TERMINATION FOR CAUSE OR DEFAULT ARE GOVERNMENT CLAIMS, NOT SUBJECT TO PRESENTMENT TO CONTRACTING OFFICER

Neither a termination for default, nor a termination for cause must be presented to the contracting officer ("CO") prior to appealing to the Board of Contract Appeals or the Court of Federal Claims. *SkyQuest Aviation, LLC,* ASBCA No. 65286, Jan 7, 2021,

SkyQuest was awarded a contract by the Air Force for pilot and related engineering services. A dispute arose over required credentialing and other performance issues. On April 7, 2020, the government terminated the contract for cause after SkyQuest disputed an Air Force Cure notice. SkyQuest filed an appeal at the Board of the termination for cause, sought a monetary claim of $430,000 and challenged a negative Contractor Performance Assessment Report ("CPAR") issued by the Air Force. The Air Force moved to strike all three aspects of the appeal—the challenge to the termination for cause, the monetary claim and the challenge to the CPAR, stating that SkyQuest had failed to present a proper monetary claim to the CO, and there was no Board jurisdiction over the CPAR claim because it sought injunctive relief.

On the monetary claim, the Board noted that SkyQuest had never certified its claim, although it was over $100,000, therefore the Board had no jurisdiction. On the CPARs claim, the Board similarly found that it lacked jurisdiction. The ASBCA only possesses jurisdiction over a CPAR claim if the contractor presented to the CO a valid claim—which SkyQuest did not.

On the appeal of the termination for cause, however, the Board stated that it *did have* jurisdiction. Their reasoning was that a termination for cause claim is a government claim that the contractor did not have to present to the CO in order to establish Board jurisdiction (i.e., no presentment to the CO was required), citing *Securiforce Int'l Am. LLC v. United States*, 879 F.3d 1354, 1363 (Fed. Cir. 2018). The Board also noted that when a contractor asserts certain affirmative defense to a termination for cause, such as seeking an extension of time or an equitable adjustment, it must present those defenses to the CO. However, because the issue of whether a contractor complied with the terms and conditions of its contract is an element of the government's termination for cause clause, and not an affirmative defense --that issue is not subject to the requirement that the contractor present the affirmative defenses to the CO. In this case, the CO erroneously terminated for cause because SkyQuest alleged failed to provide qualified personnel, even though SkyQuest disputed whether the contract required those qualifications. The Board noted that SkyQuest's assertion merely was an allegation that the government had not met its burden of proving an element of its termination for cause claim, and did not constitute an affirmative defense. As a result, no separate "claim" needed to be presented to the CO by SkyQuest in order to invoke the Board's jursidiction. All SkyQuest needed to do was state that it was a wrongful termination.

Takeaway: Simply appealing a termination for cause or default on the grounds that the government's termination was improper (i.e. that your company complied with the terms and conditions of the contract), without raising any affirmative defense, grants the Boards jurisdiction.

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