

CONTRACT TERMINATION

An Unpredictable Case Teaches Hard Lessons to Each Party Involved

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Court decisions are “opinions.” There are majority and dissenting (disagreeing) opinions. Consistency in opinions across different courts, judges, and cases promotes certainty and efficiency. Although courts may strive for consistency as they apply the facts of each case to the applicable laws, opinions can be varied and unpredictable. Opinions differed in this case involving more than six different judges.

In May 2016, the U.S. DOT’s FHWA contracted for improvements along Grand Loop Road in Yellowstone National Park, plus nearby parking areas, trails, and scenic overlooks. The work was to be performed over the course of three construction seasons, with planned shutdowns during the winter and during certain bird migration seasons. Final completion was planned for October 2018.

In late May 2016, FHWA issued notice to proceed. Within 20 days of NTP, the contractor was to submit an “initial schedule” for completion, which was to account for the planned shutdown periods and timely completion of all the work. While performing onsite work in August 2016, the contractor submitted three proposed schedules. FHWA denied all three schedule proposals for lack of compliance with the shutdown periods and other project requirements.

In October 2016 and again during the 2016-2017 winter shutdown, the contractor again submitted proposed schedules, this time with written analyses addressing FHWA’s prior rejections. FHWA did not respond. Subsequently, FHWA requested, and the contractor submitted, another proposed schedule. The contract also provided a detailed presentation to explain how the project would be timely performed within the required parameters.

On February 1, 2017, about one week after the most recent submission and presentation, FHWA terminated the contractor for default. At the time, FHWA explained the default termination was due to the contractor’s failure to diligently prosecute the work.

On appeal to the Federal Civilian Board of Contract Appeals, the Board stated that the propriety of FHWA’s termination decision depends on whether the FHWA “carefully examined the contractor’s ability to complete the work before the contract completion date.” The Board made extensive factual findings after a formal hearing and found the FHWA did not properly consider the narrative explanation accompanying the contractor’s critical path schedule submission.

The Board converted the default termination to a termination for convenience under the contractual conversion clause. The difference for the contractor was the expungement of a default termination from its record, which may affect future bonding, and the contractor’s ability to recover payment for work actually performed, including profit.

FHWA appealed the Board’s decision to the Federal Circuit Court of Appeals. The Federal Circuit Court stated the propriety of FHWA’s termination decision depends not on whether the FHWA’s examination was careful, but whether the termination decision was reasonable in light of all the facts and circumstances that existed when the decision was made. In other words, the proper point of view was not that of the FHWA, as the Board had applied, but the point of view of a hypothetical third-party under the same facts.

The reviewing authority (the Board in this case) owes no deference to the prior decision. The review begins with a clean slate and depends upon extensive factual findings developed before the reviewing authority. (The decision of the Court was made by two members of a three-judge panel. The dissenting judge criticized the other two judges for not reviewing the extensive factual findings developed by the Board.) *Department of Transportation v. Eagle Peak Rock & Paving, Inc.*, 69 F.4th 1367 (Fed. Cir. 2023).

The takeaway for contractors is to timely provide complete submittals with explanations. Here, the contractor provided what was a good explanation, but untimely.

The takeaway for owner/decision-makers is to carefully document and rationalize decisions so that, when someone else later reviews the decisions, they can more efficiently agree.

The takeaway for the legal community is that predicting outcomes with certainty is difficult, if not impossible.

