

Section 15: Terminations

Terminations

Objectives:

1. Distinguish between a termination for convenience and a termination for default.
2. State the consequences of an improper termination for default.

Success isn't permanent and failure isn't fatal

Mike Ditka



Terminations for Convenience (T4C)

- An administrative action by the contracting officer to terminate a contract for which the government no longer needs the goods or services.
- Contractor may not appeal T4C unless the decision is “arbitrary, capricious, or made in bad faith.”
- Contractor may appeal costs and consequences.



Section 15: Terminations



When Can You T4C?



T4C Only When You No Longer Need Goods or Services:

Examples:



1. **Drought**
2. **No Funding**
3. **Technological Advances**



After Notified of T4C

Contractor Must:



1. **Stop Work**
2. **No Further Subcontracts - Terminate Existing Subcontracts**
3. **Transfer Title to Government**
4. **Complete Work Not Terminated**
5. **Protect Government Goods or Property**



Section 15: Terminations



Costs Associated With T4C

When the Government chooses to T4C, it must pay:

- 1) all expenses of the contractor incurred due to the termination
- 2) all costs incurred by the contractor prior to the T4C + the contractor's profit
- 3) all costs incurred by the contractor for the materials on site. No profit is paid for these materials.
- 4) all costs incurred by the contractor after T4C. No profit is paid on these costs.



Terminations for Default (T4D)

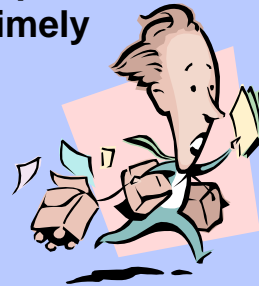
- An administrative action that the contracting officer may, but need not take, when the contractor fails to fully perform in accordance with the terms of the contract.
- Unlike T4C, Contractor may appeal.



Section 15: Terminations

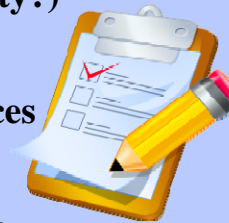
Common Ways for a Contractor to Default

- **Unexcused failure by the contractor to make delivery on time as contract requires; or**
- **Failure to proceed with work or any part of it with the diligence that will ensure timely completion**



Things to Consider Before T4D

1. **Terms of Contract (Ambiguities, Impossibility?)**
2. **Reasons for Contractor's Default**
3. **Availability of Alternative Supplies or Services**
4. **Urgency of Need of Supplies or Services**
5. **Impact on Government Acquisition Program**
6. **Ability of Contractor to Make Progress Payments and Advance Payments; and Liquidate Guaranteed Loans**
7. **Any Other Reason**



Section 15: Terminations

Cure Notices



A cure notice is

- _____ a letter sent from the Contracting Officer to the Contractor
- _____ describing the contractor's failure
- _____ providing a 10 day period for the contractor to "cure the failure."

Cure notices are required whenever the Contracting Officer alleges that the contractor

- o fails to make progress as to endanger performance of the contract.
- o Although not generally required for construction contracts, USACE recommends that cure notices be issued before proceeding to T4D a construction contract.

Cure Notices Generally Not Required



Termination of a contract:

- For failure to timely deliver goods
- Pursuant to an independent contract clause not requiring notice (ex. false certification, debarment)
- Anticipatory Repudiation (AP): Contractor's clear refusal to perform, or an absolute clear expression of an inability to perform the contract. If a contractor's inability to perform may be overcome and there is willingness to perform, there is no AP.
- Construction Contracts (BUT, providing a cure notice is often recommended)



Section 15: Terminations

Sample Language of Cure Notice

You are notified that the Government considers your _____ [*specify the contractor's failure or failures*] a condition that is endangering performance of the contract. Therefore, unless this condition is cured within 10 days after receipt of this notice [*or insert any longer time that the Contracting Officer may consider reasonably necessary*], the Government may terminate for default under the terms and conditions of the _____ [*insert clause title*] clause of this contract.

Source: FAR 49.607

Show Cause Notice

If a T4D appears appropriate, then the Contracting Officer should, if practicable, send the Contractor a Show Cause notice.

A Show Cause Notice:

_____ **Calls the contractor's attention to its contractual liabilities if the contract results in T4D**

_____ **Requests the contractor SHOW CAUSE why the contract should not result in T4D**

_____ **States that the failure of the contractor to present an explanation may be taken as an admission that no valid explanation exists.**



Section 15: Terminations

Sample Show Cause Language

Since you have failed to ____ [*insert “perform Contract No. ____ within the time required by its terms,” or “cure the conditions endangering performance under Contract No ____ as described to you in the Government’s letter of ____ (date)”*], the Government is considering terminating the contract under the provisions for default of this contract. Pending a final decision in this matter, it will be necessary to determine whether your failure to perform arose from causes beyond your control and without fault or negligence on your part. Accordingly, you are given the opportunity to present, in writing, any facts bearing on the question to ____ [*insert the name and complete address of the contracting officer*], within 10 days after receipt of this notice. Your failure to present any excuses within this time may be considered as an admission that none exist. Your attention is invited to the respective rights of the Contractor and the Government and the liabilities that may be invoked if a decision is made to terminate for default.

Any assistance given to you on this contract or any acceptance by the Government of delinquent goods or services will be solely for the purpose of mitigating damages, and it is not the intention of the Government to condone any delinquency or to waive any rights the Government has under the contract.

Source: FAR 49.607

Common Excuses for Failure to Perform

- a. Acts of God or the Public Enemy
- b. Acts of Government in either its Sovereign or Contractual Capacity
- c. Acts of another Government Contractor
- d. Fires
- e. Floods
- f. Epidemics
- g. Quarantine Restrictions
- h. Strikes
- i. Freight Embargoes
- j. Unusually Severe Weather
- k. Subcontractor/Supplier Delays beyond their Control



Section 15: Terminations

Excuses for Contractor Delay

	Potentially Excusable	Most Likely Not Excusable
Acts of God	Mt. St. Helens eruption	Death of one of the contractor's employees; Heavy rain typical for region.
Sovereign Acts	Expulsion orders from military base causing default, embargos, and scarcity of supplies due to war	Passage of a law that results in increased costs to the contractor.
Contractual Acts	Defective specs, unreasonable delay in government inspections, and failure to respond to RFI's	Contractor escorted off base for failure to comply with base rules.
Bankruptcy		Never an excuse, but gov't cannot T4D when bankruptcy papers are filed by contractor

Liabilities if T4D Occurs

Contractor

Excess Procurement Costs

Liquidated Damages

Common Law Damages

Government

Contract Price for Delivered Supplies

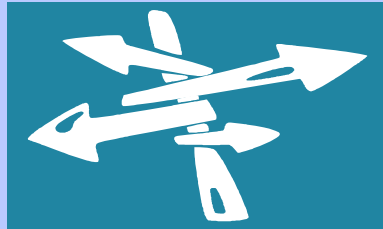
Reasonable value of construction work performed



Section 15: Terminations

Alternatives to T4D

1. Agreement to Revise Delivery Schedule with Contractor (and/or Surety if dealing with a construction contractor)
2. Permit Contractor to Proceed With an Acceptable Arrangement With a Third Party
3. Agree to a No-Cost T4C



Judicial Review of T4D

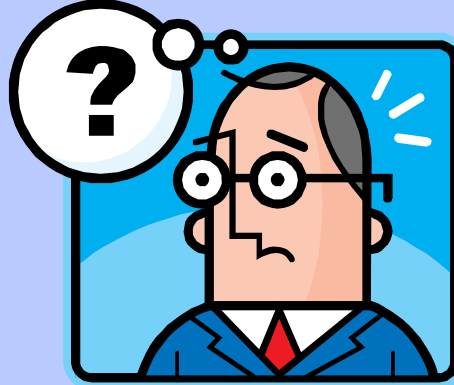


- T4D can be appealed
- The Government has the burden of establishing the propriety of a default termination.
- Just because a contractor has technically defaulted on a contract does NOT mean that a court will uphold the T4D.
 - REMEMBER: T4D is permitted under the FAR, it is never required.



Section 15: Terminations

Questions



A wise man's question contains half the answer.

Solomon Ibn Gabirol

