

# CONTRACT LAW DIVISION

Office of the Assistant General Counsel for Finance & Litigation

## A LAWYER'S VIEW OF "OTHER DAMAGES"

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### Other Ascertainable Damages

By Edward Seymour

Just what you need. You get back from lunch and the COTR calls to tell you that Superduper, Inc. appears to be defaulting under their contract. After some investigation, it seems a termination for default will be necessary. In the course of reviewing FAR Subpart 49.4-Termination For Default, you notice that the contractor is liable for "any other ascertainable damages" suffered by the Government. Hmm, does this mean that the Government can get more than just the price difference between the defaulted contract and the reprocurement? Well yes, given some care.

#### The Contract

All Government fixed-price contracts for the delivery of supplies, services, research and development, or for construction have a T/D clause in Section I of the contract. These clauses (FAR §§ 52.249-8, 52.249-9 and 52.249-10) each have a provision containing the following language.

*The rights and remedies of the Government in this clause are in addition to any other rights and remedies provided by law or under this contract.*

Although the clauses do not explain these "rights and remedies", they are essentially excess costs as described in other parts of the FAR and the rights and remedies provided by common law damages for breach of contract.

#### Yeah, So What?

Good question! The reason this is important is that the provision for common law damages for breach of contract allows the Government to be put in as good a position as it would have been in had the contract been performed according to its terms. *Rumley v. United States*, 152 Ct. Cl. 166, 285 F. 2d 773 (1961).

#### A Case In Point

A contracting officer for the Army and Air Force Exchange Service awarded a fixed-price contract to the Tester Corporation for the construction of a service station at the Walter Reed Army Medical Center. During the course of the contract, disputes arose involving the canopy work over the pump islands, the asphalt paving on the station grounds, the backfill around the underground storage tanks, and the piping from the storage tanks to the distribution pumps. The contracting officer directed certain corrective work be done to remedy defects in the construction. Tester Corp. failed to do the corrective work and the contracting officer terminated the contract for default. After soliciting bids, the contracting officer awarded the remaining work yet to be done to Coe Construction Company.

After award of the contract to Coe, the contracting of-

ficer billed Tester Corporation for not only the increased costs incurred to complete the remaining work, but also the costs absorbed by the Government to prepare the reprocurement solicitation, the additional costs for on-site inspection services, the additional testing costs required by the default, and the additional travel costs required by Government personnel due to the default. The Government's position was that these were "other ascertainable costs" that the Government had to bear and as such was entitled to reimbursement to be put back in as good a position as it would have been in had the contract been performed according to its terms. The Tester Corp. cried foul and sued in the Claims Court arguing that "administrative costs" were not permitted to be recovered even under the common law for breach of contract, that only the increased costs incurred in completing the remaining work could be fairly charged. *Tester Corp. v. United States*. 1 Cl. Ct. 370 (1982).

**The court agreed with the Government** holding that the Government has the right to seek common law damages for breach of contract following a termination for default.

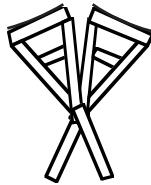
Therefore, the damages recoverable by the Government are not limited solely to the excess amount paid to the reprocurement contractor. The Government is entitled to pursue its full judicial remedies in addition to excess costs under the contract, which include those items labeled by Tester Corporation as "administrative costs." *Id.*

#### The Rule

Contrary to the opinion of some Government contractors, the Government is not limited to just the excess costs to obtain the required work. The Government can also be reimbursed for those costs incurred that are the foreseeable, direct, natural and proximate results of the breach.

#### By The Way

Subpart 1349.4 of the CAR provides both definitions of "administrative costs" and "excess costs" and guidance to contracting officers on the assessment of administrative costs after a T for D. Don't forget that the CAR requires review by your friendly contract attorney prior to making a demand for administrative costs. CAR 1349.402-7(c).



**From the Editor:** Ed Seymour is a NOAA Corps officer (comedian?) assigned to the Contract Law Division and primarily works on NOAA contract matters.

Comments, criticisms, and suggestions for future topics are welcome. Call Jerry Walz at FTS 377-1122