§ 390.13 Failure to fulfill a substantial obligation under the agreement.

(a) In general. 46 U.S.C. 53509(c) requires the Maritime Administrator to determine whether there has been a failure to fulfill a substantial obligation under an agreement.

(b) Contracting Officer’s tentative conclusion—(1) Notice. If the Contracting Officer tentatively concludes that any substantial obligation under the agreement, the joint regulations or these regulations is not being fulfilled by the party he shall serve written notice of his tentative conclusion upon the party by certified mail with return receipt requested. The notice shall contain the following information:

(i) A statement of the grounds upon which the tentative conclusion is based;

(ii) The amount the Contracting Officer tentatively concludes should be withdrawn as a nonqualified withdrawal; and

(iii) A statement that the tentative conclusion shall become a final decision unless the party requests, within 30 days, an opportunity either to cure its breach or to be heard and offer evidence in opposition to the tentative conclusion.

(2) Effect of notice. The notice of the tentative conclusion shall become a final decision as described in paragraph (d)(1) of this section, unless within 30 days of receipt of such a written notice the party by personal delivery or by certified mail, requests the opportunity either to cure its breach or to be heard and offer evidence in opposition to the tentative conclusion, in which case no further withdrawals from the fund, without the written prior approval of the Contracting Officer, shall be made by the party until a binding final decision is reached by the Maritime Administration.

(c) Basis for Contracting Officer’s tentative conclusion. In determining whether a party has not fulfilled a substantial obligation under its agreement, the Contracting Officer shall consider among other things:

(1) The effect of the party’s action or omission upon its ability to either carry out the purpose of the fund, accomplish its Schedule B program (see §390.4(c)) or satisfy its minimum level of deposits in Schedule D (see §390.4(e));

(2) Whether the party has made material misrepresentations in connection with its application, agreement or any modification or amendment thereof or has failed to disclose material information that may affect its agreement or the purpose of the fund.
(d) Contracting Officer's decision and appeals to the Maritime Administrator—
(1) Where there has not been a request to cure or to be heard. If the Contracting Officer issues a written notice under paragraph (b) of this section and the party does not request within 30 days an opportunity either to cure its breach or to be heard and offer evidence in opposition to the tentative conclusion, the Contracting Officer's tentative conclusion shall become the final decision, which decision shall be final, conclusive and binding upon the party, and no appeal therefrom shall be taken to the Maritime Administrator.

(2) Where there has been a request to cure or to be heard. If the Contracting Officer issues a written notice under paragraph (b) of this section and the party requests within 30 days an opportunity either to cure its breach or to be heard and offer evidence in opposition to the tentative conclusion, the party shall be offered such an opportunity. Request to cure must include a proposal to cure the breach. If the Contracting Officer accepts the party's proposal to cure its breach, then such determination shall be final. A party requesting to be heard and offer evidence in opposition to the Contracting Officer's tentative conclusion shall be permitted to submit, in writing, any information, evidence or argument within a period set by the Contracting Officer after considering the wishes of the party. The Contracting Officer shall reduce his final decision to writing and furnish the party a copy, by certified mail—return receipt requested, which decision shall be final and conclusive and shall bind the party unless within 30 days of receipt of the decision the party appeals from said decision by personal delivery or by certified mail to the Maritime Administrator with notice to the Contracting Officer.

(e) Appeals to the Maritime Administrator. Appeals with a request for a hearing on the record, if desired, are to be transmitted pursuant to paragraph (d) of this section and are to be addressed to the Maritime Administrator. Upon the filing of an appeal, the Contracting Officer shall transmit the entire record and a copy of his final decision to the Maritime Administrator. If a request for a hearing on the record is granted, the Maritime Administrator shall proceed pursuant to the Rules of Practice and Procedure in Part 201 of this title. The decision of the Maritime Administrator on any question of fact shall be final, conclusive and binding upon the party unless determined by a court of competent jurisdiction to be fraudulent, capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence.

Appendix I to Part 390—U.S. Department of Transportation, Maritime Administration—Application Instructions

INSTRUCTION REGARDING APPLICATION FOR A CAPITAL CONSTRUCTION FUND

An application for a capital construction fund under 46 U.S.C. 53501 et seq., the Rules and Regulations prescribed jointly by the