



# Post-Award Contract Management

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# Post-Award Contract Management

The In's and Out's of Changes and  
Terminations

# Post-Award

- What responsibilities do we have?
  - Ensure successful delivery
  - Modify the contract for changes in terms and conditions
  - Terminate the contract for convenience, default or non-appropriation of funds

# Ensure successful delivery by:

- Monitoring the supplier's performance
- Adjusting contract requirements to incorporate directed and constructive changes
- Cooperating with the supplier while demanding compliance with the contract terms and conditions

# Ensure successful delivery by:

- Deciding when performance is deficient or threatens success
- Advising the supplier of performance deficiencies and requiring correction

# Modify the contract to incorporate changes

- Directed changes
  - Specifications/scope
  - Quantities
  - Delivery
  - Schedule
- Constructive changes
  - Price/cost
  - Schedule

# Problems requiring consideration of termination

- Non-appropriation of funds
- Convenience of the State
- Supplier default

# Termination for non-appropriation of funds

- Multi-year contracts
- Lack of funding
- Lack of funds

# Termination for convenience

- Why terminate for convenience?
  - Change in requirements
  - Legislative changes
  - End or failure of a pilot project
- Considerations:
  - Stage of completion
  - Cost/benefit

# Can we terminate for convenience?

- *We no longer need the item/service or we are unhappy with the contractor*
- What does the contract say?
  - Is there a termination for convenience provision?
  - If not, do we need one?

# Should we terminate for convenience?

- 1. Are we so unhappy with the contractor that we will accept the time, effort and cost of termination and reprocurement?
- 2. In what stage of performance is the contract?
  - Just starting?
  - Middle of the contract?
  - Almost finished?

# Should we terminate for convenience? (cont'd)

- 3. Will we have to pick up the seller's settlement costs?
- 4. What are the expected costs of termination?
- 5. What is the litigation risk if we do not terminate for convenience – how long, how much?

# Should we terminate for convenience? (cont'd)

- *If we no longer need/want the item/service?*
- Yes - if the cost of settlement plus our termination costs are less than the contract price.
- Yes - if risk and cost of litigation warrants it.
- No - if substantial completion has occurred.
- No - if costs of termination (or litigation) will exceed contract price.

# Termination for default

- Why?
  - Anticipatory repudiation
  - Breach of contract e.g. failure to perform, financial incapacity
- Considerations:
  - Stage of completion
  - Benefits/savings gained by termination
  - Anticipated costs of termination e.g. litigation, reprocurement etc.
  - Contribution of State to suppliers default

# Can we terminate for default?

- *We have problems with the seller's performance –*
- 1. Is there a termination for default provision in the contract?
  - Yes. What does it say?
    - Does it provide for the existing situation?
  - No. Does a contract breach exist?
    - What are the facts of the breach?

# Should we terminate for default?

- *What is the problem?*
- 1. Completion/delivery date passed (late).
- 2. Failing to make progress.
- 3. A material breach has occurred.
- 4. You anticipate that the seller will repudiate the contract.

# Should we terminate for default? (cont'd)

- 1. Completion /delivery date has passed (late).
- Has the seller substantially completed or performed the work/service?
  - Yes - we would be liable for wrongful termination (see *Delta Constr., Inc. v. Dressler*, 381 N.E.2d 1023 (Ill. App. Ct. 1978))

# Should we terminate for default?

(cont'd)

- Have we waived the scheduled date?
  - How?
    - Encouraged continuance of performance.
    - Failed to exercise our rights.
- Yes - establish a new date – bilaterally or unilaterally.
- No - consider other possibilities.

# Should we terminate for default?

(cont'd)

- Is it an excusable delay?
  - Why?
    - We provided defective specifications.
    - We interfered with the performance etc.
- Yes - establish a new date.
- No - consider termination for default. Evaluate time to reprocur, effort, cost etc.

# Should we terminate for default?

(cont'd)

- 2. The contractor has failed to make progress.
- Is there a basis for an excusable delay?
  - Yes - establish a new delivery date.
  - No - consider other possibilities.
- Have we issued a “cure notice”?
  - Yes. Was the response adequate?
  - Yes - increase schedule oversight.
  - No - issue a “show cause notice”.

# Should we terminate for default?

(cont'd)

- 3. Has there been a material breach?
- Yes - consider your options:
  - Continue performance and sue for damages upon completion.
  - Consider obligation of continued performance terminated and sue on contract.
  - Rescind the contract and seek restitution.

# Should we terminate for default?

(cont'd)

- 4. You anticipate that the seller will repudiate the contract.
- Why?
  - Inability to perform e.g. bankruptcy, lack of eqpmt., lack of supervision etc.
  - Unwillingness to continue e.g. threatens to walk off the job etc.

# Should we terminate for default?

(cont'd)

- Termination vs. rescission –
- Termination: party giving notice may present his claim for damages up to the date of termination.
- Rescission: all parties return those things of value which they have received and pay for the value of those things retained.

# Should we terminate for default? (cont'd)

- *Should we terminate or rescind?*
- Terminate when:
  - a. contractor underbid; or,
  - b. replacement contractor will charge more.
- Rescind when:
  - a. we paid too much; or,
  - b. performance to date has little practical value and contract is neutral i.e. we have no favorable provisions.

# Termination Procedures

- Cure/show cause notice for termination for default – 10 days
- Fact finding
- Cost/benefit analysis
- Coordination within the agency
- Default strategy
- Written notice to supplier
- Receipt and audit of claims

# Pricing adjustments

- Additions
- Deletions
- Substitutions
- Delays
- Accelerations
- Disruptions

# Occurrence of adjustments

- As related to performance

- before \_\_\_\_\_ during \_\_\_\_\_ after

# Basis for adjustment

- Before performance
  - agreed to by the parties
  - unilateral decision by the buyer

## Basis for adjustment (cont'd)

- During performance - directed changes
  - State directed
  - Supplier recommended and State accepts

# Modifications within the scope

## - Additions

- Usual approach to estimating
- Includes:
  - direct costs e.g. labor, materials
  - overhead and G&A/SG&A
  - insurance (bonds)
  - facilities capital cost of money
  - other direct costs e.g. travel, freight

# Deletions from the work

- Determine cost “savings”
  - cost to perform the work today - if not a separate line item - plus reasonable amount of profit
  - price bid/offered - if a separate line item

# Work substituted

- Determine price of work added
- Determine price of work deleted
- Equitable adjustment = difference

## Work substituted (cont'd)

- Bruce Construction Corp. ASBCA No. 5932, 60-2 BCA 2797
- Question:
  - If a Supplier can purchase a material or component at a greatly reduced price, should the State be the beneficiary of the savings?

## Work substituted (cont'd)

- S.N. Nielsen Co. v. U.S. 141 Ct.Cl. 793, 1958:
  - Delete underground electrical ducts and install overhead wires
  - Underground ducts      \$34,800
  - Overhead wires est'd \$19,180

## Work substituted (cont'd)

- Underground ducts “would have cost” \$60,690
- All above prices include profit

- QUESTION:

- What is the amount of the adjustment?

## Work substituted (cont'd)

- Admiral Corporation, ASBCA No. 8634, 1964 BCA 4161:
  - Customer revised specification for a battery case which was part of the end item to be delivered

# Work substitution (cont'd)

- Original case priced in bid      \$12.48
- Replacement case cost              \$11.63
- Original “would have cost”      \$ 7.52

- **QUESTION:**

- What is the amount of the adjustment?

# The End

- From me to you - all the best!

