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WAIVER OF THE DELIVERY SCHEDULE IN GOVERNMENT CONTRACTS— A REVIEW OF THE 1967 BCA DECISIONS

E. K. GUBIN*

INTRODUCTION

The usual Federal Government contract contains a delivery schedule setting out the dates when the goods or services must be delivered or performed. Failure to deliver or perform on time gives the Government the right¹ to terminate the contract for default.

But what happens legally if the Government does not terminate a contract for default immediately after the due date stated in the delivery schedule? Must the contractor continue to perform? Does the Government lose any of its legal rights?

Because all Government regulations² prescribe the type of investigation the Government must undertake prior to declaring a contract in default, it is obvious from a practical sense that rarely can the Government complete its investigation in time to declare a contractor in default the day after a contract delivery date has passed.

The period during which the Government is making its investigation to decide whether or not it will exercise its right to terminate for default is called the "forebearance period." A later section in this article will discuss facts indicating forbearance, and the length of time during which forbearance can exist.

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1. All Government default clauses, e.g., ASPR 8-707, state: "The Government *may* . . . terminate . . . any contract," and all Government regulations, e.g., ASPR 8-602.1, state: ". . . the Government has the *right* . . . to terminate . . ." any contract where the contractor fails to deliver on time. The words "may" and "right" indicate clearly that the issuance of a default notice when a contractor is technically in default is discretionary, not mandatory.

2. ASPR 8-602.3 lists seven factors to be considered by the Government in determining whether or not to terminate a contract otherwise in default. But, BCAs will not review the exercise of Government determination where a contractor is legally in default. R. M. Cantrell & Sons, ASBCA 7680, 1962 BCA ¶ 3320.

Where performance extends beyond the due date of a contract, the Government, as the nondefaulting party, must make a choice between two alternative and inconsistent rights. It may elect either: a) to allow continued performance of the contract; or b) to refuse to go on with the contract.³ An election to permit continued performance under the contract is frequently referred to as a waiver of delivery schedule.⁴

The Government may exercise only one of these two rights. Hence, an election to permit continued performance of the contract would necessarily preclude the Government from exercising its alternative right to stop performance of the contract, i.e. the right to declare the contract in default.

A determination of whether the Government has elected to permit continued performance under the contract must be made through an examination of the particular facts of each case. Because the year 1967 produced more board⁵ cases on waiver than during any previous year, this article, in a later section, will review in detail the 1967 waiver cases to indicate the pattern of facts which must be found before waiver will be held to exist.

CONTINUED PERFORMANCE WITHOUT WAIVER

The concept of waiver should not be confused with the extensions of time traditionally granted by the Government to a contractor, otherwise in default, by means of a bilaterally executed supplemental agreement or contract modification. These time extensions are specifically recognized by Government regulations.⁶ The contractor usually gives the Government some "consideration" for an extension of time granted after he is legally in default or about to become so, even though there is some question as to whether the Government has the authority to

3. 5 WILLISTON ON CONTRACTS ¶ 683 (3rd ed. 1961).

4. Cuneo, *Waiver of the Due Date in Government Contracts*, 43 VA. L. REV. 1, 9 (1957), AFPI 8-601.51 states: "In the event the contractor becomes delinquent under the terms of the contract delivery schedule, or any extension thereof, the Government may be considered to have waived or abandoned the delivery schedule under certain circumstances."

5. There were 12 waiver cases decided in 1967, while only 3 were decided in 1966. Of the 12 cases, the Board found waiver to exist in 7 cases, and in 5 cases held no waiver existed.

6. ASPR 8-602.4 titled *Government Procedure in Lieu of Termination for Default*, permits "the contractor . . . to continue performance of the contract under a revised delivery schedule," when in the best interest of the Government.

extract such consideration.⁷ These extensions of time do not fall into the waiver category because by executing the supplemental agreement, which specifically recognizes that no waiver exists, the parties effectively prevent the existence of facts which might otherwise appear to be a waiver.

Even without the execution of a bilateral agreement, the Government sometimes can prevent the existence of waiver by sending an appropriate notice to the contractor when the delivery date expires,⁸ or even by including a paragraph, specifically stating that no waiver is intended by the actions of the Government in any communication between the parties at a time when waiver might otherwise factually exist.⁹

LENGTH OF FOREBEARANCE PERIOD

The introduction to this article indicated that failure to terminate on the exact delivery date, by itself, is not sufficient to be considered a waiver. The reasoning is that in a practical sense, it is impossible for the Government to issue its termination notice that rapidly, particularly because of the investigation the Government is required to undertake prior to issuing its notice of default.¹⁰

From the decided cases, it would appear that the Government is allowed a reasonable time, or "forebearance" period, after passage of

7. Parkside Clothes, ASBCA 4148, 60-2 BCA ¶ 2760. Even though ASPR contains no wording requiring a contractor to give "consideration" to the Government when a delinquent delivery schedule is extended by agreement between the parties, Defense Procurement Circulator No. 51 (Feb. 3, 1967) clearly states that "reasonable monetary or other consideration will be obtained, if appropriate." (AFPI 8-602.3(i)(b)(2) and 54-3006 as well as NPD 30, 101.5 [3] [a] [1] discuss consideration.)

8. While ASPR does not provide for a letter of this type, AFPI 8-602.3(iii)(b)(2) provides for such letter "in exceptional situations where neither default action nor extension of delivery is appropriate." The sample letter itself is found in AFPI 8-871 (c)(2).

9. The decision in Adec, Inc., ASBCA 12367, 67-2 BCA ¶ 6483, mentions a letter from the Government containing the following paragraph:

Any assistance rendered to the contractor on the contract or acceptance by the Government of delinquent goods or services hereunder will be solely for the purpose of mitigating damages, and is not to be construed as an intention on the part of the Government to condone any delinquency or as a waiver of any rights the Government may have under subject contract.

But a mere disclaimer letter is not of itself binding where other facts in the case show existence of waiver. See *Mavrgy Instrument Corp.*, ASBCA 11644, 67-2 BCA ¶ 6480.

10. *Supra* note 2.

delivery date, during which time the investigation takes place. The period of forbearance is not the same in every case, but the pattern appears to be that the shorter the time frame between accrual of the default and its exercise by the Government, the more likely the issuance of a decision holding forbearance to exist. Thus, periods ranging from one week to three and one-half months have been held to be forbearance, not waiver,¹¹ while periods of three to four months have been held to result in a waiver.¹² The fact that the contractor is continuing work under the contract will also shorten the time of the forbearance period.¹³

The foregoing discussion involves only the mere passage of time during which the Government does nothing. But, what happens if, besides the passage of time, the Government takes some affirmative action? Will such action be construed as indicating waiver, or absence of waiver? The answer depends on the detailed facts of the case.

While it is difficult to place a short label on waiver facts, the following two sections of this article will place a short label on certain selected facts, with the caveat that surrounding circumstances often may change the label. The importance of surrounding circumstances will be brought out clearly in the final sections of this article where the twelve waiver cases decided in 1967 will be discussed in factual detail.

FACTS PROVING WAIVER

The existence of facts proving waiver usually involve Government actions which clearly affirm the Government's apparent view that contract performance should continue after the due date, irrespective of the contractor's act of default and regardless of the passage of the due date. The following Government actions have been held to indicate waiver: acceptance of samples or preproduction units;¹⁴ acceptance of

11. *Atlantic Fish v. United States*, 116 F.Supp. 574 (Ct. Cl. 1953) (8 days); *Campbell v. Hauser Lumber*, 147 Wash. 140, 265 P. 468 (1928) (14 days); *Acme Litho*, ASBCA 2878, 56-2 BCA ¶ 1091 (3½ months); *Speedcon*, ASBCA 2523 (1955) (1 month); *Arndt*, ASBCA 2445 (1955) (2 months); *The Taylor Corp.*, ASBCA 1795 (1954) (3½ months); *Canova Silk*, ASBCA 4327, 58-1 BCA ¶ 1680; *Midwest Engineering*, ASBCA 5390, 1962 BCA ¶ 3640 (56 days).

12. *Sherwood v. Gordon Bros., Inc.*, 116 N.Y.S. 2d 306 (1952); *United Boat*, ASBCA 2452 (1955).

13. *Ace Electronics*, ASBCA 11496, 67-2 BCA ¶ 6456.

14. *Buhl Optical*, ASBCA 1702 (1954); *Aladdin Toy*, ASBCA 1818 (1954); *Nutt Mfg. Co.*, ASBCA 3594, 57-2 BCA ¶ 1480; *Aviators Equipment*, ASBCA 5924, 61-1

deliveries;¹⁵ acceptance inspection;¹⁶ issuance of change orders, substitution of specifications, and/or issuance of supplemental agreements;¹⁷ encouraging the contractor to continue to perform;¹⁸ negotiations concerning proposed contract amendment;¹⁹ and, waiver of preproduction delivery schedule.²⁰

While generally a "do nothing" position of the Government indicates forbearance rather than waiver, there are certain instances where the failure of the Government to take actions required by the contract may indicate the existence of waiver. Typical examples are failure to approve contractor's drawings needed prior to the start of production²¹ and failure to approve contractor's preproduction samples.²²

FACTS PROVING ABSENCE OF WAIVER

Facts proving that waiver does not exist usually involve Government actions which affirm its intent not to waive the delivery schedule. This intent is often established through Government documents or letters accompanying those documents which affirmatively state no waiver exists or is intended through failure to issue a default notice after the delivery date has passed.

The following Government actions have been held to indicate that no waiver is intended: issuance of show cause letter not involving delivery schedule;²³ limited operational tests by Government inspectors at plants;²⁴ acceptance of partial deliveries;²⁵ acceptance of partial

BCA ¶ 2945; Industrial Chamberheat, ASBCA 6128, 61-1 BCA ¶ 2883; Heat Exchangers, Inc., ASBCA 9349, 1964 BCA ¶ 4381.

15. *Star Metal*, ASBCA 2012 (1956); *Speedcon*, ASBCA 2523 (1955); *Roosevelt Paper*, ASBCA 1861 (1954).

16. *Assoc. Aircraft*, ASBCA 7255, 1963 BCA ¶ 3739; *BMC Industries*, ASBCA 9391, 1964 BCA ¶ 4213.

17. *Industrial Lamp*, ASBCA 1825 (1954); 6 *Contr. Cas. Fed.* ¶ 61594; *Kilgore, Inc.*, ASBCA 1616 (1954); *Steel Products*, ASBCA 2605 (1955); *Acme Litho*, ASBCA 2878, 56-2 BCA ¶ 1091.

18. *Goodrich*, ASBCA 2760, 58-1 BCA ¶ 1624.

19. *Superior Fuse*, ASBCA 6585, 61-2 BCA ¶ 3226.

20. *Aviators Equip. Corp.*, ASBCA 5924, 61-1 BCA ¶ 2945; *Heat Exchangers, Inc.*, ASBCA 9349, 1964 BCA ¶ 4381.

21. *Remsel*, ASBCA 5899, 61-1 BCA 2909; *Emerson*, ASBCA 6004, 61-2 BCA ¶ 3248.

22. *Aviators Equipment*, ASBCA 5924, 61-1 BCA ¶ 2945.

23. *M. Ten Bosch*, ASBCA 7470, 1963 BCA ¶ 3696.

24. *Universal Transitor*, ASBCA 5664, 61-1 BCA ¶ 3024.

25. *United States v. Chichester*, 312 F.2d 275 (9th Cir. 1963); *Comp. Gen. Dec. B-150515*, 43 *COMP. GEN.* 1; *Park Tissue Mills*, ASBCA 5769, 1963 BCA 3747.

delivery after show cause letter;²⁶ issuance of ten day notice to bring forth evidence of excusable delay, after earlier waiver;²⁷ signing of formal modification or agreement on revised delivery schedules, or place of manufacture;²⁸ discussions with contractor on progress;²⁹ recommendation of approval for Title II relief;³⁰ failure to answer contractor's request for time extensions;³¹ but under certain circumstances, the failure of the Government to respond to a request for a time extension has been held to be a waiver.³²

The last two examples in the above paragraph, which appear to be contrary if basic action only is viewed, indicate clearly why the facts of each individual case must be reviewed in complete detail before accepting any label for the decision in that case. It is for this reason that the balance of this article will review in detail the specific facts of the twelve waiver cases decided by boards of contract appeals in 1967.

FACTUAL DISCUSSION OF 1967 BCA CASES SUPPORTING EXISTENCE OF WAIVER

Forebearance period of three months is unreasonable, where Government induces continued performance.

Consideration is given in *Ace Electronics Associates, Inc.*³³ to the

26. All-Design Screw, ASBCA 6590, 1962 BCA ¶ 3592.

27. Engineering Enterprises, ASBCA 5527, 60-1 BCA ¶ 2647.

28. Zielinski Co., ASBCA 5848, 60-1 BCA 2642; Skyway Clothing, ASBCA 3244, 56-2 BCA ¶ 1120.

29. Sanitary Sleep, ASBCA 5846, 60-1 BCA ¶ 2641.

30. *United States v. Chichester*, 312 F.2d 275 (9th Cir. 1963).

31. Midwest Engineering, ASBCA 5390, 1962 BCA ¶ 3460.

32. Jo-Bar Mfg. Co., ASBCA 11391, 66-2 BCA ¶ 5949.

33. *Ace Electronics*, ASBCA 11496, 67-2 BCA ¶ 6456. In addition to its discussion of forbearance, the decision contains the citations of the leading pre-1967 cases on waiver, as well as an excellent summary of the law, in the following excerpt:

The rules and legal principles concerning waiver of delivery schedules, as contrasted with mere "forbearance" to terminate, have been the subject of numerous decisions of this Board. Representative of these are the appeals of Nutt Manufacturing Company, ASBCA No. 3594, 57-2 BCA ¶ 1480; Ross Meehan Foundries, ASBCA No. 4823, 59-1 BCA ¶ 2113; Harvey-Wells Electronics, Inc., ASBCA Nos. 4987 and 5033, 59-1 BCA ¶ 2185; Clad International Corporation, ASBCA No. 4813, 59-2 BCA ¶ 2385; Sanitary Sleep Products Corp., ASBCA No. 5846, 60-1 BCA ¶ 2641; Lumen, Inc., ASBCA No. 6431, 61-2 BCA ¶ 3210; L. W. Foster Sportswear Co., Inc., ASBCA Nos. 5754, et seq., 62 BCA ¶ 3364; Instruments for Industry, Inc., ASBCA No. 10543, 65-2 BCA ¶ 5097; Therm-Air Mfg. Co., Inc., ASBCA No. 11047, 66-1 BCA ¶ 5672; Systems Research and Development Co., ASBCA No. 10952, 66-2 BCA ¶ 5888; and other cases cited therein. A comprehensive

doctrine of forbearance in Government contracts. The case involved a contract for potentiometers, for which First Article tests reports were due on Nov. 18, 1965. Failing to submit them on that date, Ace Electronics was requested by the Government on Nov. 29, 1965, to suggest a firm and realistic delivery schedule with which the company definitely could conform. Ace Electronics replied that the test reports would be completed by Dec. 28, 1965. On Dec. 7, 1965, the Government sent a ten day show cause letter, to which the contractor replied on Dec. 13, 1965, stating in part that the test reports would be submitted during the week of Jan. 4, 1966. Without any further correspondence or communication occurring between the parties, the Government on Feb. 18, 1966, terminated the contract for default. Three days after receipt of the notice for default termination, Ace Electronics dispatched the required test reports to the Government. All testing had been performed under the surveillance and in the presence of Government inspectors.

According to the decision in this case, upon a contractor's failure to

discussion of this problem is contained in Cuneo, *Waiver of the Due Date in Government Contracts*, 43 Va. L.R. 1 (1957). See also Department of the Army Pamphlet 27-153, 1961 Ed., *Procurement Law*, pp 374-375.

Based on these sources, it appears well settled that since a contract remains in force after a breach unless the non-defaulting party manifests an election to terminate it, upon a failure to perform on or before the contract due date, the Government must within a reasonable time after such breach elect whether to terminate for such default or to permit continuance of performance. After breach the contracting officer is entitled to take sufficient time to determine what action will be in the best interest of the Government. At any time during this interval of time, known as a period of "forbearance," the contracting officer may elect to terminate for default without the risk of waiving the original delivery schedule. What will constitute a reasonable period of "forbearance" depends upon the circumstances of the particular case. Thus, if the contractor is vigorously and actively proceeding with efforts to perform, a reasonable time for such an election would be shorter than where the contractor is no longer making any substantial effort to cure his default and in consequence not incurring material additional expense or obligations. Mere silence and inaction without more on the part of the Government will not constitute an election to permit continued performance. However, where the Government, with knowledge of the circumstances, through the conduct and actions of its agents, encourages and induces the contractor to continue with performance and to incur further expense in connection with such performance, such conduct has been held to manifest an election to extend the time originally specified for performance. Under such circumstances the contract may no longer be terminated for failure to deliver by the previous due date.

perform on the due date established by the contract, the Government must decide whether it will terminate for default or permit continued performance of the contract. The Government need not choose its course of action immediately upon the contractor's default, but is entitled to a period of time, known as a period of forbearance, in which it may decide what conduct would be in the Government's best interests. During this interval, the Government may elect to terminate for default without running the risk of waiving the original delivery schedule. However, the Government is allotted only a reasonable period of time in which to make its decision, and what constitutes a reasonable period of forbearance depends upon the circumstances of the particular case. Thus, if the Government has reason to know that the contractor is proceeding with its efforts to perform and thereby incurring costs, a reasonable period of forbearance will be shorter than in a case where the contractor is doing nothing in reference to the contract.

Mere inaction and silence on the part of the Government can not be deemed an election to permit continued performance. In order for Government actions to be considered a manifestation of its intention to permit continued performance, the Government must through its conduct encourage and induce the contractor to continue working and incurring costs in relation to the contract. Under such circumstances, the time originally specified for performance is held to have been extended and the contract cannot be terminated for failure to deliver by the previous due date. Once the Government has waived the original contract schedule, there must either be an agreement with the contractor to establish a new schedule, or the contracting officer may unilaterally establish a due date if notice of this date is given to the contractor and if the date is reasonable under the circumstances of the case. However, notice after waiver, setting a reasonable time for performance need not be given in the following circumstances: 1) where the defaulting party abandons the contract; 2) where performance of the contract as it was contemplated has become impossible; and 3) where both parties have treated the contract as terminated. Moreover, those cases holding that all the Government must do after waiver is wait a reasonable time and then issue default termination, without setting a new due date, are all cases where the contractor was not making any material effort to perform after expiration of the due date.

Under the circumstances of the *Ace Electronics* case, it was found that during the interval after receipt by the Government of the con-

tractor's letter of Dec. 13, and prior to the receipt by the contractor of the Government notice of default termination, a reasonable period of forbearance had expired. The Government was held to have induced Ace Electronics to continue tests of the potentiometers, thereby manifesting a willingness to permit continued performance of the contract and waiving the original delivery schedule. Since the Government neither agreed to a new delivery schedule, nor gave Ace Electronics notice of a new schedule setting a reasonable time for performance, the termination for default was deemed premature.

Forebearance period of two and one-half months is unreasonable, where Government aware of contractor's continued performance.

The question of what constitutes a reasonable period of forbearance is the main concern in *Maurey Instrument Corporation*.³⁴ There, after several time extensions had been granted by the Government in a contract for potentiometers, Feb. 1, 1966 was established as the delivery date. Since Maurey Instrument delivered nothing on that date, the Government immediately issued a ten day show cause letter, which contained a statement to the effect that any assistance rendered to the corporation should not be construed as a waiver of any Government rights under the contract. Maurey Instrument replied on Feb. 4, explaining that although every effort was being made to complete the contract, difficulty with a vendor was causing the delay. After further communication from the contractor and a meeting at which Maurey Instrument and the Government discussed the corporation's problems and a possible new delivery schedule, the Government, without prior notice, on April 15, 1966, terminated the contract for default.

It was found that since no deliveries had been made on or before the due date specified in the contract, it was necessary for the Government to decide whether to terminate the contract for default or to allow Maurey Instrument to continue with performance of the contract. The Government was further held to be entitled to a reasonable time in which to make that decision.

Upon receipt of the contractor's Feb. 4 letter and from contacts with the contractor after that date, the Government became aware of the fact that Maurey Instrument had not abandoned the contract and was spending time and money in an effort to perform. The cause of delay and the probable time when Maurey Instrument could begin delivery

34. *Maurey Instrument Corp.*, ASBCA 11644, 67-2 BCA ¶ 6480.

were also known to the Government. Given these factors, it was decided that under such circumstances, "it should not have taken more than a few days to terminate the contract for default if that is what the contracting officer was going to do." Hence, the Government's delay from Feb. 7 to April 15, 1966, was considered unreasonable and unjustifiable in light of the particular facts of the case. The Government was deemed to have elected to permit continued performance beyond the original contract due date, and hence, could not terminate for default for the contractor's failure to deliver on or before that date.

Government request for a proposed revised delivery schedule waives original schedule.

The *Wilkinson Manufacturing Company* case³⁵ involved the effect of a Government request that the contractor submit a proposed delivery schedule differing from that required by the contract. The contract, as modified in March, required a preproduction sample to be delivered in ninety days with delivery installments to commence sixty days after approval of the sample. The sample was approved Nov. 19 (which would have required first production deliveries in January), but on Nov. 20, Wilkinson requested a meeting "for the purpose of discussing and revising the delivery schedule." The meeting was held on Dec. 16, with disputed testimony as to whether the Government or Wilkinson first presented the details of a new schedule, and whether the Government or Wilkinson first used the words "proposed realistic delivery schedule."

The day after this meeting, Dec. 17, the Government wrote a letter requesting "a realistic proposed delivery schedule," and Wilkinson, on Dec. 24, submitted the schedule which Wilkinson alleged had been first presented by the Government at the Dec. 16 meeting, calling for first production deliveries in March. The Government rejected that schedule, and instead insisted Wilkinson adhere to the schedule set out in the contract modification, i.e., first production deliveries in January. On Feb. 11, the Government terminated the contract for failure to deliver on time.

The conclusion reached by the Board was that even though no new delivery schedule had been established or agreed upon, the original schedule, as it existed in the modification, had been waived by the

35. *Wilkinson Mfg. Co.*, ASBCA 9860, 67-1 BCA ¶ 6165.

request for the new schedule and thus the Government was obligated to establish a new and reasonable schedule prior to any default action.

Waiver of sample and test report delivery waives production delivery schedule.

In *Delta Semiconductors, Inc.*,³⁶ the effect of Government waiver of a sample and test report delivery schedule was considered. In a contract for semiconductor devices, requiring submission of samples and test reports by Aug. 22 and deliveries by Nov. 7, sample and test reports were submitted to the Government on Aug. 22. These samples and reports were rejected as inadequate, with additional clarification required. In reply to Delta's offer to submit a new test report by Nov. 30, the Government on Nov. 15 wrote that it would "forebear further action pending receipt . . . no later than 5 December 1966, of the test report. . . ." However, no contract amendment was ever issued to change the delivery of production items. The test report was submitted by the contractor two days late (on Dec. 7) and was returned unopened, with the Government terminating the contract for default on Dec. 30.

It was held that the Government letter agreeing to forbear further action pending receipt of the test report by Dec. 5, waived the contract production delivery schedule, apparently on the theory that the original long lead time for completion of production deliveries after submission of samples and reports (Aug. 22 to Nov. 7, i.e. seventy-five days) indicated that similar lead time for production deliveries after Dec. 5 should have been allowed. In the absence of a contract amendment establishing a new, realistic production delivery schedule, the Government was bound to follow a reasonable course of action with regard to delivery of contract items. The Government's refusal to accept the test report because it was two days late and its termination of the contract for default three weeks after delivery of the late report were considered to be unreasonable under the circumstances.

Negotiations to modify specifications waives existing delivery schedule.

Consideration was given in *Monitor Plastics Company*³⁷ to the effect which negotiations to modify specifications have upon the delivery

36. *Delta Semiconductors, Inc.*, ASBCA 12285, 67-1 BCA ¶ 6357.

37. *Monitor Plastics Co.*, ASBCA 11187, 67-2 BCA 6408.

schedule of a contract. Monitor failed to deliver four sonar dome test panels on the specified delivery dates in March and April. After deliveries were due, the Government decided to allow additional time for performance and entered into negotiations with Monitor to modify the original contract specifications, without ever conceding that these specifications were defective. On May 27, the Government submitted a supplemental agreement containing changes in specifications suggested by Monitor, but also containing one change never discussed between the parties. On June 2, Monitor requested deletion of the undiscussed requirement and received no response in spite of numerous requests for a decision. Without answering the request, the Government, on Oct. 26, terminated the contract for default on the basis of the original delivery schedule.

It was held that even though no new delivery schedule was discussed or agreed upon, the original delivery schedule was waived in view of the fact that the Government agreed to grant Monitor additional time and then entered into negotiations to modify the contract specifications. Stress was placed upon the fact that the Government was entitled to terminate the contract for default when the contractor failed to deliver on time, but this right was abrogated by the Government's actions. In addition, since no new delivery schedule was ever established, the contractor was to be granted a reasonable time in which to perform. It was held that the new period of performance was tolled by the negotiations which were never concluded because the Government failed to resolve the dispute over the modifications of the specifications.

Negotiating new work method and allowing contractor to proceed according to that method waives original delivery schedule.

The *Lemesany Roofing and Insulation Company* case³⁸ discussed the effect of allowing a contractor to continue performance after the due date in the contract has passed without the establishment of a new due date. Lemesany contracted to construct a roof, with the completion date originally set for Jan. 15. Work on the project began late and proceeded slowly because of poor weather conditions and material supply difficulties. On Jan. 9, the Government sent a show cause letter to Lemesany, allowing it ten days to explain the cause of delay and the measures it would take to correct the situation. Lemesany replied with a suggested procedure for completing the roof. On Jan. 14, all work

38. *Lemesany Roofing and Insulation Co.*, IBCA 533-12-65, 67-2 BCA ¶ 6413.

on the project was halted and during the remainder of January and most of February, meetings were held between the parties to decide upon the method for completion of the contract. Agreement was reached on such method with the Government outlining this in a letter on Feb. 25. Lemesany accepted this method by letter on Feb. 29. Work commenced again under the new method on March 16. However, the contractor's progress was constantly hampered by bad weather. On April 3, the Government terminated the contract for default.

By choosing to allow Lemesany to proceed beyond the original due date of the contract under a new method of work, the Government was deemed to have waived adherence to that date. (Outlined in the decision were three possible methods for establishing a new completion date after the Government has waived the original one.) Thereafter, the Government could only terminate after establishing a new date (which it did not do on Feb. 25), or waiting a reasonable time for performance, which latter action is "fraught with all of the dangers that accompany ambiguity and uncertainty."

Government failure to accept or reject contractor's proposed revised delivery schedule and consideration of change in specifications suggested by contractor constitute waiver.

In *Hydro-Electronics Corporation*,³⁹ just after the award on May 20, 1966, of the contract in question, the contractor went into bankruptcy. It had at that time several Government contracts, most of which were in varying stages of delinquency. At a meeting with the Government in August, the contracts were sorted to decide which should have priority of performance and to establish tentative revised delivery schedules for them. To protect Government interests in the subject contract, which was not yet delinquent (the contract delivery due date was Sept. 20), a cure notice was sent with respect to it on Aug. 9, 1966. Hydro-Electronics responded on Aug. 23 with a proposed delivery schedule, which called for the first delivery on Oct. 24, 1966, and the final delivery on Dec. 5, 1966. At no time was the contractor advised whether this proposed delivery schedule would be granted. However, due to problems with suppliers and difficulties at its plant, Hydro-Electronics met none of the due dates in its proposed schedule. On Nov. 16, the Government acknowledged and considered a recommendation made by Hydro-Electronics for a cost-saving change in specifications. Further-

39. *Hydro-Electronics Corp.*, ABSCA 12199, 67-2 BCA ¶ 6651.

more, during November, the contractor, with the knowledge of the Government, began substantial work on the contract. On Dec. 14, 1966, the Government issued a show cause letter, to which Hydro-Electronics replied on Dec. 20 proposing a new delivery date of March 6, 1967. This proposal was never answered, but work on the contract continued until a termination for default was issued on Jan. 13, 1967.

Under these circumstances, it was found that the Government agreed "tacitly" to extend the Sept. 20 delivery date to a date later to be agreed upon. In addition, the first two dates of the contractor's Aug. 23 proposed delivery schedule were admittedly waived by the Government. Hence, it was held that before the right to terminate for default could be reinstated, the Government was required to fix a new and reasonable delivery date. Since no such date was established, the termination for default was improper. Furthermore, the Government's conduct, especially in entertaining Hydro-Electronics' recommendation for a change in specifications, induced the contractor to continue with performance and expenditures in an effort to complete the contract. Under these circumstances, it was found that a reasonable delivery date had not arrived at the time of the termination for default.

FACTUAL DISCUSSION OF 1967 BCA CASES DENYING EXISTENCE OF WAIVER

A waiver of delivery schedule accompanied by the establishment of a new schedule does not result in an indefinite waiver even though the new schedule is not formalized by the issuance of a change order.

Demonstration after issuance of default notice does not waive earlier default determination, where affirmative Government actions inducing continued performance by the contractor are not present.

*Decision Systems, Incorporated*⁴⁰ offers authority for the proposition that no indefinite waiver of the contract due date occurs when the parties agree to a definite extension of delivery date, even though such extension is not granted through the issuance of a formal order. Further, in order for the Government to be regarded as having waived a termination for default by its conduct *after* the date of termination, it must take affirmative action which indicates that the contractor is to proceed with performance of the contract.

In this case, the contractor was required to deliver three card reader

40. *Decision Systems, Inc., NASA BCA 94, 67-1 BCA ¶ 6097.*

memory storage systems. On May 18, 1964, Decision Systems informed the Government that because of design problems, it could not meet the original delivery schedule and requested that the due date be extended to July 9, 1964. In its reply letter of June 1, the Government acquiesced in the extension of time, stating it would withhold default action until July 9, but that failure to deliver at that time would result in a termination for default. Deliveries were not forthcoming on July 9, and the contract was terminated for default on July 15, 1968. After the date, Decision Systems in numerous communications with the Government continued to seek reinstatement of the contract, but its requests were constantly denied, as evidenced by an Aug. 1 Government telegram, which stated that the default action was being continued. Still seeking reinstatement of the contract, Decision Systems held a demonstration on Sept. 21, which was attended, at the corporation's request, by Government representatives.

The Board held that the June 1 Government letter did not extend the time for performance indefinitely. The contractor's argument that lack of a formal order extending the delivery date constituted an indefinite waiver of the original contract due date was rejected explicitly. Since the Government may, without waiving the delivery schedule altogether, withhold default action for a reasonable time in order to enable the contractor to deliver, the conclusion was that the June 1 letter did not constitute an indefinite waiver of the delivery date, but simply granted an extension of time until July 9, as Decision Systems had requested.

Further, the termination for default was not deemed to have been waived by Government actions *subsequent* to the termination date of July 15. During that time, Government communications with Decision Systems, which communications were exemplified by the Aug. 1 telegram, were not considered to be an inducement to continue performance of the contract, since they merely affirmed the contracting officer's July 15 decision.

In addition, because there was no evidence that the Government representatives attending the Sept. 21 demonstration conducted themselves in such a manner as to indicate that Decision Systems was no longer in default, attendance of the demonstration could not be regarded as a waiver of the termination for default.

Waiver of first portion of installment delivery contract can be terminated by a new show cause letter allowing a reasonable time for delivery of entire contract.

In *Utopia Precision Machine Service*,⁴¹ the doctrine of waiver and later termination of such waiver was viewed in relation to an installment contract, where a series of four show cause letters had been issued at each of the contractor's failures to deliver on time. The subject contract called for the fabrication and delivery of support tubes in installments due 60, 90, 120, 150 and 180 days after award. Upon the contractor's failure to meet the first scheduled delivery date of Nov. 8, 1964, the Government issued its show cause letter of Dec. 9. Utopia's reply cited machine breakdown and difficulties encountered by subcontractors as the cause of delay. When there were still no deliveries forthcoming, on Feb. 23, the Government issued a second show cause letter, to which Utopia replied on March 2, 1965, advising that difficulty encountered by yet another subcontractor was the cause of delay. In response to the third show cause letter of April 15, 1965, the contractor again informed the Government by letter of April 23, 1965, of problems which were hampering progress of the contract. The Government issued on July 16 its fourth and final show cause letter, to which no reply was ever made. The contract was terminated for default on Aug. 13, 1965.

The Board stated that "the Government at some point and no later than the second show cause letter dated 23 February 1965 chose not to hold the contractor to the delivery schedule as established by the contract. . . ." However, the effect of this waiver was deemed terminated by April 15, 1965 when the Government again threatened default despite the excuses offered by Utopia for failure to deliver. Thereafter, the contractor was required to perform within a reasonable time. The time between April 15 and the date of termination on Aug. 13, a period of four months, was held to be sufficient for a capable contractor to commence deliveries, especially since that period constituted double the lead time provided for in the contract. Hence, the termination for default under these circumstances was considered proper.

Although not stressed in the opinion, the facts indicate that Utopia did little under the contract, and actually no further work was done even prior to the date of the first show cause letter, except to subcon-

41. *Utopia Precision Machine Service*, ASBCA 11177, 67-1 BCA ¶ 6100.

tract that work to another contractor who was attempting to perform. The failure to perform by Utopia and its subcontractor was held to result "from their own inadequacies."

Encouraging contractor's continued performance and discussions concerning performance problems are not sufficient to constitute waiver, especially where there is no production, no delivery and no evidence of any significant additional expense incurred after the initial date of delinquency.

*Allied Paint Manufacturing Company, Inc.*⁴² advanced the proposition that the Government must act affirmatively to set aside a previous delivery schedule before waiver can exist. Encouraging a contractor to do his best and negotiations *re* inspections are not such acts. Allied Paint entered into a requirements contract on July 7, 1964, to supply paint to GSA, the purchase orders under the contract having due dates ranging from Oct., 1964, to Feb., 1965. After delivery of a number of orders, the contractor encountered inspection problems, etc. Conferences concerning these problems were held with GSA personnel over a period ending in Jan., 1965. At these meetings, the Government became cognizant of the fact that Allied Paint was experiencing difficulties, and the possibility of terminating the purchase orders without liability was investigated. No indication was ever given to the contractor by the Government that the orders in dispute were to be terminated for default, until the issuance of the termination for default notice on Feb. 10, 1965.

According to the decision, there was lacking in this case any evidence that GSA ever engaged in conduct which affirmatively set aside the established delivery dates for the disputed orders. Hence, the fact that Allied Paint "was seeking relief and that GSA discussed many times the possibility of affording such relief, does not in itself amount to a waiver of the right to call for delivery at the stipulated times," nor was the Government's encouragement of Allied Paint to do the best it could sufficient to amount to an affirmative action equivalent to a waiver.

Consideration was given in the decision to previous cases where waiver was found to exist. *Lumen*⁴³ was held to differ from the *Allied Paint* situation because in *Lumen* there was an express written waiver

42. *Allied Paint Mfg. Co., Inc.*, GSBCA 1488, 67-1 BCA ¶ 6387.

43. *Lumen, Inc.*, ASBCA 6431, 61-2 BCA ¶ 3210.

of the original delivery schedule, while the instant case provided no example of any similar conduct to establish a sufficiency of acts amounting to waiver. Also, *Foster Sportswear*⁴⁴ was considered inapplicable on the basis that *Foster* concerned the reasonableness of a new delivery schedule, established after waiver, which was not involved in *Allied Paint*.

In addition, the decision placed a great deal of emphasis on the fact that Allied Paint did nothing with respect to the terminated orders, except try to obtain manufacturing ingredients, and that no evidence of production, delivery or additional expense, incurred after the initial date of delinquency, existed. Cited with approval was Comp. Gen. Dec. B-150515, 1 July 1963,⁴⁵ holding that a contractor's actions in attempted continued production, including expenditure of funds, must be coupled with affirmative Government action to encourage continued performance, before waiver results.

Forebearance period of two months, after show cause letter, is not waiver, especially where Government failure to act does not cause contractor's additional expenses.

*Mark Associates, Inc.*⁴⁶ concerned the question of what constituted a reasonable time after the delivery date expired (forebearance period) for the Government to decide whether or not to terminate a contract. In a contract, awarded March 28, 1966, for reproducer coils, installment delivery was to begin on June 24, 1966, and end on or before Aug. 24, 1966. No communication had transpired between the parties during

44. L. W. Foster Sportswear Co., ASBCA 5754, 62 BCA ¶ 3364.

45. 43 COMP. GEN. 1. This decision involved an attempt on the part of the contractor to have GAO set aside an earlier decision by ASBCA in Seaview Electric Co., ASBCA 7189, 1962 BCA ¶ 3331, which held no waiver existed in spite of the expenditure of funds by the contractor after the delivery due date. Apparently, the contractor submitted evidence of waiver to GAO which had not been previously submitted to the Board because the GAO decision stated:

Evidence has been furnished us to the effect that the contracting officer's representative urged Seaview on many occasions during December 1960 and early January 1961 to expedite delivery of the several small initial shipments which were made after November 29, 1960. We believe this evidence has a very material bearing on the question whether the Government led Seaview to believe its default had been 'waived.' However, none of this evidence was presented to the Board of Contract Appeals. In the light of the decision of the Supreme Court in *United States v. Bianchi*, decided June 3, 1963, we believe our review of the Board's decision must be limited to the record before the Board.

46. *Mark Associates, Inc.*, ASBCA 12346, 67-2 BCA ¶ 6459.

the period from March 28 (date of contract award) until Nov. 25. Since no deliveries had been made by Nov. 25, 1966, on that date, the Government forwarded a ten day show cause letter to Mark Associates. In the contractor's reply of Dec. 6, the delay was attributed to difficulties encountered in obtaining component parts, but the promise was made to begin deliveries on Dec. 16. Neither further communication nor any delivery of units took place, with the Government terminating the contract for default on Feb. 9.

It was found that Mark Associates' failure to deliver within the extended time granted it, conferred upon the Government the right to terminate the contract for default. However, the Government was entitled to a reasonable time in which to decide whether or not it would terminate. The Government was found to have acted in a timely fashion and hence the termination for default was deemed proper. There was no requirement for the Government to act sooner, since there existed no proof that Government failure to act occasioned the contractor's additional expenses, nor that the Government was aware of any such expenses. Further, according to the decision, no duty rested upon the Government to communicate with Mark Associates prior to terminating the contract for default and failure to do so can not render the termination for default improper.

Regular visits of Government industrial specialist to contractor's plant after issuance of show cause letter is not waiver.

The issue in *Adec, Inc.*⁴⁷ was whether continued regular visits to a plant by a Government industrial specialist after issuance of a show cause letter constituted a waiver of the delivery schedule. Here a contract to furnish loudspeakers provided for delivery in four installments commencing on Dec. 3, and ending on March 3, 1967. The contractor failed to deliver the first increment on Dec. 3, and on Dec. 16, the Government sent a show cause letter, which contained a statement to the effect that any assistance rendered Adec should not be construed as a waiver of any Government rights under the contract. In its reply of Dec. 29, 1966, Adec explained the reasons for its delinquency and proposed a revised monthly delivery schedule commencing April 30. It continued work on the contract in an effort to deliver in accordance with this proposed revised delivery schedule. However, by letter of Jan. 10, 1967, the Government rejected the contractor's proposed revised deliv-

47. *Adec, Inc.*, ASBCA 12367, 67-2 BCA ¶ 6483.

ery schedule. Adec's response of Jan. 18 requested that default action be withheld pending presentation of data to establish excusable delay and suggested that delivery might be made earlier than April 30.

After the issuance of the Dec. 16 show cause letter, a Government industrial specialist visited the contractor's plant every three weeks, as he had done prior to the issuance of the show cause letter. During these visits, he performed his regular job of checking on delivery progress and trying to assist by expediting delivery of needed items, as he always had done in the past, even on other contracts. The Government terminated the contract for default on March 10, 1967, seven days after expiration of the last delivery date originally established in the contract.

The Board did not cite or attempt to distinguish earlier ASBCA decisions holding that acceptance, inspection or encouraging contractor to continue performance⁴⁸ waives the delivery schedule, so presumably the Board believed that inasmuch as the Government industrial specialist was performing merely his normal duties when he visited Adec's plant after the show cause letter had been issued, the continuation of his normal activities did not waive the original delivery schedule. The Board also stated there was no showing that Adec's efforts to deliver after receipt of the show cause letter were in reliance upon Government actions. Hence, the termination for default was deemed proper.

SUMMARY

The doctrine of election to permit continued performance under a contract after the delivery date has passed is more popularly called waiver of the delivery schedule in the field of Government contract law. It is not a new doctrine, but the upsurge of BCA cases in 1967, resulting in seven decisions in favor of waiver and five decisions against waiver, indicated that a review of these cases was appropriate to see if "anything new has been added" to the waiver doctrine.

Prior to 1967, the emphasis in Board decisions appeared to be on *Government actions* indicating encouragement for continued performance as distinguished from mere acts of forbearance. The 1967 cases, while continuing to stress the need for existence of affirmative *Government actions* seem to place a little more emphasis on the existence of the *contractor's actions* indicating continuing efforts towards performance in reliance on the Government acts of waiver. These contractor actions include purchase of additional tooling or materials, continued

48. *Supra* notes 16, 18.

production, partial delivery, or any similar action which proves the contractor suffered financial detriment by relying on the Government actions.

While the pre-1967 cases often mentioned detriment to the contractor as constituting a portion of the waiver picture, the facts of such detriment were not presented in the same detail as found in the 1967 cases. Accordingly, any *capsulized* 1967 definition of waiver would be no different than the pre-1967 definition and would include the requirement that affirmative Government acts of waiver must be coupled with detriment to the contractor, resulting from such affirmative Government acts, in order for waiver of delivery schedule to exist.

The foregoing definition would explain what otherwise might appear to be inconsistencies in the end result of three 1967 cases involving forbearance. A period of two and one half months and a period of three months were both held unreasonable and waiver was held to exist where the contractor had expended funds during that period, whereas a forbearance period of two months was held reasonable where the contractor had not expended funds during that period.

While labels are difficult to affix, especially on waiver cases, the following affirmative Government actions indicating waiver were found in 1967: request for proposed delivery schedule; failure to promptly accept or reject proposed delivery schedule; negotiations to modify specifications, and even consideration by the Government of changes in specifications; negotiation and adoption of a new work method; and waiver of schedules involving preproduction samples and test reports.

Facts held not to constitute waiver in 1967 included: existence of waiver plus new and reasonable schedule for delivery thereafter; waiver of first installment portion, plus allowance of reasonable time for delivery thereafter; encouraging continued performance without production or detriment; traditional plant visits of Government industrial specialists; and demonstration of equipment after issuance of default notice.

Because most board decisions involve sifting through the tangled and often disputed web of facts presented both by the Government and the contractor, the board member often must issue what could be called a jury verdict as to the facts. During such sifting, if there appears to exist a pattern showing Government actions which could be construed as an election to permit the contractor to continue to perform, plus actions on the part of the contractor indicating financial

detriment during such continued performance, a board will usually hold that a waiver of delivery schedule has come into existence.

After waiver the Government must send notice to the contractor establishing a definite time for performance thereafter before any new default notice can be issued, and such time must be reasonable, taking "into consideration the situation in which the contractor is at the time of such notice."⁴⁹

Therefore it would appear that a contractor's lawyer in arguing a waiver case before a board should make certain that complete facts be presented showing affirmative acts of waiver on the part of the Government as well as detriment to the contractor resulting from such acts. In defending a claim of waiver before a board, the Government lawyer also must present precise facts proving the non-existence of affirmative acts of waiver mentioned in this article, and negating any detriment to the contractor caused by such acts.

49. *Ace Electronics, ASBCA 11496, 67-2 BCA ¶ 6456*, explained why certain earlier ASCBA decisions approved of default after waiver even though the Government did not physically establish and give notice of a new delivery date but merely waited a reasonable time before issuing the default notice. In reviewing these earlier cases, the Board in *Ace* noted that in the earlier cases "... there was no evidence of any material efforts on the part of the contractor to continue with performance, in that the contractor in fact incurred no expense in connection with such performance." The Board then stated:

It is well established that notice after waiver, setting a reasonable time for performance, need not be given where the defaulting party disaffirms or abandons the contract or where performance of the contract as contemplated is no longer possible or the contract has been treated by the parties as terminated. Where the choice of an alternative right by one entitled to it is not followed by action of the other based on justifiable reliance so that the situation of the parties has not materially changed so as to make a new choice unfairly prejudicial, notice need not be given.

FPR 1-8.602-3(a) specifically requires the Government to send a notice setting a new date for delivery, after waiver exists. However, ASPR is silent on the question of notice after waiver.