It's a drastic, final, solution—and a decision that the government should never make lightly. We're talking about a default termination (T4D).

We're talking about T4D because our long-time supporter "Black Hawk Dawn" asked us to.

There's so much to write about T4Ds we hardly know where to start. It's a complex subject with myriad facets. Perhaps most importantly, the government typically needs to follow an exact series of steps in is process and, for each of those steps, the contractor may have one or more defenses available to it. Often, the contractor is able to convince a court that its T4D was inappropriate, and have its T4D converted into a **Termination for Convenience** (T4C), which is obviously a much more beneficial outcome.

You want to know how complex the T4D process is? Google "A-12 Termination". There has been roughly 20 years of litigation associated with that particular T4D—including a SCOTUS decision in 2011. Reportedly, both sides spent a combined *$500 million on attorneys' fees* during that 20 year period.

The T4D process is so complex that the DOD has a published a 2007 guide—weighing-in at 109 pages in length—to assist Contracting Officers in properly terminating a contract for default.

The Federal Acquisition Regulation (FAR) discusses T4D at Subpart 49.4. Here's **a link** for your reading pleasure. If you read it, you'll see that a T4D is what happens when a contractor fails to perform its contractual duties. In theory, the T4D remedy is available to any Contracting Officer whose contractor fails to perform
any
contractual duties, including compliance with those "incorporated by reference" Section I clauses that nobody ever reads. But of course the reality is that T4D is a drastic action that is normally reserved for the most egregious performance failures, such as when a contractor walks off the job or gives the CO an ultimatum involving delivery.

For example, should a contractor tell the CO that it's not going to deliver any goods unless the

contract is modified in its favor, it should expect the T4D process to start.

We found a semi-interesting ASBCA case that illustrates some of the complexities associated with a T4D—it's the September, 2011, **decision** in the matter of Environmental Safety Consultants, Inc. (ESCI).

The first thing we noted was that ESCI was represented by its President and not a Beltway attorney. We've found that to be a warning indicator in other decisions. (We wrote about our thoughts on the matter **right here** .)

Here's the story:

ESCI received a contract in November, 1995, "to remove old and install new underground and above ground fuel storage tanks at 35 building sites on the Naval Weapons Station (NWS), Yorktown, Virginia." Apparently the contract was firm, fixed-price in the amount of $561,764.25 and permitted submission of Progress Payments. The contract also specified that Liquidated Damages could be assessed at the rate of $500 per each day delivery was delayed. In December, 1995, the government told ESCI that it could proceed with the work. In February, 1996, the government told ESCI that 14 of the 35 tanks were ready and available to be removed.

You might think that, upon winning a contract and being told that you had authorization to proceed with work, you would, uh, *actually start work*. You might think that, upon being told several weeks later that 14/35 of your workload was awaiting your contractually agreed-upon action, you would, uh, *actually start work* . Well, if you were ESCI, then you'd be wrong.

ESCI took a different tack. ESCI decided to wait until early April, 1996, to mobilize at the site. ESCI didn't start doing any work until three weeks later, as April came to a close. Consequently, as of June 30, 1996, "after three months of work and less than two months before the specified contract completion date then in effect (26 August 1996), ESCI had completed only 20 percent of the contract work."

Now, let's be honest about this. We've all been there—right? We've all delayed and procrastinated and waited until the last minute before putting distractions away and getting down to business. Hell, we remember in college, waiting until the midnight before the paper was due before getting out the typewriter and starting to put words on paper. (This was in ancient times before the advent of PCs, obviously.)

The point is: it didn't matter when ESCI started. *What mattered was when ESCI finished*. So long as it finished within its contractually agreed-upon due date, all would be well.

And then came the fuel oil spill.

It was alleged that the spill stemmed from ESCI's failure to properly secure the tank in the excavation, and the Judge found that to be the case.

And then came the second fuel oil spill, two weeks later.

The Judge found that the second spill was caused by ESCI's failure to "properly shore the tank during excavation."

At this point, the government customer began to get concerned. As the Judge wrote—

By letter dated 24 July 1996 and at a meeting on 30 July 1996, the government expressed its concerns to ESCI about its performance of the contract to date. These concerns included among others, the lack of an effective quality control (QC) program with no full-time QC manager on-site and non-compliance with the contract requirements for: (i) marking utilities; (ii) providing shoring and site safety plans; (iii) notification to the contracting officer 48 hours before beginning excavation; (iv) barricades for open excavations; (v) protection of government utilities; (vi) repair of utilities damaged in the course of the work; (vii) timely submission of daily production and QC reports; (viii) timely submission of weekly payrolls for labor standards enforcement; and (ix) secondary containment piping material, sump and depth of underground installation.

The government began to issue "contract non-compliance notices" to ESCI. Meanwhile, ESCI

kept submitted requests for Progress Payments. As the Judge wrote—

On 21 August 1996, five days before the contract completion date specified in Modification No. POOOOl, ESCI submitted its progress payment Invoice No.3 indicating that as of 21 August 1996, performance of the contract was 34.9 percent complete. The government estimate of the percentage of completion on that date was 30.4 percent.

The government paid the request and ESCI kept working on the site, long after the contractually specified due date had passed. It was not until 18 September that the CO issued a "cure notice" which is a mandatory step in the T4C process. For its part, ESCI responded to the cure notice by proposing to hire a subcontractor to complete the remaining work. On October 4, the CO sent a letter to ESCI stating that the government was "considering default termination" and "offered ESCI the opportunity to show that its failure to perform 'arose from causes beyond your control and without fault or negligence on your part.'"

In October and November, ESCI's subcontractor(s) continued to perform work at the site, with the government's knowledge and approval. One of those subcontractors was Rickmond Environmental. The record supports the assessment that Rickmond performed well and that the government was satisfied with how things were going.

In May 1997, ESCI's payment bond surety notified the government that it was paying claims for four ESCI subcontractors. A month later, "Rickmond left the site and did not return to work thereafter." At that point, ESCI owed Rickmond $114,000 on unpaid invoices.

At that point, ESCI submitted progress payment request No. 7, showing that 78.7 percent of the contractually agreed-upon work had been completed. It was now 10 months after then contractually agreed-upon performance completion date. But this time, the CO refused to pay the request, citing ESCI's unpaid subcontractors.

On September 30, 1997, thirteen months after the original completion date, the CO gave ESCI another 30 days to get its act together "or termination for default proceedings will be initiated."

On January 6, 1998, ESCI received another cure notice.

On January 22, 1998, the CO offered ESCI an opportunity to "show cause" why its contract "should not be terminated for default." ESCI replied, stating that the failure to complete the contract "was caused by government changes and delays and by the government's wrongful withholding of payment of ESCI's progress payment Invoice No.7."

On March 20, 1998—

ESCI submitted a letter to the contracting officer stating among other things that 'ESCI is owed approximately $257,833.25 for work completed, plus interest as of June 30, 1997.' This letter also referred to its plan for having the work completed by a subcontractor or subcontractors other than Rickmond.

On April 10, 1998, the CO replied to ESCI's letter, disputing its assertions. On May 8, 1998, the government issued its third show-cause letter to ESCI. (Actually, we think it was the second show-cause, but it might have been the third cure notice.) ESCI replied to that letter, proposing to increase the contract price by $128,000 so that a subcontractor could complete the work.

On June 12, 1998, the CO terminated ESCI's contract for default, roughly 21 months after the original contract completion date had passed.

Guess what? The ASBCA Judge found that the government had not complied with the T4D processes, and thus ESCI's T4D would be converted to a T4C.

What?

We mean, if ever a contract should have been T4D'd it would appear to have been this one. Nearly two years after the contractual completion date, the work still had not been completed. How could ESCI have escaped its T4D fate?

Well, let's see how the Judge parsed the situation.

The Judge found that the government had waived its right to enforce the contract's completion date by its actions. As the Judge wrote—

… the subsequent actions of the parties starting with the instruction in the second paragraph of the contracting officer's 30 June 1997 notice of rejection of Invoice No.7 and extending over the next 11 months clearly indicated that the 30 June 1997 completion date in Modification No. P00006 was not of the essence of the contract … The repeated incantation of reservation of rights language in some of the government letters, followed by no action to terminate and further suggestions for compromise, further weakened any validity to the 30 June 1997 completion date. After eleven months of this dalliance, it was incumbent on the government to issue a new and reasonable completion date before terminating the contract for default.

But that was not the end of the story.

ESCI then filed **another appeal** at the ASBCA, asking for payment of the progress payment request that was rejected by the Contracting Officer. Remember, that payment request (in the amount of $138,506) was originally submitted in June, 1997. Judge Freeman wrote--

Fourteen years later, ESCI submitted to the contracting officer a payment request with an invoice dated 29 November 2011 for the original amount of Invoice No. 7 ($138,506.50) plus $433,381.33 for interest on that original amount from 1 January 1997 through 31 December 2011.

That, good friends, is *chutzpah*.

The problem with ESCI's cunning plan was that it had failed to submit a certified claim to the Contracting Officer, and had failed to obtain a Contracting Officer's Final Decision, before filing its appeal at the ASBCA. In essence, ESCI had nothing from which to appeal, since the CO had never issued a COFD on a certified claim. (We've discussed this point before, many times, notably **right here** .) We are reluctantly forced to conclude that ESCI failed to read our blog articles.

ESCI's appeal of nothing was denied without prejudice "for lack of jurisdiction." Accordingly, the door was left open for ESCI to file a certified claim to the CO, receive a COFD, and reinstate its appeal. At which point, the government is free to argue that the CDA Statute of Limitations operates to separately deny the ASBCA jurisdiction.

But that's not the end of the story.

ESCI filed another appeal, this time asking for attorney fees in accordance with the Equal Access to Justice Act. Its appeal was denied because the Judge found that the government's position was substantially justified.

But that's not the end of the story.

The ASBCA heard another appeal in this case, this time one brought by the Department of the Navy). Apparently, the government did appeal the ASBCA decision, but subsequently the Department of Justice attorneys agreed to dismiss the government's appeal before it was heard. This did not sit well with the Department of the Navy attorneys. As Judge Freeman wrote—

Dissatisfied with the Department of Justice's agreement to the dismissal of its appeal in the Federal Circuit, the contracting agency (Department of the Navy) returned to this Board on 28 September 2012 with a 'Motion for Relief from Judgment' pursuant to Fed. R. Civ. P. 60(b)(3)and 60(b)(6).

The Navy's Motion pled for the Judge to consider ESCI's conduct during the course of the proceedings, which allegedly included:

… violating the Prompt Payment Act (PPA), submitting false certifications and false claims to the Government, and making repeated slanderous and offensive accusations, and threats directed at the Board, Government counsel, and other Government officials and trial witnesses …

The Judge told the Navy to man-up and suck it up, writing—

All of the grounds for relief in the government's motion are matters that could have been presented in a timely motion for reconsideration, or on appeal to the Federal Circuit. The government's present motion does not assert any newly-discovered, outcome-determinative facts leading up to the termination, and we otherwise find no extraordinary or exceptional circumstances pertinent to the merits of the case that, in the nature of an FED. R. Civ. P. 60(b)(6) motion, would justify vacating the decision. The government's Motion for Relief from Judgment is nothing more than an untimely motion for reconsideration, or attempt to argue its now dismissed appeal to the Federal Circuit.

Does that end the story of ESCI and its $500,000 UST contract? Only time will tell ….

Getting back to the original article topic, we trust the ESCI story shows both the complexity of the T4D process and how a contractor might assert defenses to a T4D that it might receive. Note that ESCI's Contracting Officer issued both "cure notices" and "show cause" notices prior to terminating the contract. Those are mandatory steps.

But the fact that multiple notices were issued actually worked *against* the Government in this instance, as did the reasonableness of the CO and the attempts to work out a resolution with the contractor. The fact that no revised completion date was put into the contract operated to waive the Government's rights with respect to the original completion date. The ESCI story points to the fact that the Government must walk the T4D process *exactly*, with no missteps along the way. Otherwise, the contractor may successfully get its T4D converted into a T4C.

"Diamond Dave" from Denver told us that he likes the shorter, pithier, blog articles on this site. This has not been one of them. Sorry about that, "Diamond Dave." But we trust "Black Hawk Dawn" got what she asked for.