure specifically to identify the nature of the alleged deficiencies in the manufacturing process had forced the contractor to analyze his entire process in order to identify the reasons for delay. It was held that there had been a repudiation and failure of performance; consequently,

\(^{148}\) GSBCA No. 3218, 71-1 B.C.A. ¶ 8871.
\(^{149}\) GSBCA No. 3333, 71-1 B.C.A. ¶ 8872.
\(^{150}\) ASBCA No. 15567, 71-2 B.C.A. ¶ 8947.
in the absence of a showing that the contractor’s failure was beyond his control, the termination for default was proper.

The result in *Giller Tool Co.*\(^{151}\) is more questionable. The contractor had been awarded a contract to supply socket wrenches. Subsequently, he was awarded another contract to supply the same item. The contractor agreed to accelerate the delivery schedule of one contract in consideration for the agency’s agreement to extend the delivery date on certain other contracts. Because of the accelerated delivery schedule, however, the contractor was unable to meet the requirements of both contracts. Recognizing this, he diverted the items under one contract to meet the requirements under the accelerated contract. In doing so, he had hoped for an extension of the delivery schedule of the earlier contract, but the extension was not granted. The board held that the contractor should have been able to meet the demands of both contracts at the same time. It was noted that when the contractor resorted to diverting wrenches to meet the requirements of the accelerated contract, without assuring himself that the performance period of the earlier contract would be extended, he assumed the consequences of his decision. However, had the contractor waited until the agency directed acceleration, he might have had a far stronger basis on which to attempt to overturn the default termination of the later deliveries.

The primary question in the area of default of government contracts is whether the contractor’s performance was proper. The contractor must supply that which he has agreed to supply. The government is not obligated to accept a contractor’s unilateral proposal for a change in specifications or the method of performance, even if the contractor can show a saving and is completely convinced of the validity of his position. Therefore, a failure to perform because the government will not acquiesce in a change is a valid basis for termination for default.\(^{152}\) An unauthorized unilateral deviation from specifications may lead to the same result.\(^{153}\) Many cases decided during 1971 and 1972 involved clear failures of performance or failures to make progress toward completion, with the outcome of the appeals readily predictable.\(^{154}\)

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151. GSBCA No. 3282, 71-2 B.C.A. ¶ 8932.
154. Hughes De Santa Fe, ASBCA No. 15881, 72-2 B.C.A. ¶ 9725 (of concurrent delays, contractor's were more serious); Empresas Electronicas Walser, Inc., DOT CAB No. 72-22, 72-2 B.C.A. ¶ 9712; Dynamic Systems Int'l, Ltd., GSBCA No. 3668.
H. Abandonment of the Contract

Although there are numerous situations in private or commercial contracting in which a contractor would be justified in abandoning his contract, similar fact patterns may not convey the same right to a contractor dealing with the government. The instances in which a contractor has "walked-off" a government job and escaped liability are extremely rare; recently only two contractors have been successful in pursuing such a course of action.

72-2 B.C.A. ¶ 9705 (failure to remove surplus sale items); Comspace Corp., GSBCA No. 3550, 72-2 B.C.A. ¶ 9674; General Prod. Corp., ASBCA No. 16658, 72-2 B.C.A. ¶ 9629; Boston Pneumatics, Inc., GSBCA No. 3148, 72-2 B.C.A. ¶ 9617 (failure timely to deliver conformsing items or have items ready for inspection); Swanson Eng'rs, ASBCA No. 16353, 72-2 B.C.A. ¶ 9603; Western Appraisals & Surveys, AGBCA No. 284, 72-2 B.C.A. ¶ 9597 (failure to attain rate of progress to assure completion within anticipated planting season); Community Window Shade Co., ASBCA Nos. 13675 & 14048, 72-2 B.C.A. ¶ 9587 (failure to make submittals and obtain written approval of work); E&G Indus., ASBCA No. 16283, 72-2 B.C.A. ¶ 9561; M.D. Willner, DOT CAB No. 72-3, 72-2 B.C.A. ¶ 9548 (shoddy procurement methods); Rio Hondo Containers, Inc., GSBCA No. 3494, 72-2 B.C.A. ¶ 9514; Shamrock Indus. Maintenance, DOT CAB No. 72-11, 72-2 B.C.A. ¶ 9482 (failure properly to supervise work); Union Wholesale Distr., PSBCA No. 3, 72-2 B.C.A. ¶ 9652 (tender of rebuilt parts in lieu of new ones); Beach Architectural Prod., ASBCA No. 16179, 72-1 B.C.A. ¶ 9374 (contractor overlooked delivery date); Associated Aero Science Laboratories, Inc., ASBCA No. 15889, 72-1 B.C.A. ¶ 9333, 14 G.C. ¶ 276 (failure to supply qualified instructors); Ventilation Cleaning Engr's., Inc., ASBCA No. 14747, 72-1 B.C.A. ¶ 9244 (late work with unqualified staff and inadequate equipment); Central Tool & Mfg. Corp., ASBCA No. 15965, 72-1 B.C.A. ¶ 9198, on reconsideration, 72-1 B.C.A. ¶ 9309 (subcontractor's refusal to use prime contractor's letter of credit to ship goods); Arjay Mach. Co., ASBCA No. 16072, 71-2 B.C.A. ¶ 9165 (failure to supply product conforming technically to contract drawings); Interamerican Chem., Inc., ASBCA No. 15080, 71-2 B.C.A. ¶ 9135 (excusable delay occurred after default); Sanders Indus., ENG BCA No. 3244, 71-2 B.C.A. ¶ 9072 (failure to make delivery after contracting officer promptly replied to modification request); Blake Constr. Co., GSBCA Nos. 2456 & 2593, 71-2 B.C.A. ¶ 9045 (failure to furnish qualified supplier after notice to do so); Electro-Magnetic Measurements Co., NASA BCA No. 1067-36, 71-2 B.C.A. ¶ 9043 (no test data to show contractor's system worked before or after alleged excusable delay); John Eline, ASBCA No. 15803, 71-2 B.C.A. ¶ 8986 (failure to be available for recall of warehoused goods); Marshall Elec. Co., ASBCA No. 14565, 71-1 B.C.A. ¶ 8843 (alleged change in quality control was sanctioned by specifications); William F. Klingsmith, Inc., IBCA Nos. 717-5-68 & 734-10-68, 71-1 B.C.A. ¶ 8842 (damage to the work by children was contractor's risk); Donald R. Schluter, GSBCA No. 3232, 71-1 B.C.A. ¶ 8700 (unexplained failure to do any work within 10 days of completion date); Force Constr. Co., GSBCA No. 3163, 71-1 B.C.A. ¶ 8664 (uncontroverted evidence demonstrated performance failure); International Harwood Co., GSBCA No. 3060, 71-1 B.C.A. ¶ 8613, reconsideration denied, 71-1 B.C.A. ¶ 8718 (failure to furnish evidence of performance as requested by warning letter).

155. See, e.g., Pigeon v. United States, 27 Ct. Cl. 167 (1892).
In *Building Contractors, Inc.*,\(^{156}\) the contractor’s refusal to perform was held not to give the government a ground for declaring a default. The contractor had ceased performance when the government took beneficial possession of the work pursuant to a “Use and Possession Prior to Completion” clause in the contract. The government’s resident engineer had inspected and accepted the work in question—a pipeline; six days later, he had approved payment for the installation in accordance with the specifications. However, some six months later, leaks in the pipe were discovered. All the evidence indicated that the contractor had completed the contract according to its requirements, and there was no evidence which established latent defects. Nevertheless, the contracting officer directed the contractor to perform corrective work without additional compensation. Following the contractor’s refusal to do so, the contract was terminated for default. The board held that use and possession of the line constituted conclusive acceptance of the work by the government. The contractor’s refusal to replace or reperform work which had been performed in accordance with contract specifications was held not to constitute a ground for default, especially since a conclusive acceptance had been shown by beneficial use and occupancy, inspection, and acceptance by the engineer. The government failed to establish a latent defect, fraud, or a gross mistake, and the termination was converted to one for the convenience of the government.

*Hempstead Maintenance Service, Inc.*\(^{157}\) involved a contract to provide cleaning services in government buildings. Upon discovering that certain windows to be cleaned could not be opened without using tools, the contractor decided that it would be useless to spend 15 minutes trying to open windows when it took only three minutes to clean them. Presumably, the contractor balanced the financial aspect of doing the work under these difficult conditions against the danger of a default termination. After the contractor refused to continue performing unless the government placed all the windows in working order, the government, predictably, declared him in default. The board held the contractor’s default excusable on the ground that the government had a duty to disclose to bidders any unusual characteristics of the job which could be expected to impede contract performance. The evidence clearly indicated that the government had not disclosed information concern-

\(^{156}\) ASBCA Nos. 14840 & 15221, 71-1 B.C.A. ¶ 8884, 13 G.C. ¶ 383.

\(^{157}\) GSBCA No. 3127, 71-1 B.C.A. ¶ 8809, 13 G.C. ¶ 325.
ing the characteristics of the windows. The government attempted to counter the non-disclosure argument by urging that the contractor should have discovered the defects in a pre-bid investigation. The board disagreed, finding that the contractor's access to the windows during the inspection was blocked by obstacles and that, although he did not test to see if the windows opened, the contractor had the right to assume that they would operate in a normal fashion. The case is unusual inasmuch as the contractor escaped liability in the face of his refusal to continue performance and in spite of the fact that the standard "Disputes" clause required him to do so.

Absent such special considerations, however, a contractor who stops work and removes his equipment from the job clearly has failed to perform.\(^{158}\) Such conduct constitutes an abandonment of the contract and justifies a summary default termination. The same result may follow if the contractor does not coordinate his work with that of another contractor. In *Hawaii Fence and Iron Works*,\(^{159}\) the necessity for coordination of the work was quite clear, since the combined work was the laying of a concrete wall upon which fencing was to be installed. However, as late as one week before the scheduled completion date, the fence contractor had made no attempt to coordinate his work with that of the concrete contractor. The board held that the failure of the fence contractor to coordinate constituted an abandonment or an anticipatory breach of contract and justified termination.

Subsequent vindication of the contractor on a claim does not excuse an abandonment. In *Mai Huu An Co.*,\(^{160}\) the contractor refused to continue performance after the contracting officer had advised him that there would be no adjustment in price for a tax increase levied during performance. The advice was erroneous—a clause in the contract provided for such relief. However, because the "Dispute" clause of the contract required continued performance pending resolution of disputes, the contractor's abandonment of the work was held improper and the government's termination for default upheld.

In *American Dredging Co.*\(^ {161}\) and *NASCO Products Corp.*,\(^ {162}\) the contractors had been involved in disputes with the government involving changed conditions and changes claims, respectively. Both con-

\(^{158}\) Clean Sweep, Inc., ENG BCA Nos. 2967, 3020, 71-1 B.C.A. ¶ 8701.
\(^{159}\) ASBCA No. 15242, 71-1 B.C.A. ¶ 8690.
\(^{160}\) ASBCA No. 14953, 71-1 B.C.A. ¶ 8874.
\(^{161}\) ENG BCA No. 2920, 72-1 B.C.A. ¶ 9316, 14 G.C. ¶ 320.
\(^{162}\) VACAB Nos. 974, 1000, 72-2 B.C.A. ¶ 9556, 14 G.C. ¶ 422.
tractors declined to proceed diligently with the work and were declared in default. In the overwhelming majority of instances, contractors are required to continue performance even though a real dispute exists and even if it is shown ultimately that the position of the contractor was correct. Clearly, the contractor is at a severe disadvantage because of the manner in which standard form contracts are drafted. The cases in which a contractor has refused to perform and yet escaped liability are so few that little reliance should be placed on them. Contractors would be well-advised to continue performance and hope to prevail on appeal.

It is not necessary that a contractor abandon performance before the government justifiably may terminate the contract. An admission of inability to perform, even in the face of some effort to perform, may be treated as an anticipatory repudiation of the contract. However, the vast majority of cases involve contractors who have stopped performance for invalid reasons.

1. Notice Problems

Even though the right to terminate for default may be unquestioned in a given case, the manner in which such right was exercised may provide a basis for overturning the default. Often the question is whether notice

163. See, e.g., Charles J. Slicklen Co., GSBCA No. 3566, 72-2 B.C.A. ¶ 9666 (letters to government indicating inability to perform because of suppliers); Pacific Electro Dynamics, Inc., ASBCA No. 16805, 72-1 B.C.A. ¶ 9380 (statement of inability to perform because of financial problems); Sparkadyne, Inc., ASBCA No. 15162, 71-1 B.C.A. ¶ 8854 (unequivocal statement of cessation of business is repudiation); Hydro-Space Systems Corp., ASBCA No. 15275, 71-1 B.C.A. ¶ 8739, 13 G.C. ¶ 274 (contractor suspended work stating he was no longer able to perform).

164. See, e.g., Airmotive Suppliers Corp., ASBCA No. 16333, 72-2 B.C.A. ¶ 9671 (refusal to perform because subcontract too expensive); Urban Indus. Corp., GSBCA No. 3050, 72-2 B.C.A. ¶ 9604, 14 G.C. ¶ 421 (refusal to furnish bonds and execute contract); Marble Cliff Quarries Co., ASBCA No. 16875, 72-2 B.C.A. ¶ 9585 (refusal to furnish reasonable amounts under requirements contract); James G. Henderson, ASBCA No. 15353, 72-2 B.C.A. ¶ 9567 (abandonment pending dispute); Mercantile Bldg. Maintenance Co., ASBCA No. 16953, 72-2 B.C.A. ¶ 9560 (walk-off by unpaid employees); Clinical Supply Corp., ASBCA No. 15466, 72-1 B.C.A. ¶ 9452 (refusal to perform two contracts pending resolution of warranty problem on third); Charles Bainbridge, Inc., ASBCA Nos. 15843 & 16204, 72-1 B.C.A. ¶ 9351 (stopped work over specification dispute); LTD Indus. Corp., ASBCA Nos. 16565 & 16886, 72-1 B.C.A. ¶ 9332 (refusal to perform unless given price increase for existing specification); Lone Star Textiles, Inc., ASBCA No. 16089, 72-1 B.C.A. ¶ 9294 (abandonment because of bankruptcy); Giannini-Voltex, ASBCA No. 15077, 72-1 B.C.A. ¶ 9199, 14 G.C. ¶ 82 (lack of intention to perform and financial difficulties).
was given and, if so, whether it was proper notice under a particular clause. The appropriateness and significance of contractual notices are dependent on the type of default as well as the type of contract. Most cases deal not with the actual notice of termination, but with pre-default letters and cure notices. There is no requirement for a cure notice under Standard Form 23-A for construction contracts; however, progress failures under supply contracts, in contrast to performance failures, do require a cure notice of at least 10 days.

In *Norfolk Air Conditioning Service & Equipment Corp.*, termination was made prior to a contractually required delivery date because of a progress failure. The contract in question provided for the supply of a condensing unit and an evaporator, and the contractor was to submit equipment data prior to performance. The initial data submission was inadequate, and a conference with the government was held to resolve discrepancies between the data and the contract specifications. A second submission, which would have formed the basis for performance, indicated a forthcoming delivery of clearly non-conforming supplies. The second submission letter, however, requested a price adjustment. This request, oddly enough, was regarded as an anticipatory breach of contract and the contract was terminated for default. The board followed the general rule that a default action prior to the performance date, where the reason is the contractor’s failure to make adequate progress, requires both a prior cure notice and convincing proof that timely performance was beyond the reach of the contractor. Since no cure notice had been furnished to the contractor, the board ordered the termination converted to one for the convenience of the government. The decision demonstrates that, although a contractor may be in default, the government may lose its rights by failing to implement the default action properly. The government’s contention that the request for a price adjustment was a repudiation or anticipatory breach was without foundation, since a request for an equitable adjustment is not, by itself, clear and unmistakable evidence of a refusal or inability to perform. The board quite properly held that even though the con-

165. *See* note 1 *supra*.

166. *Id*.

167. *Id*.


169. *See* H. Lynn Williams, AGBCA No. 301, 72-2 B.C.A. ¶ 9708 (unwritten cure notice vitiates default).
tractor thought that he was entitled to an upward price adjustment, and even though he was mistaken in such a belief, his request was not a repudiation. To hold otherwise would result in drastic consequences in almost all government contracts.

*Hedlund Lumber Sales, Inc.* demonstrates a proper handling of the notice requirement. The contract was terminated for the contractor's failure to supply lumber. The defaulted contractor contended that the government failed to give proper notice of its intent to terminate and of its intent to deny a request for a time extension. On the date delivery was to have been made, the contractor received notice that its previous request for a time extension had been denied and that the government intended to terminate the contract. Although the government had taken 12 days to respond to the request for a time extension, the board held the default termination proper, since the government's delay did not cause the contractor's performance delay. It should be noted that in the absence of a showing of waiver, the performance failure in *Hedlund* would have justified a default termination without notice. Another issue raised in the case was whether there had been an assignment of the proceeds of the contract by the contractor. Although the board was unable to determine whether the assignment had been made before the time the termination notice was sent to the contractor, it held that, even had there been such an assignment, the government was not required to give notice of termination to the assignee.

*International Telephone & Telegraph v. United States* was not, strictly speaking, a termination case. However, the decision illustrates that the government must comply strictly with the notice requirements of its contracts, regardless of whether its desire is to default a contractor or to require him to continue performance. In *ITT*, the government alleged that oral notice and a follow-up telex were sufficient to require *ITT* to continue performance. The court held, however, that the telex notice was untimely and that the oral notice did not comply with the contract requirements for a written notice. Thus, it was held that *ITT* was not required to perform without a price increase.

However, the government is not required to give a cure notice in every instance, even though such notice technically could be required. For example, the boards will not require the government to perform a useless

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act; consequently, no cure notice is required if the failure cannot be cured or if it is clear that the goods or supplies are non-conforming. Furthermore, after a cure notice has been given, it is unnecessary for the government to wait until the cure period has expired before terminating the contract. Thus, proof that the government's handling of notice requirements was not technically proper may not be dispositive of a case against a contractor.

J. Preproduction Failures

Preproduction and preperformance submittals and testing are becoming more common in government contracts, particularly those in the supply area. Often, before production can begin, preproduction samples, data, or reports must be submitted. The effect of a failure at this stage of the contract may be quite significant; however, as with the question of notice, the determination whether a preproduction failure was a proper basis for a default termination may be highly technical and complicated.

Argent Industries, Inc. reaffirmed the rule announced in Radiation Technology v. United States. In Argent, complex electronic equipment which had been submitted pursuant to the first article approval provision of the contract was found to have some very minor defects. The government's default termination was held improper because none of the defects could, by any reasonable standard, be considered major, and most were easily correctable. This holding followed the principle established in Radiation Technology, where the Court of Claims indicated that a contractor has the right to cure a preproduction defect if the defect is minor and if it is correctable within a reasonable time. The defects in Argent met this requirement, and the board indicated that defects under the first article provision are now to be examined in light of the test enunciated in Radiation Technology. The result is both fair and practical. In dealing with first article and preproduction clauses,

174. See, e.g., Comp. Gen. B-160976 (June 12, 1972) (new failures by contractor justified default seven days after issuance of 10-day cure notice).
175. ASBCA No. 15207, 71-2 B.C.A. ¶ 9172, 14 G.C. ¶ 53.
See Astro Science Corp. v. United States, Ct. Cl. No. 175-69 (Commissioner's Report filed September 28, 1971).
176. 366 F.2d 1003 (Ct. Cl. 1966).
the government's right to demand that for which it bargained must be balanced against the inequities of a hyper-technical application of the government's default rights. However, first article testing is not merely for the purpose of showing the contractor's general ability to perform. If the first articles constitute delivery of production items, the contractor cannot, with impunity, submit items clearly not in conformity with the specifications.177

In the application of first article and preproduction clauses, the parties also must be mindful of the technical requirements of the clauses. In Mindeco Corp.,178 the contractor submitted the required preproduction engineering and test reports, but the government took an unreasonable time in approving these predelivery submittals. Since the contractor could not commence production until he had received full approval, his subsequent delays were held excusable.

Conversely, in Ace Electronics Associates, Inc.,179 the government failed to give written notice of its action on the contractor's first article test submittal until far beyond the time established in the contract for such notice. However, before the contractor received the notice of deficiencies in the first articles, he undertook steps to complete performance on the production units under the contract. The termination for default was held proper, even though the contractor had been encouraged by government personnel to perform, since the first article clause of the contract specifically stated that a contractor proceeding with production prior to approval did so at his own risk. Moreover, the contractor had failed to avail himself of his contractual right to inquire of the contracting officer the reasons for the government's delay in acting on the submittal. It may be argued that the case disregards the potential uncompensated time that a contractor will expend under such circumstances, and also disregards the eagerness of a contractor to please his customer. Although a rebuttal might be that the contractor has other rights under the contract, perhaps even to claim a suspension of work, such an argument overlooks the fact that such a claim would be specula-


In Electro-Neutronics, Inc., ASBCA No. 12947, 71-2 B.C.A. ¶ 8961, 13 G.C. ¶ 377, the board rejected the contractor's argument that first article testing was only for the purpose of demonstrating the contractor's ability to perform, and not to obtain items conforming exactly with the specifications. Valid tests showed clear non-conformance, and the termination for default was upheld.

178. ASBCA No. 15877, 71-2 B.C.A. ¶ 9083.

179. ASBCA Nos. 14676 & 14826, 71-1 B.C.A. ¶ 8696.
tive and contingent, and that the contractor would face a long, arduous appeal in order to recover.

Many of the cases involving preproduction issues are more straightforward. As with routine production tests, first article tests which show that the product would not satisfy the contract's specifications justify a termination for default.\textsuperscript{180} It is not an abuse of discretion for a contracting officer to refuse to allow correction of demonstrated material defects.\textsuperscript{181} Obviously, a failure to make timely delivery of preproduction samples\textsuperscript{182} or tests\textsuperscript{183} invites a default termination. Any incidental value the government may receive from the contractor's efforts is immaterial.\textsuperscript{184}

K. Bid Problems Causing Default

It has become firmly established that the Boards of Contract Appeals lack jurisdiction to reform contracts. As a result, and as more lawyers become expert in the field of government contracts, the number of appeals involving mistakes in bidding and resulting in default terminations has continued to decrease.

Occasionally, a contractor does obtain relief.\textsuperscript{185} Usually, however, the contractor will be held responsible for mistakes on a bid which have resulted in performance problems.\textsuperscript{186} Thus, if the contractor has financial difficulties because of underbids, he must perform or risk a termination for default.\textsuperscript{187} Similarly, a mistake in computing a bid price does not excuse a default, even though the government makes a mistake in payment.\textsuperscript{188} An attempt to withdraw a bid on an alleged mistake

\textsuperscript{180} Pariser Machinery Corp., ASBCA No. 15553, 72-1 B.C.A. ¶ 9194, 14 G.C. ¶ 165.
\textsuperscript{181} Standard-Thomson Corp., ASBCA No. 15772, 72-1 B.C.A. ¶ 9220; Consolidated Machine Corp., ASBCA Nos. 14176 & 14366, 72-1 B.C.A. ¶ 9212.
\textsuperscript{183} See, e.g., Applied Scientific Prod. & Research, ASBCA No. 17244, 72-1 B.C.A. ¶ 9428 (inability to meet specifications and loss of a key employee do not excuse first article failure).
\textsuperscript{184} U.B. Corp., ASBCA No. 16556, 72-1 B.C.A. ¶ 9284.
\textsuperscript{185} Comp. Gen. B-175613 (June 1, 1972) (GAO recommended that the contract be cancelled without liability because the government contributed to the contractor's mistake in quoting his bid price).
\textsuperscript{186} Of the five cases the authors classified under the heading of bid problems, the contractor was unsuccessful in four.
\textsuperscript{188} Campbell Keypunch Service, GSBCA No. 3123, 71-1 B.C.A. ¶ 8800.
after the contract has been formed or a subsequent refusal to perform are also grounds for a default termination. 189

L. Labor Problems

Although strikes are among the enumerated events which may excuse a delay in performance, not every strike or labor problem can be relied upon successfully to excuse a default. 190 It is the smaller contractor, in particular, who frequently has been unable to utilize labor problems as a defense to default terminations. For example, in Harold Leloeuf Business Machines, Inc., 191 it was held that the contractor was not subject to a general strike or labor problems sufficient to excuse nonperformance, even though the contractor’s entire work force of two men had quit. It was necessary to show more than the mere existence of a strike. For example, if a strike involves a contract other than the one terminated for default, a board can find that the delay on the defaulted contract was inexcusable because there was no causal connection between the strike and the terminated contract. Thus, in Pacific Sandblast Equipment Co., 192 the board held that in the absence of a clear showing that the strike delayed performance of the terminated contract, the delay was not excusable. However, the result in cases of this type may be questioned if the same employees are performing both contracts. Generally, a strike is against an employer and not a particular contract. It is submitted that judicial scrutiny of the contractor’s production methods, and determinations of whether the contractor could have avoided the effects of the strike by an earlier commencement of performance, overlook the reality that a strike usually is designed to paralyze an employer’s total operational capacity.

However, a refusal to overturn a default termination has more support where a contractor contends that the default was excusable because of a strike against his suppliers. For example, in Boston Pneumatics, Inc., 193 the board determined that although the strike against the contractor’s suppliers may have caused the initial delays, the contractor had not shown the strike to be the operative cause of his own default.


190. See, e.g., Indian Prod. Co., GSBCA No. 3420, 71-2 B.C.A. ¶ 9178; see note 19 supra.

191. GSBCA No. 3304, 71-1 B.C.A. ¶ 8732.

192. ASBCA No. 15565, 71-2 B.C.A. ¶ 8942.

193. ASBCA Nos. 15167 & 15635, 71-1 B.C.A. ¶ 8918.
This rationale is an outgrowth of the "beyond the control and without the fault or negligence of the Contractor" language of the excusable delay clause. It is incumbent on a contractor to assure himself that he has adequate personnel and an adequate source of supply. It is only under unusual circumstances that a contractor may be successful in attributing his failure to a lack of personnel.

It should be emphasized that the requisite evidence, not only in a labor problem but in all cases where the contractor alleges an excusable cause of delay, must be supplied by the contractor. Many contractors apparently have adopted the attitude that the mere occurrence of a strike is ipso facto an excusable cause of delay. However, before he can be relieved of the onus of a default termination, the contractor must show that the event was beyond his control and without his fault or negligence, and that such event actually delayed his performance.

M. Waiver of the Default

It is possible to find that the government has waived its right to declare a contractor in default. Most waiver cases involve the contractual requirement of timely delivery or completion. Typically, the government has permitted the contractor to continue performance beyond the established date and to expend additional money. In effect, the government has elected to obtain continued performance, and the contractor has relied upon this election to his detriment. Consequently, it may be held unfair to allow termination after such election, unless a new delivery or completion date has been established and not met.

For example, in *Al Green, Inc.* a default termination was held improper because the government had permitted the contractor to perform beyond the scheduled performance date and had failed to fix a new reasonable performance date. Four days after the original completion

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194. See note 19 supra.
195. In Products Eng'r Corp., GSBCA No. 3479, 72-2 B.C.A. ¶ 9627, impending steel and existing dock strikes were held to be excusable delays. However, most contractors during the past two years were unsuccessful on labor issues. For example, in Duralab Equip. Corp., GSBCA No. 3412, 72-1 B.C.A. ¶ 9565, an unusual turnover in skilled help was not an excusable delay.
197. See, e.g., Whitlock-Dunn, Inc., GSBCA No. 3355, 72-2 B.C.A. ¶ 9594 (failure to prove that strike at another company delayed performance); Woodford Hardware Co., ASBCA No. 16062, 72-1 B.C.A. ¶ 9445 (no evidence that strike affected contractor's ability to obtain raw materials).
198. ASBCA No. 15225, 71-1 B.C.A. ¶ 8789.
date, the contracting officer had directed the contractor to continue performance but had failed to set a new completion date. At the time of his action, the contracting officer not only had full knowledge that the specified date had passed, but also knew that completion of the contract would require further commitments by the contractor for labor and materials. Under these circumstances, it was held that the contracting officer had the duty to establish a new reasonable time for completion of the work. By inducing the contractor to continue performance and by delaying termination for more than three months after the original performance date, the government was held to have waived its right to terminate for default. Consequently, the termination was converted to one for the convenience of the government.

H.N. Bailey & Associates v. United States\textsuperscript{199} involved a waiver issue complicated by a first article clause. The court interpreted the default rights in the first article test submittal clause as a departure from the usual default clause. The clause was held to allow the government, upon a finding of defective performance, either to declare a default immediately or to notify the contractor of the defects, extend the time, and call for resubmission within 15 days. However, if the second submission failed, the contractor would be in default, the contracting officer not having the discretionary power to re-extend the time for a third submission. In Bailey, the government merely notified the contractor of defects in performance. Since the notice was not accompanied by a default termination, the government was held to have elected to allow the contractor to make the second submission. The default therefore was held improper. In response to the government's argument that the contracting officer should have a reasonable amount of time to decide on a proper course of action, the court applied the accepted rule that a reasonable time must be determined in light of the particular contract provisions. Although recognizing that under the ordinary default clause a failure to declare a default immediately upon learning of a defect would not constitute a waiver, the court found that the default provision in the first article approval clause was much more stringent than those in the standard default clause. Applying a rule of strict construction against the government, the court held that by not declaring a default within 15 days after the accrual of this right, the government had waived its right to terminate unless and until the testing of a second submission proved the product to be unsatisfactory.

\textsuperscript{199} 196 Ct. Cl. 156, 13 G C. ¶ 439 (1971).
The court in Bailey also dealt with an infrequently mentioned problem in contract administration. It is the customary administrative practice to transfer termination questions from the administrative or procuring contracting officer to a termination contracting officer. The government apparently argued that this transfer of function required time in order for the successor contracting officer to review the file, acquaint himself with all the salient facts, gather additional pertinent information, and obtain the advice of his technical and legal assistants. The court disposed of this argument stating:

The trial commissioner's proposed opinion touched off the discussion by counsel of the propriety of defendant's internal arrangements by which the case went from the previous contracting officer to a "Termination Contracting Officer" for the decision to terminate for default and the act of terminating. Our conclusion that plaintiff was not in default moots this issue, for a termination by the original Contracting Officer would have been just as bad. On the other hand, a contract demanding compliance with a tight schedule, on pain of sudden default, requires a like tightness in the government's decision making. The contractor is not to be deemed to have acquiesced in or to have foreseen delays that might be caused by the new man's having to act in a manner with which he was previously unfamiliar, whether or not plaintiff had legal notice of the regulations involved.

Although the court's comments were not necessary to its decision on the default question, the statement is instructive. Considerations of the manner in which the government terminates a contract and the necessity of a reasonable time in which to make that decision were found not to override the stringent default provisions in the first article approval clause. It is possible that the court's statement could have a wider application to the standard default clause, where it generally has been accepted that the government has a reasonable time to decide upon a course of action. However, if the court's comments in Bailey are extended to the standard default clause, then a delay in terminating which is traceable solely to a transfer of function from one contracting officer to another, and which was not a result of the evaluation itself, may be unreasonable to the extent the contractor has been prejudiced.

200. See, e.g., ASPR 1.201.3.
201. 196 Ct. Cl. at 156.
The effect on the contractor of the government's conduct is critical to the issue of waiver. Thus, the encouraging of continued performance may support a finding of waiver; conveying the impression that time is not an important factor may produce the same result. For example, in Simplex Manufacturing Corp., the delivery date was held to have been extended as a result of the conduct of the parties. However, the mere fact that an original delivery or completion has been waived may not be dispositive of the question of propriety of a default termination, since an admission of inability to perform, even in the face of an effort to perform, is a repudiation of the contract. Thus, the contractor's failure to make progress in Simplex was held to have demonstrated a clear likelihood of an inability to perform; consequently, the default was proper. Similarly, a waiver may not be sufficient to overturn a default termination if the contractor subsequently abandons performance, fails to make sufficient progress after a waiver, or delivers non-conforming supplies.

A factor which may contribute to the difficulty encountered by contractors on the issue of waiver is the concept of forebearance. The government is entitled to a reasonable time after a default to make a decision whether to terminate. During this period of forebearance, the government's failure to terminate is a matter of grace and does not constitute a waiver. Forebearance problems are peculiarly dependent upon the facts of individual cases. A contractor must evaluate the totality of the circumstances in deciding whether to appeal. Pertinent considerations may include the reasonableness of the government's delay.

203. See, e.g., Baifield Indus., Division of A-T-O, Inc., ASBCA Nos. 14582 & 14583, 72-2 B.C.A. ¶ 9676 (government's conduct manifested a lack of concern with the delivery schedule, and the contractor was induced to continue performance); Globe Constr. Co., ASBCA No. 13316, 71-2 B.C.A. ¶ 9123 (government and contractor abrogated “time is of the essence” provision).
204. ASBCA Nos. 13897 & 14380, 71-1 B.C.A. ¶ 8814.
208. In the 32 cases dealing primarily with waiver during 1971 and 1972, six contractors were successful and 26 were not.
in defaulting the contract, prejudice suffered by the contractor as a result of the delay, additional costs or obligations to suppliers and subcontractors incurred by a continuation of performance, and knowledge by the government of the contractor's actions. There can be no general rule by which to determine whether there has been a waiver; the passage of an hour may constitute a waiver in one case, while five months in another may not.\textsuperscript{210}

The requirement that a new reasonable delivery date be set also can be problematic. For example, \textit{Associated Aero Science Laboratories, Inc.}\textsuperscript{211} involved a contract contemplating a written agreement between the parties for the establishment of the contract performance period. However, the contractor waived the requirement for a written agreement, and the default declared upon his failure to meet the date set by the government was upheld. Of course, if the government waives a default and unilaterally sets a new reasonable date for completion, the contractor's failure to meet that date will justify a default action.\textsuperscript{212}

The failure to take decisive action after the default may not constitute a waiver if the government has taken other self-protective actions. For example, it has been held that the issuance after the completion date of a limited objective cure notice\textsuperscript{213} or a preliminary default warning notice\textsuperscript{214} effectively prevented a finding of waiver.

One of the necessary elements of a waiver is detrimental reliance by the contractor on the conduct of the government. In \textit{P.J. Hydraulics, Inc.}\textsuperscript{215} the government successfully contended and proved that the contractor's extensive efforts to perform were not taken as a result of any

\begin{itemize}
\item \textsuperscript{210} Clark Cable Corp., ASBCA No. 17090, 72-1 B.C.A. \textsuperscript{2} 9463 (six-working-day wait was not waiver); Standard Mfg. Co., ASBCA No. 13624, 72-1 B.C.A. \textsuperscript{1} 9371, 14 G.C. \textsuperscript{1} 280 (40-day delay was not waiver; extensions granted under other contracts were insufficient to show a course of dealing); Chester Morton Elec., Inc., ASBCA No. 14904, 72-1 B.C.A. \textsuperscript{4} 9185 (17-day wait was forebearance); Gardner Constr. Co., DOT CAB No. 71-13, 71-2 B.C.A. \textsuperscript{2} 9096 (four-month delay in termination was forebearance); Electro-Magnetic Measurements Co., NASA BCA No. 1067-36, 71-2 B.C.A. \textsuperscript{2} 9043 (24-day extension based on representation of timely performance was forebearance); Continental Chem. Corp., GSBCA No. 2986, 71-2 B.C.A. \textsuperscript{2} 9018, \textit{on reconsideration}, 71-2 B.C.A. \textsuperscript{2} 9154 (termination one month after purchase order's expiration date was forebearance).
\item \textsuperscript{211} ASBCA No. 15831, 72-1 B.C.A. \textsuperscript{4} 9333, 14 G.C. \textsuperscript{4} 276.
\item \textsuperscript{212} R. E. Atckison Co., ASBCA Nos. 15896 & 15905, 72-1 B.C.A. \textsuperscript{2} 9421.
\item \textsuperscript{214} Guenther Systems, Inc., ASBCA No. 14187, 72-2 B.C.A. \textsuperscript{2} 9495.
\item \textsuperscript{215} ASBCA No. 16310, 72-2 B.C.A. \textsuperscript{2} 9524, 14 G.C. \textsuperscript{2} 398.
\end{itemize}
action or inaction on the part of the government. Accordingly, although recognizing that the contractor had taken exceptional steps to cure his default, the board held that the contractor had taken the initiative in performing, and that detrimental reliance on government conduct had not been present. Thus, the contractor's efforts had been at his own risk and expense.

The authority of government representatives often is involved in waiver questions. For example, in General Products Corp., the contractor's misinterpretation of the limits of authority of various government officers was fatal to his appeal. As has been described, when a termination is in issue, the functions of administering the contract customarily are transferred from an administrative contracting officer (ACO) or procurement contracting officer (PCO) to a termination contracting officer (TCO). In a termination, the TCO's determination normally is dispositive—subject, of course, to review by higher authority. Thus, it was held that the contractor in General Products acted at his own risk in relying on statements of the ACO that he would obtain or recommend a waiver.

A second case styled H. N. Bailey & Associates v. United States indicates that the actions of the contractor may have an impact on the issue of waiver. The contractor argued that there had been a waiver of the contract delivery schedule. The court noted that, in the absence of any formal amendment, modification, or other expression of contractual waiver, the question of whether a waiver has occurred must be resolved by examining the conduct of the parties prior to final termination. Relying on the fact that the government urgently needed the supplies and was influenced by the contractor's optimistic statements that performance problems had been resolved and production soon would be forthcoming, the court held that a 41-day delay after default did not constitute a waiver. The government's voluntary meeting with the contractor because of the urgency of the situation was found to be a mere offer of courteous assistance beyond its contractual obligations. Consequently, it was held that no waiver could be implied from the defendant's action at that meeting.

216. See, e.g., Clark Cable Corp., ASBCA No. 14521, 71-1 B.C.A. ¶ 8748.
217. ASBCA No. 16658, 72-2 B.C.A. ¶ 9629.
218. See notes 200-01 supra & accompanying text.
219. See notes 143-46 supra & accompanying text.
The case was complicated by the fact that on the same day the contract was terminated, an engineering adviser had received a sample from the contractor and, knowing of the termination, had tested it and reported the negative results. This action was held immaterial to the waiver issue on the ground that such conduct was consistent with the government's repeated efforts to aid the contractor. The court characterized the government actions as a "benevolent attitude" not often assumed by the government. To hold that such action constituted a waiver of default rights could result in the preclusion of any government assistance to contractors beyond that specifically and technically required by the contract, lest the government unintentionally waive its default rights.221

N. Reprocurement

Since the vast majority of contractors are unsuccessful in overturning default terminations, it is necessary to examine the grounds which may be utilized to escape liability for the excess costs of reprocurement. The default clause provides that the government may reprocure similar items and charge the contractor in default for excess costs.222 However, as with any administrative procedure, the government must act with a degree of fairness and dispatch; otherwise, it may lose its right to charge the contractor for the costs of reprocurement.223 In brief, the government must make the repurchase within a reasonable time after default, obtain a reasonable repurchase price, and attempt to lessen or

221. In Bailey, the government urged the application of a principle established in Helene Curtis Industries, Inc. v. United States, 160 Ct. Cl. 437 (1963). The Helene Curtis, or superior knowledge, doctrine is applicable where the government, knowing of non-apparent difficulties of performance, permits a contractor to bid on and perform a contract. If the government withholds from the contractor knowledge which is essential to the successful completion of the contract and it is found unreasonable to expect the contractor to obtain the information from any other accessible source, the government may be found to have violated the contract. In Bailey, the contractor was declared in default because he could not perform required metallurgical processes. The superior knowledge doctrine was held inapplicable on the ground that the government did not possess knowledge of the metallurgical process; furthermore, any information the contractor needed to fulfill his obligation could have been obtained from commercial sources.

The contractor also failed to prevail on his argument that the reprocured items varied from those under the original contract and that, consequently, he should not be assessed reprocurement costs. It was determined that the essential configuration and purpose of the reprocured items was the same as those under the original contract.

222. See note 1 supra.

mitigate damages.\textsuperscript{224} As a general rule, if the government fails to comply with these requirements, it may lose the right to assess excess costs to the contractor.\textsuperscript{225} What constitutes a reasonable time in which to award a reprocurement contract is dependent upon the circumstances of the individual case.\textsuperscript{226} The test usually imposed by the various boards is whether the contractor has been prejudiced by the government's delay in reprocuring the item.\textsuperscript{227}

A contractor in default may contest the government's calculation of excess costs. In Central Fire Truck Corp.,\textsuperscript{228} for example, the contractor was held entitled to a reduction in the amount of the excess cost assessment because of the government's failure to reduce the costs to the full extent made possible by modification in the reprocurement contract. The parties to the reprocurement contract had agreed to reduce the price as a result of a waiver of \textit{all} preproduction testing. In assessing the costs against the defaulted contractor, the government decreased the liability of the contractor in default by an amount reflecting only the waiver of government testing. The board held that the contractor was entitled to an additional reduction, since the waiver of testing also included tests to be performed by the contractor.

Thus, the government must be prepared to demonstrate that reprocurement costs have been held to a minimum. In the absence of such proof, the boards have shown a willingness to find in favor of contractors on the issue of reprocurement costs.\textsuperscript{229} For example, in American Metal Fabricators Co.,\textsuperscript{230} the contractor in default produced evidence that the government recently had awarded a contract for the same item involved in reprocurement at one-quarter of the price for which the reprocurement contract was issued. The board held that the government could assess a price no higher than that obtained on the intervening contract. A different result might have obtained had the government proved


\textsuperscript{225} American Trans-Coil Corp., ASBCA No. 16651, 72-2 B.C.A. ¶ 9544.

\textsuperscript{226} See, e.g., National Elec. Metal Co., ASBCA No. 14806, 71-1 B.C.A. ¶ 8839 (four to five month delay in reprocurement held reasonable).

\textsuperscript{227} Id.

\textsuperscript{228} ASBCA No. 12715, 71-2 B.C.A. ¶ 8946.

\textsuperscript{229} See, e.g., Fitzgerald Laboratories, Inc., ASBCA Nos. 15205 & 15594, 71-2 B.C.A. ¶ 9029 (reprocurement costs 40 percent higher than original costs); A&W Gen. Cleaning Contractors, ASBCA No. 14809, 71-2 B.C.A. ¶ 8994 (government failed to solicit second low bidder on original procurement).

\textsuperscript{230} ASBCA No. 12986, 71-1 B.C.A. ¶ 8772, 13 G.C. ¶ 324.
damages suffered under the defaulted contract in addition to the reprocurement costs.

In addition to the requirement of a reasonable price, the government is required to reprocure items, services, or supplies which are similar to those which the original contractor was to provide. The contractor is entitled to receive the benefit of changes of specifications in the reprocurement contract resulting in reduction of costs. Furthermore, if the government awards a different kind of contract on reprocurement (for example, changing a production contract to one for research and development), then an assessment of excess costs may not be allowed. However, the contracting officer has vast discretion in reprocurement matters, so long as his decisions meet a standard of reasonableness.

The burden is on the government to show that the work has been done and the reprocurement contractor paid. Completion of and payment for the work must occur with the intent of utilizing such work as a reprocurement. There is authority to the effect that if a contract is classified as a reprocurement only after it has been awarded, there can be no assessment for excess reprocurement costs.

There have been rare instances in which defaulting contractors or their affiliates have bid on reprocurement contracts. Although the government usually rejects such bids or offers, the fact that a contractor has completed supplies on hand may reduce his damages greatly. The government need not accept such supplies; however, to the extent completed supplies are available, the government may not backcharge a higher price on reprocurement assessments.

231. See note 1 supra.


233. See notes 50-55 supra & accompanying text.

234. See note 235 supra & accompanying text.


Hydro Fitting Manufacturing Corp.\textsuperscript{240} demonstrates the complications which can arise in the reprocurement area. The government had divided the reprocurement into two contracts; one was awarded on a regular delivery schedule and the other was placed on an accelerated delivery schedule with a concomitantly higher price. However, the accelerated items were delivered subsequent to the regularly scheduled deliveries. It was held that since, at the time the contracts were awarded, the contracting officer had based the payment of a premium price for the accelerated deliveries on a reasonable projection of government needs, the contractor remained liable for the costs of the accelerated deliveries. Similarly, but in another context, if the original contract provided for an alternative but more expensive item, the government has the option to procure and base its assessment of excess reprocurement costs on that item.\textsuperscript{241}

Although the default of the original contractor does not give the government a free hand to build up costs or to delay unreasonably in reprocurement, the contractor will be liable if the government makes a prima facie showing that its actions were reasonable.\textsuperscript{242} However, failure to demonstrate the reasonableness of its conduct may result in reduction or removal of excess cost liability of the contractor in default.\textsuperscript{243} However, there need not be a formal reprocurement contract with a third party if there is adequate proof of the reasonableness of the reprocurement and the costs assessed.\textsuperscript{244}

As has been noted,\textsuperscript{245} the termination clause requires reprocurement of products or work similar to that specified in the defaulted contract. However, holdings based on dissimilarity are becoming infrequent, insignificant variations in the specifications often being overlooked.\textsuperscript{246} It would appear that similarity is being viewed now more as a matter of function than of appearance or name. Thus, it has been held that since pineapple and apple juice are equivalent in nutritional value, it was per-

\begin{itemize}
\item \textsuperscript{240} NASA BCA Nos. 1169-20 & 270-4, 71-2 B.C.A. ¶ 9042.
\item \textsuperscript{241} Philip Bradley & Sons, AGBCA No. 314, 71-2 B.C.A. ¶ 9002.
\item \textsuperscript{242} R.C. Allen Business Mach., Inc., ASBCA No. 12932, 72-1 B.C.A. ¶ 9325, 14 G.C. 264.
\item \textsuperscript{243} See, e.g., American Trans-Coil Corp., ASBCA No. 16651, 72-2 B.C.A. ¶ 9544 (government unable to provide satisfactory explanation why it did not solicit original bidders on reprocurement); Marshall Elec. Co., ASBCA No. 14908, 72-1 B.C.A. ¶ 9387, 14 G.C. ¶ 365.
\item \textsuperscript{244} Collins Elec., Inc, ASBCA No. 16956, 72-2 B.C.A. ¶ 9542, 14 G.C. ¶ 415; R.A. Miller Indus., Inc., ASBCA No. 16433, 72-1 B.C.A. ¶ 9409, 14 G.C. ¶ 392.
\item \textsuperscript{245} See note 231 \textit{supra} & accompanying text.
\item \textsuperscript{246} See, e.g., Rio Hondo Containers, Inc., GSBCA No. 3494, 72-2 B.C.A. ¶ 9514.
\end{itemize}
missible to reprocure pineapple juice even though the original contract was for apple juice. Eventually, however, a point is reached where similarity cannot be defined effectively in terms of function. For example, two very simple components may be equivalent functionally, but still require vastly different tools and dies, production runs, and quality control methods. A reprocurement of the more expensive item would result in a substantially larger assessment against the contractor in default, if such item is considered similar to the less expensive item required by the original contract. Moreover, it can be argued that a waiver of specifications on the reprocurement contract may change the nature of the work or product to such a great extent as to negate similarity. If so, the contractor should escape all excess cost liability, rather than simply receiving the benefit of a lower price.

O. Conclusion

Several general observations may be drawn from the recent default cases. Most significant is the fact that the percentage of successful appeals by contractors continues to decline as the number of cases increase. Several reasons may be suggested for this phenomenon. Undoubtedly, a significant number of terminations for default result from deficient or defective performance of contractual obligations. However, the cases demonstrate that apart from clear failures or refusals to comply with specifications, many government contractors either misinterpret or do not fully comprehend the rights and obligations inherent in a government contract. The result is a plethora of needless and often unmeritorious disputes between the contractor and the contracting agency.

Contractor problems frequently result from an inability to perform coupled with an assumption of risk. For example, contributing to the increasing number of defaults in supply contracts is the fact that many such contracts require production of extremely complicated items in strict conformity with difficult technical specifications. A growing number of government contracts have shifted to the contractor the risk that he will be unable to perform—even in situations where the bargained-for service or product is in very early stages of technological development. Contractors frequently have been unaware that they have assumed this technical risk.

Finally, contractors, most often those of smaller size, accept contracts without the financial capability necessary to perform. Often in such

cases, a default may be attributed to the use of an inappropriate contract payment mechanism: for example, a fixed price contract or a variation thereof may be employed where a cost reimbursement type contract more adequately would serve the exigencies of the situation.

Numerous and varied solutions to these individual problems potentially are available. However, a simple starting point toward alleviating many fundamental difficulties would be improved communications at the pre-award and preperformance stages in order to insure that all parties fully understand the obligations required of them.

II. Termination for the Convenience of the Government

Frequently, the government determines that it no longer requires the work or products for which it has contracted and that its best interests would be served by terminating the contract in whole or in part. Most government contracts contain a termination for convenience clause, which permits the government, under such circumstances, to prevent a contractor from completing performance of the contract. Before examining recent cases involving terminations for convenience, it is necessary to examine the nature and extent of the right to terminate, which is conveyed in the following terms:

The performance of work under this contract may be terminated by the Government in accordance with this clause in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interest of the Government...248

The brevity of the language of the clause is somewhat misleading in light of the breadth of the right conveyed. The Court of Claims has stated that the clause applies in numerous varied and unspecified situations.249 In effect, the clause permits the government to terminate a contract whenever it feels termination is appropriate. Justifications for invoking the clause might include a lack of funds, changing needs or policies, or considerations of foreign relations. For example, the Anti-Ballistic Missile program recently was curtailed because of the apparent success of disarmament negotiations.

The termination for convenience clause contractually delineates and states the right to terminate. However, the power of the government to

248. ASPR § 8-701, ¶ (a) (emphasis supplied). See note 2 supra.
terminate was established by case law long before development of the contractual right. In 1875, the Supreme Court held in United States v. Corliss Steam-Engine Co.\textsuperscript{250} that a contracting officer was authorized to negotiate and settle a terminated contract. With the development of the termination for convenience clause, however, a question arose concerning the parameters of the government's rights in the absence of such a clause in the contract. The Court of Claims, in G.L. Christian and Associates v. United States,\textsuperscript{261} noted that procurement regulations, carrying the force and effect of law, required the termination for convenience clause to be included in the contract. Therefore, the court held that the rights and duties of the parties were governed by the language of that clause, even though it was not physically a part of the contract.

Invocation of the termination for convenience clause permits the government to discontinue performance of a contract with only limited liability.\textsuperscript{252} If, in a private contract, a party attempts to terminate the contract without a contractual right to do so, that party would be liable for breach of contract. However, in a government contract, the termination for convenience clause converts what otherwise would be a breach into an administrative claim cognizable under the contract; additionally, the clause seriously circumscribes the rights of the contractor, primarily by limiting the extent of his recovery. Furthermore, the concept of fault is of only minor significance in termination for convenience cases. Although a small number of contractors have appealed from terminations for convenience alleging bad faith or arbitrariness, they have been uniformly unsuccessful.\textsuperscript{253} Concepts of fault or improper action usually are related only indirectly to terminations for convenience, most frequently when a wrongful default termination is converted into one for the convenience of the government.\textsuperscript{254}

A termination for convenience is initiated with a formal termination notice to the contractor. Thereafter, the contractor's course of action is governed by provisions of the contract clause and procurement regulations.\textsuperscript{255} He may be required, for example, to stop work, amass

\textsuperscript{250} 91 U. S. 321 (1875).
\textsuperscript{251} 312 F.2d 418 (Ct. Cl. 1963).
\textsuperscript{252} See note 2 supra.
\textsuperscript{253} See Librach & Cutler v. United States, 147 Ct. Cl. 605 (1959); R. Nash and J. Cibinic, supra note 14, at 758.
\textsuperscript{254} See notes 1 & 2 supra.
\textsuperscript{255} See note 1 supra.
\textsuperscript{256} ASPR § VIII.
his inventory, reduce costs, and notify affected subcontractors. Although these requirements may be highly technical, compliance therewith may play an important role in subsequent settlement negotiations. These negotiations, designed to achieve a fair and just settlement, are built around the termination settlement proposal submitted by the contractor. However, if negotiations break down and the parties cannot agree on a settlement, the contracting officer will issue a unilateral decision, which is appealable under the "Disputes" clause of the contract.

The cost principles in section 15 of the Armed Services Procurement Regulations and in the Federal Regulations are applicable in determining the allowable costs under a termination settlement. Complications may result if the termination is only partial and the termination clause of the contract provides that in the event of a partial termination, the contractor is entitled to an equitable adjustment in the price of the continued work. Moreover, pricing of the terminated portion of the work often is no less difficult and requires accounting expertise and detail.

Disputes often arise as to the amount of recoverable profits. As a general rule, anticipatory profits—those the contractor would have earned had the contract been performed fully—are not recoverable. However, as with other disputed costs, recoverable profits are negotiable based on costs incurred as well as other factors. Until recently, the termination for convenience clause contained a formula providing that a percentage of certain costs would be the maximum profit; that formula was to be invoked if the parties could not reach a settlement. However, revisions to the Armed Services Procurement Regulations (ASPR) in 1966 and to the Federal Procurement Regulations (FPR) in 1971 resulted in deletion of the formula from the clause. In the absence of agreement, profit is now determined unilaterally by the contracting officer, using a "fair and reasonable" standard. Unfortunately, tradition has become entrenched, and the government often bases its proposals on the six percent maximum profit permitted by the old clause;

257. See note 2 supra.
258. Id.
260. ASPR § 8-703.
261. See note 2 supra.

It should be noted that in defense contracts negotiated prior to 1966 and civilian contracts awarded prior to 1971, profit still will be computed on the basis of the formula if negotiations fail.
most contractors claim a 10 percent profit margin. The present clause does provide considerable flexibility, however, and it is to the distinct advantage of the contractor to negotiate a settlement.

Inasmuch as settlement following termination of a large contract may involve significant expense, recoverability of settlement costs is a question of importance. In general, legal costs incurred in appealing a termination claim are not recoverable.262 This rule is applicable even if the purpose of the appeal is to establish the existence of a termination for convenience, and even though the issue is resolved in favor of the contractor.263 However, the contractor is entitled to recover the accounting, legal, clerical, and similar costs incurred in the preparation, presentation, and negotiation of the termination settlement claim, provided such costs are reasonable and properly documented.264

With this abbreviated statement of general principles applicable to terminations for convenience, it is now possible to examine recent cases in the area. Termination for convenience cases are not as susceptible of classification as are cases involving termination for default. However, it is possible to make a division on the basis of the two issues most frequently litigated: whether a termination for convenience has occurred, and the amount of the settlement to be allowed the contractor.

A. Establishing the Termination for Convenience

Although the government's discretion to act under the termination for convenience clause is virtually unlimited, problems often arise in determining whether the government has terminated a contract wrongfully by purporting to act under some other clause or for some other reason. Typically, in these types of cases, the government discontinues performance but fails or refuses to classify the termination as one for convenience, and the contractor must appeal to establish his right to a settlement.

For example, in *T.M.C. Systems and Power Corp.*,265 the contractor was awarded a cost-plus-fixed-fee contract containing a pre-1966 "Limitation of Cost" clause. As the contractor's funds diminished, he forwarded appropriate notices of the extent of his expenditures and a projected timetable for the exhaustion of funds. The government delayed

263. Id.
264. See note 2 supra; see, e.g., Douglas Corp., ASBCA No. 8566, 69-1 B.C.A. ¶ 7378;
Cryo-Sonics, Inc., ASBCA No. 13219, 70-1 B.C.A. ¶ 8313.
action on the notices for 17 months and refused to advise the contractor as to the procedures to be followed in closing out the contract, maintaining that the contract had expired. The contractor considered his contract to have been terminated for convenience, but the government refused to act on a termination settlement proposal submitted by him. On appeal, the contractor argued that the government's failure to take action after timely notice under the "Limitation of Cost" clause constituted a termination for convenience. The board held that the government delayed unreasonably in responding to the overrun notices and that, under these circumstances, the contract had not expired under its own terms. Thus, under limited circumstances, an unreasonable government delay in taking action under the "Limitation of Cost" clause may be deemed a termination for convenience.266

_T.M.C. Systems and Power_ may be placed with a group of cases involving constructive terminations; although they are similar in result, these cases should be distinguished from cases in which an improper default has been converted to a termination for convenience. The nature of a constructive termination is exemplified by _Henry Angelo & Sons, Inc._,267 where the board rectified a gross inequity perpetrated by the government. The contractor had been awarded a requirements contract for painting various buildings at a military base. The contract contained a schedule of the estimated quantities of requirements which supposedly were beyond the government's own capacity to perform. The estimated cost of the work was approximately $520,000, with $120,000 apportionable to the painting of family housing and the remaining $400,000 allocable to the painting of administrative buildings. Painting of the housing units was considerably less profitable than the other work under the contract.

During performance, the government ordered the contractor to perform almost all the less profitable work, while performing most of the profitable work with its own personnel. The government explained its action on the basis of the unavailability of funds; however, this particular contract was not subject to the availability of funds. Moreover, the board found that the government had channeled available funds to other projects, thereby increasing its capacity to perform the painting work at the contractor's expense. Noting that a requirements contract contains an implied condition of good faith, the board held that the

266. Cf. Comp. Gen. B-171692 (August 18, 1971) (contract found to have expired by its own terms).

267. ASBCA No. 15082, 72-1 B.C.A. ¶ 9356, 14 G.C. ¶ 246.
government's actions in having the contractor perform only the less expensive work did not satisfy this standard. To the extent that the government performed the work itself, the board deemed the government's actions a termination for convenience.

A similar result based on constructive termination was reached in *Maxson Electronics Corp.* The contractor had been awarded a five-year multi-year contract to supply artillery targets; however, after two years, the government gave notice to the contractor that funds would not be available for the remaining three years of the contract and that the items would not be ordered. The board found that sufficient funds were in fact available and that the government had procured the product from another contractor. Consequently, the government's actions were held to constitute a termination for convenience. Contractors sometimes misapprehend the nature of the government's power to terminate for convenience or the authority of government representatives to reach settlements once a termination has been established. *Western Appraisals & Surveys* reaffirmed the rule that the government may terminate for convenience even in the absence of a clause to that effect in the contract. In connection with this rule, a distinction must be drawn between the contracting officer's authority or power to declare a termination and the jurisdiction of the boards to grant relief in termination for convenience cases. Although it is not necessary that the contract contain such a clause in order to declare a termination, absent a clause under which it can grant relief, a board generally will dismiss an appeal. As a result, the contractor's remedy when there is no termination for convenience clause is a court suit. *Atlantic Gulf & Pacific Co. of Manila, Inc.* involved the issue of the authority of government representatives to settle terminations for convenience. A contractor in good faith may believe that a settlement has been reached; however, if the action of the government representative participating in the settlement is subject to review by his superiors, the settlement is not binding on the government until so approved. As a rule, any case involving a settlement of $50,000 or more is subject to review and approval by settlement review boards within the agencies.

268. ASBCA No. 12983, 72-2 B.C.A. ¶ 9543, 14 G.C. ¶ 428.
270. See note 251 supra & accompanying text.
271. ASBCA No. 13533, 72-1 B.C.A. ¶ 9415, on reconsideration, 72-2 B.C.A. ¶ 9698.
272. See note 2 supra.
A termination for convenience may result from a bid protest. For example, if a contract is awarded as the result of a government mistake, the generally accepted course of action is to terminate the contract for the convenience of the government. Since, under such circumstances, the contractor would not have been at fault in the erroneous award, a termination for convenience would be an equitable resolution. The result would be different, however, if the contractor had contributed to the error through fraud or other illegal methods.

One of the more significant cases decided during the past two years, North Star Aviation Corp. v. United States, involved the question of recoverability of anticipatory profits, as well as that of whether the contract had been terminated for convenience. As has been noted, the general rule is that anticipatory profits are not recoverable; this rule is applicable even though the government's actions are held to have been improper. In North Star Aviation, however, the contractor was able to recover anticipatory profits because of the presence of special provisions in the contract. When the contractor furnished a performance bond which did not satisfy the contractual requirements, the government declared a default termination. However, the contractor subsequently tendered a proper bond, still within the time allowed by the contract. Although the government conceded and the Comptroller General agreed that the default termination was improper, no further action was recommended since a successor contract already had been awarded. The contracting officer denied the contractor's claim for damages, and the board dismissed the appeal because of lack of jurisdiction.

The Court of Claims held that the wrongful termination was a common law breach of contract for which the measure of damages was the loss of anticipatory profits. The court found that the default clause used in the contract failed to include government error as a ground upon which a wrongful default termination could be converted into a convenience termination. Furthermore, the contract was found not to


275. See note 259 supra & accompanying text.
contain the usual termination for convenience clause. As has been noted, it has been held that the government has the power to declare a termination for convenience even in the absence of a clause in the contract granting that right, where valid procurement regulations require inclusion of such a clause in the contract. However, in *North Star Aviation*, the applicable procurement regulations did not require the inclusion of a termination for convenience clause. The only situation in which a termination for convenience could have occurred under the contract was where a wrongful default termination was converted into a termination for convenience. However, since the default clause limited such conversions to default terminations which had occurred due to events "beyond the control and without the fault or negligence" of the contractor, and since the improper default in this case had been a result of government error, it was not possible to find that there had been a termination for convenience. Therefore, the government's actions were held to have been a common law breach of contract, and the usual prohibition in terminations for convenience against the recovery of anticipatory profits was not applicable.

B. The Termination Settlement

Profit, of course, is just one of the elements to be considered in the settlement of a termination for convenience claim. Because contractors do not anticipate terminations for convenience when bidding on government contracts, their accounting records often are not helpful in determining the allowability and amount of the various cost elements in a termination claim. Although generalization among cost cases is difficult, a brief survey of the more significant decisions may be useful in indicating fundamental principles.

Adequate proof of costs often is an insurmountable barrier to recovery. In *Roberts International Corp.*, for example, the contracting officer made a unilateral decision as to the amount of the settlement after the contractor had failed for 33 months following termination to furnish data or produce records supporting a claim for termination expenses. Furthermore, during the 13 months after the docketing of his appeal, the contractor failed to answer any of the board's correspondence extending to him the opportunity to submit data for consideration. As a

276. See note 251 supra & accompanying text.
277. ASBCA No. 15118, 71-1 B.C.A. ¶ 8869.
result, the board was forced to decide the appeal based on the evidence in the record and upheld the contracting officer's decision.

A similar result was reached in Delaware Tool and Die Works, Inc.,\textsuperscript{278} where the contractor either could not or did not offer any proof that he had incurred costs in performing work under parts of the contract which the government had terminated for convenience. The only evidence presented was a general statement that costs had been incurred, which statement clearly was not sufficient to satisfy the contractor's burden of proof.

In extenuating circumstances, however, the contractor may be excused from presenting actual cost records. For example, in Bailey Specialized Buildings, Inc.,\textsuperscript{279} the contractor's cost records were destroyed through no fault of his own. On remand from the Court of Claims, the board computed allowable termination costs on the basis of the expert testimony of accountants and a presentation of engineering and production evaluations. It was concluded that the evidence thus adduced provided a reasonably reliable method of reconstructing the costs which had been incurred.

Balley also involved the issue of allowable termination settlement expenses—those administrative and legal costs incurred by the contractor as a direct result of the termination. The case had arisen after an improper default termination was converted to a termination for convenience; the long interval between these two events was found to be a significant factor in determining the allowability of the settlement expenses. Recognizing the problem the contractor faced in reconstructing his records, the board allowed a substantial recovery of legal and accounting fees, excluding, however, those costs related directly to the appeal.\textsuperscript{280}

Cost-plus contracts frequently present peculiar difficulties of settlement. When a CPFF or a similar contract is terminated before the work has been completed, the fixed fee or profit factor has to be adjusted to reflect the contractor's achievement. Emerson Electric Co.\textsuperscript{281} held that a fee reduction is in the nature of a claim by the government and that the government thus must establish both its right to a reduction in fee and the amount thereof. In Technology Inc.,\textsuperscript{282} the contractor was per-

\textsuperscript{278} ASBCA No. 14033, 71-1 B.C.A. ¶ 8860.  
\textsuperscript{279} ASBCA No. 10576, 71-1 B.C.A. ¶ 8699.  
\textsuperscript{280} See notes 262-64 supra & accompanying text.  
\textsuperscript{281} ASBCA No. 15591, 72-1 B.C.A. ¶ 9440.  
\textsuperscript{282} ASBCA No. 14083, 71-2 B.C.A. ¶ 8956, reconsideration denied, 72-1 B.C.A. ¶ 9281.
forming under a cost-plus-fixed-fee contract until it was terminated for the convenience of the government. The contractor appealed from the termination and the contracting officer’s unilateral determination of the recoverable settlement costs. The issues of dispute were the amount of allowable overhead and the percentage of the fixed fee to which the contractor was entitled. The percentage of completion argued by the parties varied by as much as 30 percent. The contractor argued that he had assumed a risk in the form of a ceiling on the costs of materials and subcontracts and that this ceiling should be deemed the measure of his percentage of completion. The board, however, rejected this theory, noting that although a fixed price contractor assumes the risk that the costs of materials and subcontracts will exceed the ceiling, he is not entitled to profit until the work has been performed. Thus, the contractor in Technology was held entitled to his fee only to the extent that he had performed. The board noted that were it to adopt the approach urged by the contractor, it would be difficult to find, under the facts established, that the contractor had earned any significant portion of the fee. The more precise approach based on the percentage of completion of the work was found preferable. In applying this approach, however, the board noted that the percentage of completion must be based on all indicators of completion, including direct labor expenditures incurred, vouchers submitted, and progress and milestone charts prepared during performance. On the basis of the facts presented, it was found that the dollar expenditure for direct labor provided the most reliable estimate of the work completed, and the fee adjustment was computed on that basis.

The board in Technology rejected the contractor’s claim for unabsorbed overhead, holding such overhead to be a continuing cost of an ongoing organization and not a cost of the terminated contract. It was conceded that the contractor’s direct labor pool was reduced for some months and therefore, as a result of the termination, was not at the level anticipated during other months; the contractor was thus forced to charge the overhead that would have been absorbed by the direct labor under the terminated contract against direct labor under other contracts. However, the board held that if all of the unabsorbed overhead were chargeable against the terminated contract, the government would be placed in the position of a guarantor of the contractor’s overhead, a result which would be contrary to the intent and language of the
termination clause. However, in Adam Barr's Son,\textsuperscript{283} where a 67-day suspension of work preceded the termination, the contractor was held entitled to an allowance for overhead but not for profits in his settlement. The refusal to allow a profit allowance for the period of the suspension was based on a combined interpretation of the termination clause, which permitted a reasonable allowance for profits on work done under the contract, and the suspension of work clause, which disallowed profit allowances for periods of suspension. Thus, it can be seen that a termination does not necessarily render a suspension of work clause inapplicable.

C. Conclusion

The 75 termination for convenience cases decided during the past two years are almost evenly split between those involving questions as to the existence of a termination for convenience and those in which the amount of the termination settlement was in issue. In the first category, there has been a perceptible increase in the number of cases in which the contractor has prevailed on a theory of constructive termination or some variation thereof. A similar increase has occurred in the number of cases in which a meritorious bid protest has resulted in the termination for convenience of a contract which had been awarded to another contractor.

Pricing cases, however, continue to present difficult issues, in addition to requiring terminated contractors to find, digest, and apply an overwhelming number of complicated procurement regulations and pricing policies. Although proof of costs is in itself a difficult initial hurdle, the contractor must also establish that particular cost elements are allowable and that they are allocable to the terminated contract. The cases underscore the necessity for a detailed and coordinated approach to termination settlements by contract administrators and their accounting experts and legal counsel. Only through such combined efforts can cost records be identified properly and costs audited, verified, and then defined in terms of allowability and allocation. Some issues, such as profit, will continue to be decided by the realities of negotiation; however, a firm understanding of the principles involved is highly beneficial in achieving amicable resolution of termination settlements.

\textsuperscript{283} ASBCA No. 15178, 71-1 B.C.A. ¶ 8917.
(a) If the Contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in this contract, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the Contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. Whether or not the Contractor's right to proceed with the work is terminated, he and his sureties shall be liable for any damage to the Government resulting from his refusal or failure to complete the work within the specified time.

(b) If fixed and agreed liquidated damages are provided in the contract and if the Government so terminates the Contractor's right to proceed, the resulting damage will consist of such liquidated damages until such reasonable time as may be required for final completion of the work together with any increased costs occasioned the Government in completing the work.

(c) If fixed and agreed liquidated damages are provided in the contract and if the Government does not so terminate the Contractor's right to proceed, the resulting damage will consist of such liquidated damages until the work is completed or accepted.

(d) The Contractor's right to proceed shall not be so terminated nor the Contractor charged with resulting damage if:

(1) The delay in the completion of the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including but not restricted to, acts of God, acts of the public enemy, acts of the Government in either its sovereign or contractual capacity, acts of another Contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, or delays of subcontractors or suppliers arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and such subcontractors or suppliers; and

(2) The Contractor, within 10 days from the beginning of any such delay (unless the Contracting Officer grants a further period of time before the date of final payment under the contract), notifies the Contracting Officer in writing of the causes of delay. The Contracting Officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when, in his judgment, the findings of fact justify such an extension, and his findings of fact shall be final and conclusive on the parties, subject only to appeal as provided in the "Disputes" clause of this contract.

(e) If, after notice of termination of the Contractor's right to proceed under the provisions of this clause, it is determined for any reason that the Contractor was not in default under the provisions of this clause, or
that the delay was excusable under the provisions of this clause, the rights
and obligations of the parties shall, if the contract contains a clause provid-
ing for termination for convenience of the Government, be the same as if the
notice of termination had been issued pursuant to such clause. If, in the
foregoing circumstances, this contract does not contain a clause providing
for termination for convenience of the Government, the contract shall be
equitably adjusted to compensate for such termination and the contract
modified accordingly; failure to agree to any such adjustment shall be a
dispute concerning a question of fact within the meaning of the clause of
this contract entitled "Disputes".

(f) The rights and remedies of the Government provided in this clause
are in addition to any other rights and remedies provided by law or under
this contract.

(g) As used in paragraph (d) (1) of this clause, the term "subcontractors
or suppliers" means subcontractors or suppliers at any tier.

See Federal Procurement Regulation (hereinafter FPR) 1-8.709-1 and 1-8.709-2 for
equivalent clauses for civilian agencies awarding fixed price construction contracts.

There are additional clauses for use in different kinds of contracts, for example,
ASPR 7-103.11 and FPR 1-8.707 for fixed price supply contracts, the former of which
is as follows:

DEFAULT (1969 AUG)

(a) The Government may, subject to the provisions of paragraph (c)
below, by written notice of default to the Contractor, terminate the whole
or any part of this contract in any one of the following circumstances:

(i) if the Contractor fails to make delivery of the supplies or to
perform the services within the time specified herein or any
extension thereof; or

(ii) if the Contractor fails to perform any of the other provisions
of this contract, or so fails to make progress as to endanger
performance of this contract in accordance with its terms, and
in either of these two circumstances does not cure such failure
within a period of 10 days (or such longer period as the Con-
tracting Officer may authorize in writing) after receipt of notice
from the Contracting Officer specifying such failure.

(b) In the event the Government terminates this contract in whole or
in part as provided in paragraph (a) of this clause, the Government may
procure, upon such terms and in such manner as the Contracting Officer
may deem appropriate, supplies or services similar to those so terminated,
and the Contractor shall be liable to the Government for any excess costs
for such similar supplies or services; provided, that the contractor shall
continue the performance of this contract to the extent not terminated
under the provisions of this clause.

(c) Except with respect to defaults of subcontractors, the Contractor shall
not be liable for any excess costs if the failure to perform the contract arises
out of causes beyond the control and without the fault or negligence of the
Contractor. Such causes may include, but are not restricted to, acts of God
or of the public enemy, acts of the Government in either its sovereign or
contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes,
freight embargoes, and unusually severe weather; but in every case the
collapse to perform must be beyond the control and without the fault or
negligence of the Contractor. If the failure to perform is caused by the default of a subcontractor, and if such default arises out of causes beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either of them, the Contractor shall not be liable for any excess costs for failure to perform, unless the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the required delivery schedule.

(d) If this contract is terminated as provided in paragraph (a) of this clause, the Government, in addition to any other rights provided in this clause, may require the Contractor to transfer title and deliver to the Government, in the manner and to the extent directed by the Contracting Officer, (i) any completed supplies, and (ii) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called “manufacturing materials”) as the Contractor has specifically produced or specifically acquired for the performance of such part of this contract as has been terminated; and the Contractor shall, upon direction of the Contracting Officer, protect and preserve property in the possession of the Contractor in which the Government has an interest. Payment for completed supplies delivered to and accepted by the Government shall be at the contract price. Payment for manufacturing materials delivered to and accepted by the Government and for the protection and preservation of property shall be in an amount agreed upon by the Contractor and Contracting Officer; failure to agree to such amount shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled “Disputes”. The Government may withhold from amounts otherwise due the Contractor for such completed supplies or manufacturing materials such sum as the Contracting Officer determines to be necessary to protect the Government against loss because of outstanding liens or claims of former lien holders.

(e) If, after notice of termination of this contract under the provisions of this clause, it is determined for any reason that the Contractor was not in default under the provisions of this clause, or that the default was excusable under the provisions of this clause, the rights and obligations of the parties shall, if the contract contains a clause providing for termination for convenience of the Government, be the same as if the notice of termination had been issued pursuant to such clause. If, after notice of termination of this contract under the provisions of this clause, it is determined for any reason that the Contractor was not in default under the provisions of this clause, and if this contract does not contain a clause providing for termination for convenience of the Government, the contract shall be equitably adjusted to compensate for such termination and the contract modified accordingly; failure to agree to any such adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled “Disputes”.

(f) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

(g) As used in paragraph (c) of this clause, the terms “subcontractor” and “subcontractors” mean subcontractor(s) at any tier.

ASPR 7-203.10 or FPR 1-8.702 are used in cost reimbursement type contracts.
APPENDIX B

TERMINATION FOR CONVENIENCE OF THE GOVERNMENT
(1971 NOV)

(a) The performance of work under this contract may be terminated by the Government in accordance with this clause in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interest of the Government. Any such termination shall be effected by delivery to the Contractor of a Notice of Termination specifying the extent to which performance of work under the contract is terminated, and the date upon which such termination becomes effective.

(b) After receipt of a Notice of Termination, and except as otherwise directed by the Contracting Officer, the Contractor shall,

(i) stop work under the contract on the date and to the extent specified in the Notice of Termination;

(ii) place no further orders or subcontracts for materials, services of facilities, except as may be necessary for completion of such portion of the work under the contract as is not terminated;

(iii) terminate all orders and subcontracts to the extent that they relate to the performance of work terminated by the Notice of Termination;

(iv) assign to the Government, in the manner, at the times, and to the extent directed by the Contracting Officer, all of the right, title, and interest of the Contractor under the orders and subcontracts so terminated, in which case the Government shall have the right, in its discretion, to settle or pay any or all claims arising out of the termination of such orders and subcontracts;

(v) settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts, with the approval or ratification of the Contracting Officer, to the extent he may require, which approval or ratification shall be final for all the purposes of this clause;

(vi) transfer title and deliver to the Government, in the manner, at the times, and to the extent, if any, directed by the Contracting Officer, (A) the fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced as a part of, or acquired in connection with the performance of the work terminated by the Notice of Termination, and (B) the completed or partially completed plans, drawings, information, and other property which, if the contract had been completed, would have been required to be furnished to the Government;

(vii) use his best efforts to sell, in the manner, at the times, to the extent, and at the price or prices directed or authorized by the Contracting Officer, any property of the types referred to in (vi) above; provided, however, that the Contractor (A) shall not be required to extend credit to any purchaser, and (B) may acquire any such property under the conditions prescribed by and at a price or prices approved by the Contracting Officer; and provided further that the proceeds of any such
transfer or disposition shall be applied in reduction of any payments to be made by the Government to the Contractor under this contract or shall otherwise be credited to the price or cost of the work covered by this contract or paid in such other manner as the Contracting Officer may direct;

(viii) complete performance of such part of the work as shall not have been terminated by the Notice of Termination; and

(ix) take such action as may be necessary, or as the Contracting Officer may direct, for the protection and preservation of the property related to this contract which is in the possession of the Contractor and in which the Government has or may acquire an interest.

At any time after expiration of the plant clearance period, as defined in Section VIII, Armed Services Procurement Regulation, as it may be amended from time to time, the Contractor may submit to the Contracting Officer a list, certified as to quantity and quality, of any or all items of termination inventory not previously disposed of, exclusive of items the disposition of which has been directed or authorized by the Contracting Officer, and may request the Government to remove such items or enter into a storage agreement covering them. Not later than fifteen (15) days thereafter, the Government will accept title to such items and remove them or enter into a storage agreement covering the same; provided, that the list submitted shall be subject to verification by the Contracting Officer upon removal of the items, or if the items are stored, within forty-five (45) days from the date of submission of the list, and any necessary adjustment to correct the list as submitted shall be made prior to final settlement.

(c) After receipt of a Notice of Termination, the Contractor shall submit to the Contracting Officer his termination claim, in the form and with certification prescribed by the Contracting Officer. Such claim shall be submitted promptly but in no event later than one year from the effective date of termination, unless one or more extensions in writing are granted by the Contracting Officer, upon request of the Contractor made in writing within such one year period or authorized extension thereof. However, if the Contracting Officer determines that the facts justify such action, he may receive and act upon any such termination claim at any time after such one year period or any extension thereof. Upon failure of the Contractor to submit his termination claim within the time allowed, the Contracting Officer may, subject to any Settlement Review Board approvals required by Section VIII of the Armed Services Procurement Regulation in effect as of the date of execution of this contract, determine, on the basis of information available to him, the amount, if any, due to the Contractor by reason of the termination and shall thereupon pay to the Contractor the amount so determined.

(d) Subject to the provisions of paragraph (c), and subject to any Settlement Review Board approvals required by Section VIII of the Armed Services Procurement Regulation in effect as of the date of execution of this contract, the Contractor and the Contracting Officer may agree upon the whole or any part of the amount or amounts to be paid to the Contractor by reason of the total or partial termination of work pursuant to this clause, which amount or amounts may include a reasonable allowance for profit on work done; provided, that such agreed amount or amounts, exclusive of
settlement costs, shall not exceed the total contract price as reduced by the amount of payments otherwise made and as further reduced by the contract price of work not terminated. The contract shall be amended accordingly, and the Contractor shall be paid the agreed amount. Nothing in paragraph (e) of this clause, prescribing the amount to be paid to the Contractor in the event of failure of the Contractor and the Contracting Officer to agree upon the whole amount to be paid to the Contractor by reason of the termination of work pursuant to this clause, shall be deemed to limit, restrict, or otherwise determine or affect the amount or amounts which may be agreed upon to be paid to the Contractor pursuant to this paragraph (d).

(e) In the event of the failure of the Contractor and the Contracting Officer to agree, as provided in paragraph (d), upon the whole amount to be paid to the Contractor by reason of the termination of work pursuant to this clause, the Contracting Officer shall, subject to any Settlement Review Board approvals required by Section VIII of the Armed Services Procurement Regulation in effect as of the date of execution of this contract, pay to the Contractor the amounts determined by the Contracting Officer as follows, but without duplication of any amounts agreed upon in accordance with paragraph (d):

(i) With respect to all contract work performed prior to the effective date of the Notice of Termination, the total (without duplication of any items) of—

(A) the cost of such work;

(B) the cost of settling and paying claims arising out of the termination of work under subcontracts or orders as provided in paragraph (b) (v) above, exclusive of the amounts paid or payable on account of supplies or materials delivered or services furnished by the subcontractor prior to the effective date of the Notice of Termination of Work under this contract, which amounts shall be included in the cost on account of which payment is made under (A) above; and

(C) a sum, as profit on (A) above, determined by the Contracting Officer pursuant to 8-303 of the Armed Services Procurement Regulation, in effect as of the date of execution of this contract, to be fair and reasonable; provided, however, that if it appears that the Contractor would have sustained a loss on the entire contract had it been completed, no profit shall be included or allowed under this subdivision (C) and an appropriate adjustment shall be made reducing the amount of the settlement to reflect the indicated rate of loss; and

(ii) the reasonable cost of the preservation and protection of property incurred pursuant to paragraph (b) (ix); and any other reasonable cost incidental to termination of work under this contract, including expense incidental to the determination of the amount due to the Contractor as the result of the termination of work under this contract.

The total sum to be paid to the Contractor under (i) above shall not exceed the total contract price as reduced by the amount of payments otherwise made and as further reduced by the contract price of work not terminated.
Except for normal spoilage, and except to the extent that the Government shall have otherwise expressly assumed the risk of loss, there shall be excluded from the amounts payable to the Contractor under (i) above, the fair value, as determined by the Contracting Officer, of property which is destroyed, lost, stolen, or damaged so as to become undeliverable to the Government, or to a buyer pursuant to paragraph (b) (vii).

(f) Costs claimed, agreed to, or determined pursuant to (c), (d), and (e) hereof shall be in accordance with Section XV of the Armed Services Procurement Regulation as in effect of the date of this contract.

(g) The Contractor shall have the right of appeal, under the clause of this contract entitled "Disputes," from any determination made by the Contracting Officer under paragraph (c) or (e) above, except that if the Contractor has failed to submit his claim within the time provided in paragraph (c) above and has failed to request extension of such time, he shall have no such right of appeal. In any case where the Contracting Officer has made a determination of the amount due under paragraph (c) or (e) above, the Government shall pay to the Contractor the following: (i) if there is no right of appeal hereunder or if no timely appeal has been taken, the amount so determined by the Contracting Officer, or (ii) if an appeal has been taken, the amount finally determined on such appeal.

(h) In arriving at the amount due the Contractor under this clause there shall be deducted (i) all unliquidated advance or other payments on account theretofore made to the Contractor, applicable to the terminated portion of this contract, (ii) any claim which the Government may have against the Contractor in connection with this contract, and (iii) the agreed price for, or the proceeds of sale of, any materials, supplies, or other things acquired by the Contractor or sold, pursuant to the provisions of this clause, and not otherwise recovered by or credited to the Government.

(i) If the termination hereunder be partial, prior to the settlement of the terminated portion of this contract, the Contractor may file with the Contracting Officer a request in writing for an equitable adjustment of the price or prices specified in the contract relating to the continued portion of the contract (the portion not terminated by the Notice of Termination), and such equitable adjustment as may be agreed upon shall be made in such price or prices.

(j) The Government may from time to time, under such terms and conditions as it may prescribe, make partial payments and payments on account against costs incurred by the Contractor in connection with the terminated portion of this contract whenever in the opinion of the Contracting Officer the aggregate of such payments shall be within the amount to which the Contractor will be entitled hereunder. If the total of such payments is in excess of the amount finally agreed or determined to be due under this clause, such excess shall be payable by the Contractor to the Government upon demand, together with interest computed at the rate of 6 percent per annum, for the period from the date such excess payment is received by the Contractor to the date on which such excess is repaid to the Government; provided, however, that no interest shall be charged with respect to any such excess payment attributable to a reduction in the Contractor's claim by reason of retention or other disposition of termination inventory until ten days after the date of such retention or disposition, or such later
date as determined by the Contracting Officer by reason of the circumstances.

(k) Unless otherwise provided for in this contract, or by applicable statute, the Contractor, from the effective date of termination and for a period of three years after final settlement under this contract shall preserve and make available to the Government at all reasonable times at the office of the Contractor but without direct charge to the Government, all his books, records, documents and other evidence bearing on the costs and expenses of the Contractor under this contract and relating to the work terminated hereunder, or, to the extent approved by the Contracting Officer, photographs, microphotographs, or other authentic reproductions thereof. See FPR 1-8.703 for use in civilian contracts.