

What Were You Thinking? Agency's Failure to Consider Relevant Factors and Evidence Dooms its Decision to Terminate Construction Contract for Default

Litigation Alert

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The Civilian Board of Contract Appeals (the Board or CBCA) recently overturned an agency's decision to terminate a construction contractor for default, finding that the government failed to properly consider relevant factors and evidence, which demonstrated that the contractor was ready, willing and capable of completing the project on time. The opinion is a good reminder that, when reviewing an agency's decision to impose the "drastic sanction" of default termination, the Board considers the totality of the circumstances and will not uphold the decision based solely upon technical errors. For construction contractors, it also highlights the importance of being able to demonstrate, through documentation and data, the ability to timely complete contract performance. Below we examine the CBCA's decision in *Eagle Peak Rock & Paving, Inc. v. Department of Transportation*, CBCA 5692 (Dec. 16, 2020), [available here](#).

Background

On May 2, 2016, the Federal Highway Administration (FHWA) awarded Eagle Peak an approximately \$28 million firm-fixed price with economic price adjustment contract for the construction of improvements along 4.7 miles of road in Yellowstone National Park. The project was scheduled for three construction seasons with a project completion date of October 5, 2018. On July 14, 2016 the total contract value was increased to approximately \$34 million after FHWA exercised option work via a unilateral modification. *See Eagle Peak* at 2.

Pursuant to the terms of the contract, Eagle Peak was required to submit an initial construction schedule showing completion of work within the contract time. *Id.* at 3; FHWA Special Contract Requirements (SCRs) § 155.03. A construction schedule was defined as a "Critical Path Method (CPM) schedule and a written narrative." *See Eagle Peak* at 3; SCR § 155.06. Over the course of several months, Eagle Peak submitted a series of baseline schedules, all of which were rejected by the contracting officer (CO), despite Eagle Peak's best efforts to demonstrate that it would perform on time. Indeed, in several of its submissions, Eagle Peak explained it would be able to mobilize additional crew members to the project to ensure timely completion. *See Eagle Peak* at 4-8.

On or about January 25, 2017, at the request of the CO, Eagle Peak submitted a "recovery schedule." The recovery schedule also included a narrative report "detailing specific project activities, the work to be done, and the estimated number of days to complete each activity", as well as identifying subcontractors and their availability and proposed site mobilization efforts. *Id.* at 8-9.

On February 1, 2017, the contracting officer terminated Eagle Peak for default pursuant to FAR 52.249-10. The termination letter explained that the CO took the action "based on Eagle Peak's failure to prosecute the work with the diligence" that would ensure timely completion of the project. The CO determined that Eagle Peak's January 25, 2017 schedule did not identify any "excusable delays that would extend the fixed completion date of [the] contract" and that the schedule contained errors, that when corrected put the project completion date past the fixed project completion date. *Id.* at 9. The termination letter also explained that the CO calculated that Eagle Peak had completed around nine percent of the work, but that around 30 percent "of the time available under the contract had been used." *Id.* at 10. Eagle Peak subsequently appealed the termination for default to the Board.

Summary of Decision

The Board [granted](#) Eagle Peak's appeal and converted the termination for default to a termination for convenience, finding that FHWA had failed to satisfy "its burden that there was no reasonable likelihood of Eagle Peak's timely performance by October 5, 2018." *Id.* at 11. In reaching its decision, the Board cited the well-established principle that "[a] termination for default 'is a drastic

sanction which should be imposed (or sustained) only for good cause grounds and on solid evidence." *Id.* at 11 (quoting *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987)). The Board made the following three determinations in its decision:

FHWA Failed to Consider Factors Set Forth in FAR 49.402-3(f) : FAR 49.402-3(f) sets forth the factors that an agency must consider when contemplating a termination for default and while a CO's failure to "consider one or more of the factors . . . does not necessarily invalidate a default termination, compliance, or failure to comply, with the regulation is relevant to an evaluation of alleged abuse of discretion." See *Eagle Peak* at 12 (quoting *Marshall Associated Contractors, Inc.*, IBCA 1901, 01-1 BCA ¶ 31, 248). The Board determined that, with two full seasons remaining on the contract, the CO failed to consider "the urgency of the need for the . . . services [described in the contract] and the period of time" that another contractor would have needed to complete the work compared to the date by which Eagle Peak could complete the work. *Id.* at 12-13 (emphasis in original); FAR 49.402-3(f) (4). The Board also found that the CO failed to consider Eagle Peak's "capability to dedicate additional resources to the Project to ensure timely performance." *Id.* at 13; FAR 49.402-3(f)(7). Ultimately, the Board found that it could not uphold the termination when the CO did not give due consideration to relevant information, including the information in Eagle Peak's detailed narrative, which the CO did not recall reviewing. See *Eagle Peak* at 13-14.

FHWA's Assessment of Work Completed by Eagle Peak Prior to Termination Was Inaccurate : While the CO determined that Eagle Peak had only completed nine percent of the work under the contract, FHWA's own expert calculated that it was 17.1 percent and Eagle Peak's expert, opined that Eagle Peak had completed 26.5 percent in the first season "when weather and design impacts were considered." *Id.* at 14. The Board was persuaded by Eagle Peak's expert that simply breaking the project duration into thirds for a three-year project to determine that Eagle Peak should have completed approximately 30 percent of the work was too simplistic. *Id.* at 10-11.

FHWA did Not Demonstrate Evidence of Untimely Completion : Relying on precedents, the Board found that the CO's "decision . . . [was] not sufficient to support the termination" because, among other reasons, Eagle Peak's CPM schedules, including its narrative, were "evidence that the company was ready, willing, and capable of performing the project work in the two remaining seasons of the contract." *Id.* at 15, 16. The Board explained that its review of a termination for default "must be based on the totality of circumstances and 'tangible, direct evidence, reflecting the impairment of timely completion.'" *Id.* at 16 (quoting *Edge Construction Co. v. United States*, 95 Fed. Cl. 407, 422 (2010)). The Board further explained that while Eagle Peak "may be in technical default" due to errors in its CPM schedules, this "is not determinative to establish the propriety of [a] termination for default" and that here, the facts did not warrant the "drastic sanction of default termination." *Id.* at 16-17.

Notably, throughout its decision, the Board cited to, and was at times expressly persuaded by, the testimony of Eagle Peak's scheduling expert. Specifically, the Board highlighted the expert's testimony that CPM schedules "evolve" over time and get more accurate as additional information becomes available. The Board also noted that the expert testified (1) that the schedules demonstrated that Eagle Peak had "an appreciation for the scope of the Project, the various elements within the contract, and the Project calendar" and (2) that Eagle Peak's recovery schedule fixed the majority of the issues highlighted by FHWA's November 4, 2016 letter and the remaining activities did not have an impact on the critical path. *Id.* at 9, 15.

Takeaways

There are four principal takeaways for contractors from the *Eagle Peak* Appeal:

The Board will consider whether a CO failed to comply with FAR 49.402-3(f) as a factor in determining whether the CO abused his/her discretion in terminating a contractor for default;

The Board will consider the totality of the circumstances when reviewing a termination for default and a technical default due to errors in a contractor's CPM schedule is not determinative of the propriety of a termination for default;

Narrative reports accompanying CPM schedules may be important evidence of a contractor's ability to timely complete a

project; and

Expert testimony can play an important role in scheduling cases before the Board.

Going forward, contractors should still focus on creating accurate and complete CPM schedules, but this decision highlights the importance of documenting and providing the government with as much information as possible to show timely completion of contract work. Of particular importance is information showing that a contractor has the necessary resources. Additionally, because here the Board appeared to find the contractor's expert testimony persuasive on certain issues, if a contractor finds itself at the Board on an appeal of a matter that involves CPM scheduling issues, the contractor should carefully consider how to best use expert testimony on CPM scheduling and other issues related to timely project completion.

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