

ASBCA Highlights Challenges of Proving Excusable Delay Based on Impact of COVID-19

Litigation Alert

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A recently released Armed Services Board of Contract Appeals (ASBCA) decision serves as a reminder that the COVID-19 pandemic in and of itself is likely not to be considered a sufficient basis for an excusable delay defense to a default termination. In *Central Company*, ASBCA No. 62624 (Feb. 3, 2022), the Board indicated that delays resulting from the COVID-19 pandemic will not count as a cure-all defense against terminations for default, but that contractors will be held to a potentially rigorous standard of proof in overturning such terminations.

Background

The Air Force awarded Central Company (Central) a contract for the design and construction of a one-story metal building at the Grissom Air Reserve Base on September 30, 2019. The contract required work to be completed by May 19, 2020, 180 days after the November 21, 2019 notice to proceed. Following the contract award but prior to the onset of the COVID-19 pandemic, Central's work was described by the Board as "slow or non-existent," facing delays due to Central's lack of bonding, missed deadlines, and deficient submissions. The first acknowledgement of COVID-19 occurred on March 25, 2020, four months into the performance period. However, when Central requested additional time from the Air Force because of a subcontractor testing positive and issues with suppliers, they referenced delays they were having with a different contract with the Army Corps of Engineers. On June 4, 2020, two weeks after the project deadline, zero percent of the contract work had been completed and the Air Force terminated Central's contract for default.

Summary of Decision

In coming to its ultimate decision that Central's delays were not excusable due to COVID-19, the Board performed an in-depth analysis of the pre- and post-pandemic delays, as well as any indications that Central had communicated the pressures of the pandemic to the Air Force. Central relied on e-mails that it wrote to the Air Force that indicated concern about COVID-19's impact on the project but did not "assert any actual impacts of Central's performance, past or future." The Board specifically examined Central's claim that a subcontractor employee had tested positive and had to quarantine — which the Board did not see as an "insurmountable obstacle" to Central's work — and the claim that suppliers had shut down factories — which the Board saw as impacting only construction, not any delays in the design or submission of pre-construction paperwork.

Furthermore, in response to Central's argument that the Air Force was not aware of "how bad the situation was," the Board found that the obligation was on Central to "contemporaneously demonstrate when the delays occurred and their real effect on Central's work." The Board consistently indicated that the issue it took with Central's position was not that it relied on the pandemic as the cause of delays, but that it lacked the proper documentation to demonstrate the actual impact of the pandemic on the contract performance.

Ultimately, the Board found that neither the record nor Central's allegations "support[ed] *any* argument that COVID impeded Central's work to the point where Central's overall lack of progress was beyond its control."

Takeaways

The *Central Company* decision provides important indicators of how the ASBCA will treat pandemic-related delay arguments:

- **Documentation Matters.** While COVID-19 may have impacted a contractor's performance or the environment in which it was working, it does not serve as a blanket justification for delay or defense against default termination. Therefore, contractors

thinking about bringing a claim based on COVID-19 delays or facing a potential termination for default because of COVID-19 delays should begin marshalling evidence to support their arguments. In this regard, it is notable that Central was a *pro se* litigant and the Board went to significant lengths on its own to explore the possibility that delays related to COVID-19 could weigh in Central's favor. Contractors represented by counsel can expect the Board not to engage in such an effort and instead rely more heavily on the contractor's own presentation of the evidence.

- **The Timeline Matters.** The Board took care to distinguish between pre- and post-COVID-19 delays, as well as the junctures at which the agency considered the pandemic. Therefore, in addition to the documentation of when and why delays occur, contractors should consider which of their arguments are based on grounds independent of the pandemic.
- **COVID-19 (Still) Matters.** While the ASBCA found that COVID-19's impact was not an excusable delay in this circumstance, it did not foreclose the possibility that there may be cases where the pandemic's effect on the labor pool or supply chain serve as a viable defense to a termination for default. Therefore, in deciding when to challenge a default termination, contractors should still consider the pandemic in assessing their potential arguments.

If you have questions about the *Central Company* decision or the impact of COVID-19 on your government contracts, please contact one of the Miller & Chevalier attorneys listed below:

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