WILL AN EMPLOYEE STRIKE EXCUSE A DEFAULT? WHAT IS A STRIKE?

The fixed price default clause at Federal Acquisition Regulation ("FAR") 52.249-8(c) as well as the "excusable delays" clause in commercial item contracts at FAR 52.212-4(f) provide that a contractor shall not be liable for default in the event of "strikes." The Civilian Board of Contract Appeals ("CBCA") recently considered how a "strike" should be defined, and whether a default should be excused in the event of a strike. *Asheville Jet Charter and Mgt., Inc., v. Dept of the Interior*, CBCA 4079, May 19, 2016.

Here is what the two default clauses say about strikes. (Excerpts)(emphasis added):

> FAR 52.249-8 (Default (Fixed Price Supply and Service). [T]he Contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions **(7) strikes,** (8) freight embargoes, and (9) unusually severe weather. In each instance the failure to perform must be beyond the control and without the fault or negligence of the Contractor.
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> FAR 52.212-4(f) *Excusable delays.* [Commercial Item Contracts] The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence such as, acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, **strikes**, unusually severe weather, and delays of common carriers….

In *Asheville,* the contractor was required to provide on-call aircraft transportation of government personnel and cargo for the U.S. Fish and Wildlife Services ("FWS"). The contract required the contractor to maintain an air carrier certificate, and in order the do so, the aviation regulations required the contractor to employ three key personnel: one pilot-in-command ("PIC"), one second-in- command ("SIC") and one mechanic. On June 14, 2014, Asheville advised FWS that all three of its key personnel had resigned, and could not fly in accordance with the contract. On June 17, 2014, Asheville notified the contracting officer that it was unable to perform a scheduled flight that day because of employee resignations. On June 24, 2014, the contracting officer terminated the contract for cause (default) because of the resignation of multiple key personnel thereby ceasing operations for an indefinite period.

The Board held that the contracting officer properly found that Asheville was in default. However, the major issue for the Board was whether Asheville had a valid excuse for default under the contract (something beyond the control and without the fault or negligence of Asheville).

The Board noted the presence of the word "strikes" in the default clause, and stated that a "contractor does not need the classic strike situation to invoke the excusability exception in the Default clause." Prior to the appeal, Asheville had never called this a "strike" until it filed the appeal. The Board further noted that Asheville alleged that its three personnel left the company in an effort to effect a change that had occurred during a dispute over the company's

management. The Board held that "it is conceivable that the resignations of these employees could be categorized as a 'strike'". However, the Board noted strikes *per* se are not excusable, and that if a contractor seeks to establish that an excusable delay resulted from "conditions comparable to a strike" it must show the following:

> (1) There was in fact a strike or a comparable situation;
> (2) The strike directly affected the contractor's ability to perform the contract requirements;
> (3) The strike was beyond the contractor's control and did not result from the contractor's fault or negligence; and
> (4) There was no other source than the one affected by this strike from which the contractor could have obtained and provided the necessary services in accordance with the contract.

(citing *Otis Elevator Co Mat'l Handling Div.,* VACAB 1157, 76-1 BCA ¶11738.)

The Board declined to rule on whether this apparent "condition comparable to a strike" was excusable. The Board stated that

> in order to establish excusable delay, Asheville would need to show that its own position and actions in the employment dispute were reasonable and that the work stoppage was not its fault. To the extent that these resignations occurred because Asheville, for example, had attempted to take advantage of or had taken inappropriate positions with its employees, it could not rely on the strike to excuse its performance failures…. Asheville must also establish that it could not have found, through the exercise of reasonable diligence, alternate workers to perform the services required….[T] record regarding the reasonableness of [Asheville's] efforts to find temporary relief…is too sparse to allow us to grant summary judgment for [Asheville].

The Board refused to find summary judgment for either Asheville or the Government. Instead, it held that it would conduct further proceedings to permit the admission of more evidence.

The takeaway is that a contractor may have a "condition comparable to a strike" for purposes of the default clause, but even if that condition (or an actual strike) exists, it does not automatically excuse a contractor from performance. The contractor must show it made reasonable efforts to perform the services without the striking workers. In Asheville's case, the evidence was unclear, so the Board deferred a ruling until it obtained such evidence.