

CONTRACTOR MUST FILE CLAIM FOR TIME EXTENSION OR IT CANNOT ASSERT GOVERNMENT CAUSED DELAY IN DEFAULT TERMINATION

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A contractor cannot assert government caused delays in a subsequent default termination, unless it has filed a claim for a time extension. *Windamir Dev., Inc.*, ASBCA No. 63461, Dec. 21, 2023. Windamir sought more than \$1 million in alleged damages in its challenge of the government's default of its contract. But most of its appeal was dismissed.

Windamir received an indefinite quantity, indefinite delivery contract in 2019 for construction work at naval stations in Florida and Georgia. Two years after award, the Navy issued a notice of noncompliance alleging there were excessive amounts of organics in fill material soils used to construct a building pad in Georgia. In December 2021, Windamir filed a claim stating the material was satisfactory, not unsatisfactory. In August 2022 the Navy terminated the contract for default citing the unsatisfactory materials it previously notified Windamir about, and alleging that the contractor had failed to meet the contract completion date of May 4, 2022.

Windamir noticed an appeal, claiming it was appealing from a denial of its 2021 claim as well as from the termination for default. The complaint sought:

- Conversion of the termination to one for convenience because the soil was satisfactory;
- Declaratory relief that certain specifications were incorrectly interpreted;
- Damages of \$1.2 million; and
- Breach of contract.

The Board noted that Windamir presented allegations of government-cause project delay as an affirmative defense. However, the Board noted that a contractor contesting a default termination due to excusable delays must submit a claim for a time extension before appealing to the Board, otherwise the Board lacks jurisdiction—and Windamir had not done so. The Board dismissed the allegations of government caused delay. The Board stated it would consider other potential affirmative defenses at a hearing on the appeal

Windamir requested declaratory relief that the Navy had interpreted certain specifications incorrectly. Because the contract was now terminated, there was no longer any live dispute and declaratory relief would not be appropriate.

Finally, since Windamir had not requested any monetary relief/damages in its claim to the contracting officer, the Board lacked jurisdiction and those requests were dismissed.

Takeaway. Once again, proper claim procedures must be followed when seeking monetary relief (i.e. claimed amounts must be submitted to the CO-not submitted in a complaint to the Board for the first time), and government delay must be claimed before at the CO level if there is a default termination if it is to be used to defend the default.

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