



Commercial aquatic drones are staged in preparation for a demonstration for 2d Infantry Division Soldiers to showcase the capabilities of cutting-edge underwater vehicles. (Credit: SPC John Farmer)

Practice Notes

Cure Notices in Commercial Contract Terminations

By Major Kelly R. Snyder

From the infrastructure and systems that manage and support permanent changes of station¹ to our homeland’s defense against the increasing threat of small unmanned aircraft systems,² commercial contracts play a critical role in supporting Department of Defense (DoD) missions. When nonconformance, delays, or other issues arise, the attorneys who advise contracting officers must be confidently ready to advise on the Government’s options and the steps required to take certain actions.

If the Government has determined that it is necessary to terminate a commercial contract, the concepts and procedures for doing so vary from those for non-commercial contracts in subtle but important ways. The well-known mechanism for governing non-commercial contract terminations—Federal Acquisition Regulation (FAR) Part

49, Termination of Contracts³—does not primarily govern commercial contract terminations. Instead, contracting officers must follow the termination procedures found in the commercial products/services clause and FAR Part 12, Acquisition of Commercial Products and Commercial Services. They are, however, permitted to use FAR Part 49 “as guidance to the extent that Part 49 does not conflict with [Part 12] and the language of the termination paragraphs in 52.212-4.”⁴ These overlapping regulations have generated confusion about whether cure notices—warnings that the Government considers a contractor’s work delinquent and a deadline for the contractor to “cure” the condition to prevent termination⁵—are required for commercial terminations for cause.⁶ The express language of FAR 52.212-4(m) makes no mention of a cure notice requirement, while

FAR Parts 12 and 49, as well as the non-commercial default clauses for supplies and services, expressly provide for cure notices in certain situations.⁷

This article explores the overlapping frameworks surrounding cure notices for commercial contracts and explains when a cure notice is required. Drawing from FAR provisions, commercial contract norms, and key adjudications, it offers a path for judge advocates (JAs) to navigate this nuanced and important area of contract law while helping to prevent costly errors and delays in procurement actions.

Background

Commercial contract provisions “address, to the maximum extent practicable, commercial market practices.”⁸ They therefore differ from the sometimes lengthy and onerous provisions and clauses the Government uses for procuring non-commercial products and services. For example, a contract termination due to the contractor’s failure to meet contractual requirements is called a “termination for default” for a non-commercial contract, while for a commercial contract, it is called a “termination for cause.”⁹ This distinction gets muddled, however, as the FAR’s commercial termination clause seems to use the terms “cause” and “default” interchangeably.¹⁰ FAR 52.212-4(m) provides the following regarding commercial contract terminations:

Termination for cause. The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall

be deemed a termination for convenience.¹¹

FAR 12.403(c) also applies to commercial contracts.¹² It states that contracting officers “shall send a cure notice prior to terminating a contract for a reason other than late delivery” and notes that the “excusable delays” provision (FAR 52.212-4(f)) should eliminate a need to send a show cause notice prior to termination because it requires contractors to notify the contracting officers “as soon as possible after commencement of any excusable delay.”¹³

To further understand this landscape, it helps to consider commercial marketplace norms. The Uniform Commercial Code (UCC) typically governs private-sector commercial contracts.¹⁴ While not binding, the Government looks to the UCC for guidance when regulations or the contract itself do not squarely cover a topic and to help practitioners understand how the commercial marketplace operates. Under the UCC, when a tender or delivery is rejected for nonconformance and the time for performance has not yet passed, sellers may notify the buyer of their intention to cure the failure and then make a proper delivery within the contract time period.¹⁵ Even after the delivery time has elapsed, if a buyer rejects a nonconformance but the seller “had reasonable grounds to believe [it] would be acceptable,” the seller may have reasonable time to cure the defect if they timely notify the buyer.¹⁶

Repudiation is another term of art relevant to cure notice requirements. It is synonymous with rejection, disclaimer, or renunciation, and it refers to the “refusal to perform a duty or obligation owed to the other party.”¹⁷ Repudiation can be evidenced through words or actions.¹⁸ When done before the delivery or performance due date, repudiation is “an anticipatory breach of contract but does not constitute a breach unless the other party elects to treat it as such.”¹⁹

Under the UCC, if “reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance.”²⁰ This anticipatory repudiation is not limited to “cases of express and unequivocal repudiation.”²¹ Instead, it includes “cases in which reasonable grounds support the obligee’s belief that

the obligor will breach the contract.”²² The failure to provide adequate assurance of due performance within a reasonable time (not exceeding thirty days) constitutes repudiation of the contract.²³ Until the next performance due date, or until the aggrieved party has materially changed their position or elected and indicated they consider the repudiation final, the offending party may retract their repudiation “by any method which clearly indicates to the aggrieved party that the repudiating party intends to perform, but must include any assurance justifiably demanded.”²⁴

Application: When Cure Notices Are Required

While the FAR’s commercial termination for cause provision does not explicitly require the Government to provide a cure notice and opportunity for the contractor to cure,²⁵ courts and boards will read this into the clause—at least for those situations either called for by FAR 12.403(c) or typically requiring such a notice under FAR Part 49.²⁶ This is important because “failure to give a cure notice, when required, will result in an improper termination” and will convert the termination into one for convenience, in which the Government incurs more liability and the contractor incurs much less.²⁷

Some Terminations for Cause Require Cure Notices Despite FAR 52.212-4’s Silence

In the 2005 General Services Administration Board of Contract Appeals (GSBCA) decision *Geo-Marine*, a Government contracting officer terminated a commercial task order without issuing a cure notice.²⁸ Highlighting confusion even within the Federal contracting profession, the contracting officer notified the contractor that they were being terminated for “default” under FAR 52.249-8—the termination for default provision—which the contract did not reference.²⁹ The contract did, however, contain the standard commercial items clause from FAR 52.212-4.³⁰ Because “the termination for default clause contained in [standard supply and service] contracts is similar to the termination for cause clause included in this commercial item contract,” the GSBCA considered the “precedent which applies to standard supply and service contracts.”³¹ It noted that terminations for default do not

require a cure notice if the termination is based on failing to deliver or perform in a timely manner or on repudiating contractual duties before the performance deadline.³² The board explained that “[a]lthough the commercial item contract termination for cause clause does not mention sending a cure notice, the regulations which apply to commercial item contracts require the Government to send a cure notice before terminating for any reason other than late delivery.”³³

Geo-Marine requested a summary judgment and that the termination be converted into a termination for convenience because a cure notice was not issued.³⁴ However, because they had not presented enough evidence to show that the termination was not based on non-performance or repudiation—which would not require a cure notice—the GSCBA denied the request.³⁵

The Civilian Board of Contract Appeals (CBCA) has also read an implicit cure notice requirement into commercial contracts. In its 2016 *Brent Packer* decision, the CBCA found that “although the commercial termination provision, unlike the standard default clause, does not expressly reference the need for the contracting officer to issue a cure notice before terminating a contractor for failure to comply with contract provisions, FAR 12.403 imposes that requirement.”³⁶ The board refused to “interpret the FAR in such a way as to render its requirement for issuance of a cure notice pointless” because a regulation’s interpretation is “unreasonable if it would render portions of the regulation meaningless.”³⁷

In *Brent Packer*, the Social Security Administration (SSA) terminated for cause two calls of blanket purchase agreements (BPA) with two different contractors for medical consulting services.³⁸ The SSA terminated, without issuing a cure notice, each call and their underlying BPA because each contractor had accepted employment with a state agency, which violated the [organizational conflict of interest (OCI)] requirements of BPAs and call order[s].³⁹ Although the CBCA said it was clear the SSA viewed the OCI provisions as a material requirement of the call orders, the board stated they “need not address the materiality issue here because, as the SSA acknowledges, it never issued

a cure notice [to the contractors] before terminating their call orders for cause.”⁴⁰

While the SSA argued that issuing a cure notice would have been futile, and the CBCA agreed that cure notices are not required when they “would be futile (such as if, for example, a contractor expressly repudiates a contract),” the SSA had not explained why it would have been futile in that situation.⁴¹ Because “it is well established that the . . . cure notice requirement is intended to allow an errant contractor a time certain within which to correct identified problems,” and it was clear the contractors at issue would have corrected the identified problems to comply with the OCI provision, the termination was invalid.⁴²

A Cure Notice Is Not Required When Terminating for Failed/Late Delivery/Performance

As the GSCBA did in *Geo-Marine*, the CBCA dealt with a challenge based on termination for cause without a cure notice in the 2007 *Bus. Mgmt. Rsch. Assoc., Inc. v. Government Services Agency* (GSA) case.⁴³ The CBCA noted that “a termination for cause is the equivalent of a termination for default, so we apply the same legal standards to both types of cases.”⁴⁴ However, the contractor failed to provide two required training courses, and the board found that while “regulations governing commercial item contracts require the [GSA] to send a cure notice before terminating for any reason other than late delivery,” when late delivery occurs, “no cure notice is required” prior to termination.⁴⁵

The CBCA reinforced this ruling in 2012 when CDA, Inc. argued that the SSA was required to give it a cure notice before terminating for cause because the contracting officer stated in a deposition that “non-performance” was the basis for termination.⁴⁶ However, the board found that late delivery was the basis of the non-performance, and in accordance with the applicable regulations, “because CDA failed to deliver its services on time, SSA was not obligated to provide CDA with a cure notice.”⁴⁷

The Armed Services Board of Contract Appeals (ASBCA) has held the same in similar situations. *In re General Injectables & Vaccines, Inc.* involved the Defense Logistics Agency’s termination for cause of

a flu virus vaccine contract, without a cure notice, for failure to deliver without any excusable causes.⁴⁸ The notice of termination also explained, “As the contractor notified the contracting officer of its intent to not perform, the contracting officer will not send a cure notice or show cause letter to the contractor.”⁴⁹ The ASBCA denied the contractor’s appeal,⁵⁰ and the Court of Appeals for the Federal Circuit affirmed that decision.⁵¹

A Cure Notice Is Likely Required When Terminating for Anticipatory Repudiation

In *NCLN20, Inc. v. United States*, five days before performance was supposed to start on a facilities guard contract, the GSA issued a cure notice requiring the contractor, within twenty-four hours, to provide copies of permits and assurances that it could perform or be terminated for default.⁵² The contractor was unable to comply, and two days later—three days prior to the performance due date—the GSA terminated for default.⁵³ The U.S. Court of Federal Claims noted that the doctrine of anticipatory repudiation has been incorporated into Government contract law, and it requires “that the contractor give reasonable assurances of performance but only in response to a validly issued cure notice.”⁵⁴ Because the GSA failed to give a validly issued cure notice and only twenty-four hours to respond, the court barred the GSA from asserting anticipatory repudiation as a defense.⁵⁵

In *Cross Petroleum, Inc. v. United States*, the contract required a ten-day cure notice, but the Forest Service did not issue one before terminating the fuel contract for default; it instead argued that a cure notice was not required because the contractor anticipatorily repudiated the contract.⁵⁶ The U.S. Court of Federal Claims once again rejected the Government’s argument, and it noted that non-government contracts “require[e] merely a vague ‘demand’ for adequate assurance, whereas the contract provision requires a formal cure notice that allows a ten-day period for cure.”⁵⁷ Therefore, it appears that to terminate for anticipatory repudiation in the commercial contract setting, courts would require the Government to send a cure notice under FAR 12.403 because anticipatory repudiation is a “reason other

than late delivery” and all such bases for termination require a cure notice.⁵⁸

Conclusion

Terminations for default/cause are considered “drastic sanction[s]” that should be utilized “only for good grounds and on solid evidence.”⁵⁹ As such, JAs should review terminations for cause before the contracting officer issues them.⁶⁰ Legal counsel should get involved early in the process, as determining whether a cure notice is required can be a fact-intensive analysis. Even when a cure notice may not be legally necessary, it may be beneficial, such as when a contractor can still deliver soon or cure their failure. JAs should also advise contracting officers to issue cure notices to mitigate litigation risk—especially when the basis for termination is ambiguous or when it is unclear whether repudiation has actually occurred or is just anticipated. Given the high stakes of commercial terminations, this small procedural step can make a significant difference in ensuring that the Government’s position will withstand scrutiny if challenged. **TAL**

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Notes

1. *Statement by Chief Pentagon Spokesman Sean Parnell on Implementation Memorandum for Permanent Change of Station Joint Task Force*, U.S. DEP’T OF DEF. (June 18, 2025), <https://www.defense.gov/News/Releases/Release/Article/4221479/statement-by-chief-pentagon-spokesman-sean-parnell-on-implementation-memorandum> [<https://perma.cc/UED8-UPJA>] (“Today the DoD terminated Home-Safe Alliance LLC (HSA), the DoD HHGs contractor, for cause due to HSA’s demonstrated inability to fulfill their obligations and deliver high quality moves to Service members.”).
2. *Anduril Awarded 10-Year \$642M Program of Record to Deliver CUAS Systems for U.S. Marine Corps*, ANDURIL (Mar. 13, 2025), <https://www.anduril.com/article/anduril-awarded-10-year-642m-program-of-record-to-deliver-cuas-systems-for-u-s-marine-corps> [<https://perma.cc/D5WX-2MYG>].
3. FAR 12.403(a) (2025).
4. *Id.*
5. FAR 49.607(a) (2025).
6. *See* 1 SEC. 809 PANEL, REPORT OF THE ADVISORY PANEL ON STREAMLINING AND CODIFYING ACQUISITION REGULATIONS 43-45 (2018).
7. *See* FAR 12.403(c)(1), 49.402-3(d), 52.212-4(m), 52.249-8 (2025).
8. FAR 12.302 (2025).
9. *See* Paul J. Seidman et al., *Service Contracting in the New Millennium - Part II*, BRIEFING PAPERS 12 (West Group 2002).
10. FAR 52.212-4(m) (2025) (“The Government may terminate this contract, or any part hereof, for cause in the event of any *default* by the Contractor . . . If it is determined that the Government improperly terminated this contract for *default*, such termination shall be deemed a termination for convenience.”) (emphasis added); *see also* FAR 52.212-4(f) (2025) (“The Contractor shall be liable for *default* unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence . . .”) (emphasis added).
11. FAR 52.212-4(m) (2025).
12. FAR 12.403 (2025).
13. FAR 12.403(c)(1) (2025); *see also* FAR 52.212-4(f) (2025) (“[T]he Contractor shall notify the Contracting Officer in writing as soon as it is reasonably possible after the commencement of any excusable delay, setting forth the full particulars in connection therewith, shall remedy such occurrence with all reasonable dispatch, and shall promptly give written notice to the Contracting Officer of the cessation of such occurrence.”).
14. *See* RALPH C. NASH, KAREN R. O’BRIEN-DEBAKEY, & STEVEN L. SCHOONER, THE GOVERNMENT CONTRACTS REFERENCE BOOK 520 (4th ed. 2013).
15. U.C.C. § 2-508(1) (A.L.I. & UNIF. L. COMM’N 2023).
16. *Id.* § 2-508(2).
17. NASH ET AL., *supra* note 14, at 428.
18. *Id.*
19. *Id.*
20. U.C.C. § 2-609(1) (A.L.I. & UNIF. L. COMM’N 2023); *see also* NCLN20, Inc. v. United States, 99 Fed. Cl. 734, 756 (2011), *aff’d*, 495 F. App’x 94 (Fed. Cir. 2012).
21. *Danzig v. AEC Corp.*, 224 F.3d 1333, 1337 (Fed. Cir. 2000).
22. *Id.*
23. U.C.C. § 2-609(4) (A.L.I. & UNIF. L. COMM’N 2023); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 251 (A.L.I. 1981).
24. U.C.C. § 2-611 (A.L.I. & UNIF. L. COMM’N 2023).
25. *See* FAR 52.212-4(m) (2025).
26. *See* Richard D. Lieberman, *Commercial Item Contracts Require Cure Notices Before Termination for Cause*, PUB. CONTRACTING INST., <https://publiccontractinginstitute.com/commercial-item-contracts-require-cure-notices-before-termination-for-cause> [<https://perma.cc/Z3WF-NQRX>] (last visited July 7, 2025).
27. *Appeal of Bell*, ENGBCA 5872, 92-3 BCA ¶ 25,076; *Kisco Co. v. United States*, 610 F.2d 742, 750-51 (Ct. Cl. 1979); FAR 52.212-4(m) (2025); *see also* JOHN CIBINIC, RALPH C. NASH & JAMES F. NAGLE, ADMINISTRATION OF GOVERNMENT CONTRACTS 964 (5th ed. 2016).
28. *Geo-Marine, Inc. v. Gen. Servs Admin.*, GSBCA No. 16247, 05-2 BCA ¶ 33,048.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Brent Packer and Myrna Palasi v. Soc. Sec. Admin.*, 16-1 BCA ¶ 36,260.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Bus. Mgmt. Rsch. Assocs., Inc. v. Gen. Servs. Admin.*, CBCA 464, 07-1 BCA ¶ 33,486.
44. *Id.*
45. *Id.*
46. *CDA, Inc. v. Soc. Sec. Admin.*, CBC 1558, 12-1 B.C.A. ¶ 34,990.
47. *Id.*
48. *In Re Gen. Injectables & Vaccines, Inc.*, ASBCA No. 54930, 06-2 B.C.A. ¶ 33,401.
49. *Id.*
50. *Id.*
51. *Gen. Injectables & Vaccines, Inc. v. Gates*, 519 F.3d 136 (Fed. Cir. 2008).
52. *NCLN20, Inc. v. United States*, 99 Fed. Cl. 734 (2011), *aff’d*, 495 F. App’x 94 (Fed. Cir. 2012).
53. *Id.* at 755.
54. *Id.* at 756 (quoting *Danzig v. AEC Corp.*, 224 F.3d 1333, 1338 (Fed. Cir. 2000) (internal quotations omitted)).
55. *Id.*
56. *Cross Petroleum, Inc. v. United States*, 54 Fed. Cl. 317, 325 (2002).
57. *Id.* at 326.
58. FAR 12.403(c)(1) (2023). *See also* *Appeal of -- Bulova Techs. Ordnance Sys. LLC*, ASBCA No. 59089, 18-1 BCA ¶ 37183 (Government sent what was “tantamount to a cure notice” seeking assurances including supporting documentation, contractor responded with inadequate conditional assurances, and ASBCA upheld termination for cause.).
59. *Cross Petroleum, Inc.*, 54 Fed. Cl. at 326.
60. *See, e.g.*, DAFFARS 5333.290(b) (Oct. 16, 2024).