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FREE Checklist for Government Contractors Facing Termination for Default (T4D) Under FAR Subpart 49.4

Provided by Watson & Associates LLC | Disclaimer: This checklist is for informational purposes only and shall not be considered legal advice.*

Facing a Termination for Default (T4D) from a government contract can be a complex and stressful process. The following checklist is designed to help contractors understand key steps, defenses, and legal avenues available under the Federal Acquisition Regulation (FAR) Subpart 49.4, and to avoid common legal mistakes. This tool should not replace professional legal counsel.

1. Receive and Analyze the Termination Notice

Thoroughly review the Termination for Default notice sent by the contracting officer (CO).

- Ensure that the notice is in compliance with FAR 49.402-3. The contracting officer must provide written notice, citing the reasons for the termination.

- Check for any references to unsatisfactory performance, delays, or failure to meet contractual terms.

Deadline: Mark the deadline for any responses or challenges. You often have a limited window to appeal or respond.

Key Tip: The contracting officer must demonstrate that the default was the result of your failure to comply with the contract's terms. Examine whether the allegations are specific and supported by evidence.

Key Tip: Asking the CO to reconsider the decision does not postpone the appeal deadlines. You also presumed to know what the appeal deadlines are.

2. Gather Relevant Documentation and Evidence

Identify key contract documents: This includes the contract itself, any modifications, performance reports, communications with the CO, or CORs and any correspondence related to delays or problems on the project.

Compile all records of performance: Include proof of work completed, timelines, sub-contractor communications, and any delays beyond your control (e.g., force majeure events).

- *Focus on actual discrepancies:* Any evidence that contradicts the contracting officer's stated reasons for termination will be vital to your defense.

- Documentations to prioritize:

- Written approvals for delays or modifications by the CO.
- Logs of government-caused delays (i.e., failure to provide government-furnished property (GFP)).
- Evidence of excusable delays under FAR 52.249-14.

Case Example Appeals of Southwest Marine, Inc., ASBCA No. 54397, 2004 WL 1598796 (2004)—the contractor successfully demonstrated that delays were excusable because the government failed to provide GFP in a timely manner.

3. Consider Potential Defenses to T4D

Defenses to a Termination for Default, could include the following, which should be fully explored with supporting documentation:

- *Excusable Delays:* Demonstrate that delays in performance were excusable under FAR 52.249-8(c), such as acts of God, strikes, or government actions.

- Example: If the government failed to approve submittals on time, this may be a basis for excusing performance delays.

- *Contracting Officer Errors:* Analyze whether the CO failed to follow procedures. A termination for default must be based on facts and in accordance with FAR regulations.

- *Substantial Completion:* Argue that a significant portion of the work was completed, making default an unreasonable outcome (see Krygoski Construction Co. v. United States, 94 F.3d 1537 (Fed. Cir. 1996)).

- Government-Caused Delays: Prove that delays were beyond your control and were caused by government actions, such as failure to provide critical approvals or information.

Legal Strategy: Work closely with your attorney to assess any waiver of the right to terminate. Courts may rule that if the CO took too long to terminate after becoming aware of the default, the government waived its right to terminate for default.

4. Submit a Response (if you decide to File a Contract Disputes Act Claim) and Support Defenses

- Draft and submit a detailed response to the CO outlining any defenses you are raising. Be sure to meet any deadlines specified in the termination notice. Note that if you have any legal theories as defense (breach of contract, delay claims etc.) you **MUST** file a contract claim to the CO. You should not wait until you file an appeal to do this. Your case may be thrown out.

- Include supporting documentation and legal precedents if possible.

Mistake to Avoid: Failing to submit a claim in response to the termination to preserve your rights. If appropriate, submit a claim to the CO under the Contract Disputes Act (CDA) outlining why the termination was improper. This could include requesting conversion of the default termination to a termination for convenience.

Case Reference: In *Malone v. United States*, 849 F.2d 1441 (Fed. Cir. 1988), the court found that a contractor must challenge the CO's decision and cannot remain silent, as this could forfeit their right to contest the termination later.

5. Understand the Appeal Process

If the CO denies your claim or refuses to reverse the termination for default, you can pursue the following legal actions:

- File an appeal with the appropriate Board of Contract Appeals (BCA), such as the Armed Services Board of Contract Appeals (ASBCA) or Civilian Board of Contract Appeals (CBCA).

- The appeal must typically be filed within 90 days of the CO's final decision under the Contract Disputes Act (CDA).

- Appeal to the U.S. Court of Federal Claim: Alternatively, you can file suit within one year of receiving the final decision from the CO.

Legal Tip: Timing is critical in the appeal process. Missing appeal deadlines can result in losing the right to challenge the termination.

6. Legal Consequences of T4D

-Financial Implications A T4D can lead to demands for repayment of unliquidated progress payments and the potential for negative past performance evaluations, which can impact future contracting opportunities.

- Seek Conversion to Termination for Convenience: If the government improperly terminated your contract, you can seek to have the termination converted to a Termination for Convenience, which would entitle you to payment for completed work

plus termination settlement costs (see *Cascade Pacific International v. United States*, 773 F.2d 287 (Fed. Cir. 1985)).

This checklist is designed to help you navigate the complexities of a Termination for Default (T4D) under FAR Subpart 49.4. Facing a T4D is challenging, but with proper preparation, a thorough understanding of your defenses, and timely action, you may be able to mitigate or overturn the default. Always consult a knowledgeable attorney experienced in government contract law to ensure the best possible outcome.

Disclaimer

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