Government Contract Terminations: Understanding the Process, Maximizing Recovery and Exploring Continuity

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Panelists:

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- Mr. Nagel advises businesses on a broad range of legal issues involving their relationship with the government. His work includes a particular focus on companies that contract with the U.S. Department of Defense (DoD) and U.S. Intelligence Community (IC), as well as other aspects and matters that involve national security.
- Mr. Nagel represents clients in bid protests, contract claims, suspension/debarment, False Claims Act (FCA) matters and disputes between contractors. He regularly guides corporations through compliance issues, including internal investigations and employee training.
- Mr. Nagel served for 12 years on active duty and as a reservist in the U.S. Marine Corps (USMC). While on active duty, he was deployed to Afghanistan, where he adjudicated claims against the North Atlantic Treaty Organization (NATO) and the U.S. government. His previous tours include stints as a special assistant U.S. attorney for the U.S. District Court for the Eastern District of Virginia, officer-in-charge of the Quantico Legal Assistance Office and as a military prosecutor.
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- Provides counsel and representation across the spectrum of government contract matters, including bid protests, size protests, claims, prime-subcontractor disputes, small business contracting programs, suspension and debarment, and federal leasing.
- Previously served on a presidential transition team, advising the incoming administration on federal procurement matters.
- Well-versed in the issues facing government contractors engaged in M&A and has represented several dozen clients in the closing of such deals, as well as post-transaction matters such as novations.
- Specializes in representing clients within the Defense Industrial Base (DIB), including advising on white papers and negotiating the terms of Other Transaction Authority (OTA) Agreements.
- Spent 9 years on active duty in the U.S. Army, including several years as agency counsel advising DOD officials on significant acquisitions and representing the Army in bid protests and contract appeals. Continues to serve in the Army Reserve.

Agenda

- Introduction
- Overview of Government Contract Terminations and Default
- Steps to Take Upon Receiving a Termination Notice
- Preparing Termination Settlement Proposals
- Alternative Creative Solutions: Exploring FAR 49.102(d)

Overview of Government Contract Terminations for Convenience and Default

Key Contract Provisions to Manage Change

- **Changes (unilateral or bilateral)**
  - Purpose: address changing requirements
  - Commercial Products or Services: changes must be *bilateral*
- **Stop Work Order**
  - Purpose: Address a situation that requires a temporary pause (up to 90 days) of work under a contract
- **Exercise of Option Periods**
  - Purpose: Government elects to continue performance for another period of performance
- **Termination for Default/Cause**
  - Purpose: Terminate remaining performance when contractor fails to perform
- **Termination for Convenience**
  - Purpose: Government terminates remaining period of performance

New Administration Action on Federal Funding

- **Key Executive Orders Impacting Funding of Contracts/Grants**
  - **EO 14151: Ending Radical and Wasteful Government DEI Programs and Preferencing:** terminate all "equity-related" grants or contracts
  - **EO 14154: Unleashing American Energy:** 90-day pause in disbursements under IIJA-funded or IRA-funded grants
  - **EO 14169: Reevaluating and Realigning United States Foreign Aid**: 90-day pause in foreign assistance programs followed by terminations of over 7,000 contracts by USAID and State
  - **EO 14222: Implementing the President's DOGE Cost Efficiency Initiative:** Terminate "covered contracts" to reduce spending or relocate spending to promote efficiency and advance administration policies
    - Review due date was March 28; terminations to follow….

Can an Unlawful Termination be Enjoined?

- **Administrative Procedures Act (5 USC 704, 706):**
  - **APA:** Agency action can't be "**arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law**."
  - **No APA jurisdiction where another statute provides a remedy**
  - **Contract Disputes Act: disputes based on "breach" of contract**
  - **CDA vs. APA Jurisdiction**
    - Look at the **source of the rights** on which the claim is based
    - A **right to be "free from government action beyond its congressional authority"** is not a contract claim under the CDA
  - **APA Remedy (Injunction) vs. CDA Remedy (Money Judgment)**
    - A claim to **enjoin the unlawful withholding of payment otherwise due** is not a claim for "money damages," although it is a claim that would result in the payment of money

Can an Unlawful Termination be Enjoined?

- **Supreme Court skepticism about APA review of terminations?**
  - ***Dept. of Education v. California*, No. 24A910 (Apr. 4, 2025)**
    - District Court issued TRO staying the termination of grants and expressly requiring the agency to pay invoices
    - "True, a district court's jurisdiction "is not barred by the possibility" that anorder setting aside an agency's action may result in the disbursement of funds. *Bowen* v. *Massachusetts*, 487 U. S. 879, 910 (1988). But, as we have recognized, the APA's limited waiver of immunity does not extend to orders "to enforce a contractual obligation to pay money" along the lines of what the District Court ordered here. "
  - SCOTUS issued decision on an expedited basis without full briefing or argument
  - How will district court's understand and apply this decision?

Steps to Take Upon Receiving a Termination Notice

Government Contracts: Termination for Convenience

- **What is a termination for convenience?**
  - The FAR defines a termination for convenience ("T4C") as the government's unilateral right to end a contract in part or in full when it's in the government's best interest. **This can happen even if the contractor has fully met their obligations.**
  - Even if the clause is not included in a prime contract, it will be read in by operation of law under the *Christian* doctrine.
  - **Review your subcontracts carefully.**
- **Contractors can submit a settlement <u>proposal</u> to recover costs pursuant to the FAR clause in their contract. How you proceed differs depending on the clause.**
  - FAR 52.249-2, Fixed-price contracts
  - FAR 52.249-4, Service contracts
  - FAR 52.249-6: Cost-reimbursement contracts
  - FAR 52.212-4(l): Commercial item contracts
- **Anticipate a negotiation with the contracting officer.**

Government Contracts: Termination for Convenience

- **If you receive a T4C, what should you do?**
  - **Step one: review your termination notice**
    - Has the agency terminated the contract in part or in full?
    - What requirements are included in the termination notice (e.g., signing an acknowledgement, deadline to file settlement proposal)?
    - Establish open lines of communication with the CO
    - Engage legal counsel, consultants, etc. early on
    - Stop work internally at the company and flow down a termination notice and stop work order to each immediate subcontractor and consultant.
  - **Step two: determine what termination clause is in your contract and timelines for deadlines**
    - Provides instructions on steps a contractor must including stopping work, terminating subcontracts, and other related steps.
    - *See also* FAR 49.104, which outlines responsibilities upon receiving a termination notice.

Government Contracts: Termination for Convenience

- **For non-commercial contracts, contractors can generally recover:**
  - **Payment for work performed** (that the government hasn't already paid for) **prior to the termination**
  - Costs incurred in performing terminated work (e.g., initial costs, preparatory expenses, etc.)
  - Reasonable profit on costs incurred
  - Costs of settling subcontract terminations
  - Reasonable settlement expenses (e.g., legal, accounting, clerical, and other expenses to prepare a termination proposal)

- **For commercial contracts, contractors can recover:**
  - The "**percentage of the contract price**" reflecting the percentage of the work performed prior to the notice of the termination
  - Plus **reasonable charges** that **resulted from the termination**

Government Contracts: Termination for Convenience

- **If you receive a T4C, what should you do (continued)?**
  - **<u>Step three</u>: establish separate internal timekeeping system and cost collection codes**
    - As discussed previously, accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data are allowable costs.
  - **<u>Step four</u>: collect information and documentation on costs for settlement proposal**
    - Contractors have the burden of establishing the proposed settlement amount
    - Maintain records of all project-related expenses, deliverables, and progress to substantiate claims for compensation. *See* FAR 49.206-2 (outlining documentation requirements for contractor settlement proposals).

Government Contracts: Termination for convenience

- **If you receive a T4C, what should you do (continued)?**
  - **<u>Step five</u>: complete termination settlement with subcontractors**
    - Prime contractor's settlement proposal should include reasonable costs of settlement of the work including termination and settlement of subcontracts (excluding the amounts of such settlements)
  - **<u>Step six</u>: submit the settlement proposal and enter negotiations with the Government**
    - Submit a logical, well-supported termination settlement proposal, which generally includes:
      - Cover letter and summary of claimed costs
      - Standard forms required by specific FAR termination clause
      - Documentation support for claimed costs (e.g., receipts, invoices, internal timekeeping records, documentation related to subcontractor terminations and settlements, etc.)
  - **<u>Step seven</u>**: remain alert on new Trump Administration actions

Preparing Settlement Proposals

Overview

- General Settlement Principles
- Types of Recoverable Costs and Limitations
- Settlement Process
- Appeal of Settlements

Relevant FAR Provisions, Clauses, Forms

- FAR Part 49
  - Subpart 49.1 – General Principles
  - Subpart 49.2 – Additional Principles - Fixed Price Contracts
  - Subpart 49.3 – Additional Principles - Cost Reimbursement Contracts
  - Subpart 49.4 – Termination for Default
  - Subpart 49.5 – Contract Termination Clauses
  - Subpart 49.6 – Forms and Formats

- FAR 52.212-4 – Commercial Items

- FAR Cost Principles, 31.205, et seq.
  - Especially 31.205-42

General Settlement Principles

- **What Can I Recover? Review Each Contract**
  - Recoverable costs are determined by the contract terms. *See OK's Cascade Co. v. United States*, 97 Fed. Cl. 635, 646 (2011), aff'd, 467 F. App'x 888 (Fed. Cir. 2012) ("Because a termination for convenience is an authorized action under the contract, the costs that a contractor can recover under a termination for convenience are dictated by the terms of the parties' agreement.")
- **Why Does This Matter?**
  - Differences between the Termination for Convenience clauses:
    - FAR 52.212-4(l) Commercial clause
    - FAR 52.249-2 Fixed Price clause
    - FAR 52.249-6 Cost Reimbursement clause
- **What if There is No Termination Clause in the Contract?**
  - Will be read into the contract under the *Christian Doctrine*
    - *JKB Sols. And Servs., LLC v. United States*, 170 Fed. Cl. 241 (2024)(citing *G.L. Christian & Assocs. v. United States*, 312 F.2d 418, 426 (Ct. Cl. 1963))

General Settlement Principles

- **Fair Compensation**
  - "A settlement should compensate the contractor fairly for the work done and the preparations made for the terminated portions of the contract, including a reasonable allowance for profit." *NUES, Inc. v. Department of Health & Human Services*, CBCA 7165 (Oct. 26, 2021) (quoting FAR 49.201(a)).
  - Fair compensation is a matter of judgment and cannot be measured exactly.
  - The use of business judgment, as distinguished from strict accounting principles, is the heart of a settlement.

What Can I Recover?

- Costs for:
  - (1) Work performed prior to termination and for preparations for the terminated portions of the work, including reasonable allowance for profit
  - (2) Termination costs (no profit)
  - (3) Settlement costs (no profit)

Work Performed Prior to Termination

- **FAR 52.212-4, Commercial Clause**
  - FAR 52.212-4(l) specifies that "recovery for work performed prior to termination be calculated based on contract price, i.e., ***as a percentage of contract price*** reflecting percentage of work performed prior to notice of termination."
  - Not subject to cost principles
    - "The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose." FAR 52.212-4(l).

- **Non-Commercial Clause**
  - A termination for convenience of a task order in a ***non-commercial items contract*** effectively converts a fixed-price contract into a ***cost-reimbursement*** contract, which entitles a contractor to recover ***allowable costs*** and reasonable profit. *Envtl. Safety Consultants, Inc.*, ASBCA No. 58343, 15-1 BCA ¶ 35,906 at 175,522.
  - Subject to cost principles. FAR 49.113

- **Limitations (FAR 52.249-2)**
  - Actual and allowable costs of work ***prior to the termination*** are *limited to* ***the total contract price***

Work Performed Prior to Termination

- **Defective or Nonconforming Work?**
  - *New York Shipbuilding Co.*, ASBCA No. 15443, 73–1 B.C.A. ¶ 9852
    - The Boards have held that "where a contract is terminated for convenience of the Government, the contractor is entitled to recover its reasonable, allocable, and allowable costs incurred with respect to termination inventory ***even if such inventory did not comply in all respects with specification requirements***."
    - Unless Government establishes that alleged deficiencies stemmed from ***gross disregard*** by the contractor of its contractual obligations.
  - *Best Foam Fabricators, Inc. v. United States*, 38 Fed. Cl. 627 (1997)
    - Contractor "entitled to recover the costs of producing the foam fuel cells, even if some were shown not to be in strict compliance with all of the contract specifications, unless the government established that any defects resulted from Best Foam's ***gross disregard*** of its contractual obligations or that any defects are so extensive as to render Best Foam's costs unreasonable."

Can I Recover Profit? FAR 49.202

- **Yes** - on preparations made and work done for the terminated portion of the contract ***unless*** contractor would ***have incurred a loss had the entire contract been completed***.
- **No** - on the settlement expenses or indirect costs.
- Anticipatory profits and consequential damages – **not allowed**

- The TCO may use ***any reasonable method*** to arrive at a fair profit.
  - See FAR 49.202(b) for factors to be considered

- *Russell Sand & Gravel Co. v. Int'l Boundary & Water Commission,* CBCA 2235, 13 BCA ¶ 35,455 (discussion on how Board calculated profit).

Termination Costs - FAR 31.205-42

- **Common Items**
  - The costs of items reasonably usable on the contractor's other work shall ***not be allowable*** unless the contractor ***submits evidence that the items could not be retained at cost without sustaining a loss***.
  - Contemporaneous purchases of common items by the contractor shall be regarded as evidence that such items are reasonably usable on the contractor's other work.
  - Any acceptance of common items as allocable to the terminated portion of the contract should be ***limited to the extent*** that the quantities of such items on hand, in transit, and on order are in excess of the reasonable quantitative requirements of other work.

Termination Costs - FAR 31.205-42

- Costs Continuing After Termination
  - Despite all reasonable efforts by the contractor, costs which cannot be discontinued immediately after the effective date of termination are generally allowable.
  - Any costs continuing after the effective date of the termination due to the ***negligent or willful failure*** of the contractor to discontinue the costs shall be unallowable.
- *Russell Sand & Gravel Co. v. Int'l Boundary & Water Commission,* CBCA 2235, 13 BCA ¶ 35,455
  - T4C (FAR 52.212-4) of contract for supply and delivery of embankment material
  - Board allowed costs associated with the vehicles (registration and insurance, facilities capital cost of money, and depreciation) that could not be discontinued during the time when contract performance would have continued, but for the termination.)
  - Testimony from contractor that it tried hard but failed, during the year after termination, to get work for which the vehicles could be used.

Termination Costs - FAR 31.205-42

- **Initial Costs** – includes starting load and preparatory costs
  - Starting load costs not fully absorbed because of termination are nonrecurring labor, material, and related overhead costs incurred in the early part of production and result from certain factors such as-
    - (Idle time and subnormal production due to testing and changing production methods; Training; and Lack of familiarity or experience with the product, materials, or manufacturing processes
  - (2)Preparatory costs incurred in preparing to perform the terminated contract include such costs as those incurred for initial plant rearrangement and alterations, management and personnel organization, and production planning. They do not include special machinery and equipment and starting load costs.

Initial Costs - FAR 31.205-42

- In *Value Recovery Holding v. United States*, 2022 WL 3641779, the Court of Federal Claims found that obtaining an authority to operate (ATO) certification was a contractual requirement that was necessary prior to performance. Specifically, the Court found that termination of the contract precluded the contractor from recovering the costs incurred in obtaining an ATO through contract performance.

- *4H Constr. Corp.*, ASBCA No. 59977, 19-1 B.C.A. ¶ 37, 317 (finding the plaintiff "entitled to compensation for any direct or indirect costs it reasonably incurred in preparing to perform the contract prior to the issuance of the notice to proceed, plus profit on those preparatory activities.")

- *Zahra Rose Constr.*, 22-1 BCA ¶ 38,111 at 185,111 (contractor entitled to recover its costs incurred in leasing fuel trucks in preparation for performing the contract).

Termination Costs - FAR 31.205-42

- **Loss of Useful Value**
  - (1)The special tooling, or special machinery and equipment is not reasonably capable of use in the other work of the contractor;
  - (2)The Government's interest is protected by transfer of title or by other means deemed appropriate by the contracting officer; and
  - (3)The loss of useful value for any one terminated contract is limited to that portion of the acquisition cost which bears the same ratio to the total acquisition cost as the terminated portion of the contract bears to the entire terminated contract and other Government contracts for which the special tooling, or special machinery and equipment was acquired.
- **Rental Under Unexpired Leases**
  - Must make reasonable efforts to terminate, assign, settle, or reduce the cost of the lease
- **Alterations of Leased Property**
  - Only if they were necessary to perform the contract

Termination Costs - FAR 31.205-42

- **Settlement Expenses**
  - (i)Accounting, legal, clerical, and similar costs reasonably necessary for
    - (A)The preparation and presentation, including supporting data, of settlement claims to the contracting officer; and
    - (B)The termination and settlement of subcontracts
  - (ii)Reasonable costs for the storage, transportation, protection, and disposition of property acquired or produced for the contract.
  - (iii)Indirect costs related to salary and wages incurred as settlement expenses in (i) and (ii); normally, such indirect costs shall be limited to payroll taxes, fringe benefits, occupancy costs, and immediate supervision costs

Other Potential Costs

- **Facilities Capital Cost of Money (FCCM) (FAR 31.205-10)**
  - FCCM "is an imputed cost designed to compensate a contractor for the opportunity and inflationary costs of holding fixed assets used to perform a contract."
  - *Fiesta Leasing & Sales, Inc.*, ASBCA 29311, 87-1 BCA ¶ 19,622 (decision holding that commercial vehicles – buses - are eligible for application of FCCM).

Subcontractor Costs – FAR 49.108

- Subcontractors have no contractual rights against the Government upon the termination of a prime contract.

- Prime contractors should **include a termination clause in their subcontracts** for their own protection.
  - Failure to include a termination clause shall not affect the Government's right to require termination of the subcontract
  - Suggestions regarding use of subcontract termination clauses are in subpart 49.5.

Subcontractor Costs – FAR 49.108

- Contractors shall settle with subcontractors in general conformity with the policies and principles relating to settlement of prime contracts
  - Each settlement **must be supported by accounting data** and **other information** sufficient for adequate review by the Government.
  - No loss of anticipatory profits or consequential damages resulting from the termination of any subcontract

- Must submit all settlements with subcontractors to TCO for approval or ratification
  - Unless approval from the TCO if amount is $100,00 or less and meets certain requirements. FAR 49.108-4

Subcontractor Costs – FAR 49.108

- The TCO will determine if the subcontractor settlement is:
  - Necessary for the termination of the prime contract
  - Arrived at in good faith
  - Reasonable in amount
  - Allocable to the terminated portion of the contract.

- **Profit** for the ***contractor's efforts*** in settling subcontractor proposals shall not be based on the dollar amount of the subcontract settlement agreements but the contractor's efforts will be considered in determining the overall rate of profit allowed the contractor

- Indirect Expenses
  - An appropriate share of the contractor's indirect expense may be allocated to the amount of settlements with subcontractors; provided, that the amount allocated is reasonably proportionate to the relative benefits received and is otherwise consistent with FAR 31.201-4 and 31.203(d).

Indirect Costs

- After a termination, contractors can charge indirect costs as direct costs.
- See *Russell Sand & Gravel Co. v. Int'l Boundary & Water Commission,* CBCA 2235, 13 BCA ¶ 35,455.
  - RS&G spent $133,873.50 on direct project overhead, including items such as ***rent for office space and living quarters for employees, fencing, and utilities***, during contract performance. Contractor deducted 3.259% for non-IBWC work.
- Must remove the costs from indirect cost pools to avoid double counting.
  - *Allied Materials and Equipment Co.*, ASBCA No. 17318, 75-1 BCA ¶ 11,150 (preparatory expenses and costs of leasehold improvements treated as direct costs for purposes of termination could not also be included in overhead)
- If charging G&A, must be supported by documentation and an explanation of how they are allocated to the contract at issue. *See First Division Design,* ASBCA No. 60049,18-1 BCA ¶ 37,201.

Subject to Certain Requirements

- Truthful Cost and Pricing Statute
  - Termination settlement proposals for *other than commercial item* contracts are subject to the Truth in Negotiations Act and must be certified if the amount proposed exceeds the TINA threshold ($2M). FAR 49.105(c)(15)
- Audit
  - Proposals of $2M or more must be audited, and proposals of less than that amount may be audited at the TCO's discretion. FAR 49.107(a).
  - Not applicable to FAR 52.212-4(l)
- False Claims Act Risks
  - FAR Part 49 expressly states that termination settlement proposals constitute a "claim" within the meaning of the False Claims Acts (civil and criminal)

Adequate Documentation

- A fixed-price contractor is not expected to have documented its cost of performance in the same manner as a cost-reimbursement contractor
- FAR 49.201(c):
  - Cost and accounting data may provide guides, but are not rigid measures, for ascertaining fair compensation.
  - In appropriate cases, costs may be estimated, differences compromised, and doubtful questions settled by agreement.
  - Other types of data, criteria, or standards may furnish equally reliable guides to fair compensation.
  - The amount of recordkeeping, reporting, and accounting related to the settlement of terminated contracts should be kept to a minimum compatible with the reasonable protection of the public interest.

FAR 52.212-4 - “Standard Record Keeping System”

- While plaintiff provided a significant number of legal invoices, it failed to separate out the costs associated with the preparation of its termination settlement proposal and explain how those invoices are connected to that preparation. *ACLR, LLC v. United States*, 157 Fed. Cl. 324, 340 (2021).
- *Campus Management Corporation*, ASBCA Nos. 59924, 59925, 17-1 BCA ¶ 36,727 (testimony under oath by a company officer without any documentation does not suffice to prove costs).
- *First Division Design*, ASBCA No. 60049, 18-1 BCA ¶ 37,201 (denying a claim for personnel compensation for time spent settling a subcontract because the employee did not take a salary and the plaintiff could not demonstrate the hours he worked in a standard record keeping system).

Methods of Settlement

- FAR 49.103, Methods of Settlement. Settlement of contracts terminated for convenience may be effected by:
  - (a) negotiated agreement,
  - (b) determination by the TCO,
  - (c) costing-out under vouchers using SF 1034, Public Voucher for Purchases and Services Other Than Personal, for cost-reimbursement contracts (as prescribed in subpart 49.3), or
  - (d) a combination of these methods.
- When possible, the TCO should negotiate a fair and prompt settlement with the contractor.
- The TCO shall settle a settlement proposal by determination only when it cannot be settled by agreement.

Settlement Proposal Process

- Termination Settlement Proposal Deadline
  - Must be submitted within **one year** from the effective date of termination, unless extended by the TCO
    - *Abdul Khabir Constr., Co.*, ASBCA No. 61155, 18-1 BCA ¶ 37,027 (appeal denied where termination settlement proposal was untimely and contracting officer did not grant an extension)
- Termination Conference
- TCO Prepares a Settlement Negotiation Memorandum
- Execution of Settlement Agreement
  - Standard Form 30 (Amendment of Solicitation/ Modification of Contract)
- Final Payment
  - Contractor Shall Submit Invoice or Voucher showing the amount agreed upon, less any portion previously paid and TCO shall attach copy of settlement agreement before forwarding to disbursement office
- Interest on amounts due under a settlement agreement?
  - No, settlement agreement is a ***mutually agreed upon*** resolution of termination rights. See also FAR 49.112-2(d).

Settlement Proposal Process

- **Termination Conference (FAR 49.105)**
  - The TCO should promptly hold a conference with the contractor to develop a definite program for effecting the settlement. When appropriate in the judgment of the TCO, after consulting with the contractor, principal subcontractors should be requested to attend.
  - Topics that should be discussed at the conference and documented include:
    - (1) General principles relating to the settlement of any settlement proposal, including obligations of the contractor under the termination clause of the contract;
    - (2)Extent of the termination, point at which work is stopped, and status of any plans, drawings, and information that would have been delivered had the contract been completed;
    - (3) Status of any continuing work;
    - (4) Obligation of the contractor to terminate subcontracts and general principles to be followed in settling subcontractor settlement proposals
    - (7) Arrangements for transfer of title and delivery to the Government of any material required by the Government.
    - (9) Contractor accounting practices and preparation of SF1439 (Schedule of Accounting Information)
    - (10) Form in which to submit settlement proposals
    - (13) Tentative time schedule for negotiation and settlement

What if Parties Can't Come to an Agreement?

- Settlement by Determination (FAR 49.109-7)
  - If the contractor and TCO cannot agree on a termination settlement, or if a settlement proposal is not submitted within the period required by the termination clause, the TCO shall issue a determination of the amount due consistent with the termination clause, including any cost principles incorporated by reference.
- Contractor Must Be Given Notice
  - TCO shall give the contractor at least 15 days notice by certified mail (return receipt requested) to submit written evidence to the TCO on or before a stated date, substantiating the amount previously proposed.
- TCO Issues Final Determination
  - The transmittal letter shall advise the contractor that the determination is a **final decision** from which the contractor **may appeal under the Disputes clause** if the TSP was timely.

Appeal of Settlement Amounts

- The contractor may appeal any settlement determination, under the Disputes clause, ***except when the contractor has failed to submit the settlement proposal within the time provided*** in the contract and failed to request an extension of time. FAR 49.109-7(f).
  - *Black Bear Construction Co.*, ASBCA No. 61181, 2017-1 BCA ¶ 36,914, the ASBCA denied the appeal of a contractor that had not filed its termination settlement proposal (or requested an extension) within one year of the date of the contract's termination for convenience as required by FAR 52.249-2(e) and instead submitted a claim 3 years after termination date.

- Must appeal within 90 days of final decision. 41 U.S.C. § 7104
- The pendency of an appeal shall not affect the authority of the TCO to settle the settlement proposal or any part by negotiation with the contractor at any time before the appeal is decided. FAR 49.109-7(f)
- Interest on successful appeal of settlement? **Yes**.

Alternative Creative Solutions:

Reinstatement under FAR 49.102(d) and Making Your Case to the Agency

Government Contracts: Termination for Convenience

- **If you receive a T4C or Stop Work Order, explore whether it is possible to keep the project going.**
- **A Termination may not be exactly what the agency wants**
  - **The action may have been prompted by a misconception of the program, or the agency may not fully appreciate the benefit of the work.**
  - **The agency may just want to renegotiate the Contract,** and is using termination as an aggressive step towards that goal.
    - President's Directive: "Each Agency Head . . . shall review all existing covered contracts and grants and . . . terminate or modify (including through renegotiation) such covered contracts and grants to reduce overall Federal spending or reallocate spending to promote efficiency and advance the policies of my Administration.

Government Contracts: Termination for convenience

- Thus, **a Termination may really be an opportunity to renegotiate**
- **FAR 49.102(d)** *Reinstatement of Terminated Contracts*:
  - Upon written consent of the contractor, the contracting office may reinstate the terminated portion of a contract in whole or in part by amending the notice of termination if it has been determined in writing that:
    - (1) Circumstances clearly indicate a requirement for the terminated items; and
    - (2) Reinstatement is advantageous to the Government.
- The government can reinstate a terminated contract if 1) the contractor consents and 2) reinstatement is advantageous to the government.
- Reinstatement is "wholly within the discretion of the contracting officer"
- Used rarely in past, but likely to be used more frequently now

Government Contracts: Termination for Convenience

Steps for Proactively Responding to a T4C

1. **If you believe the termination is due to a misunderstanding of the work, contact the Agency and verify**

   Sometimes, imprecise DOGE reviews may take words out of context ("diversity"), or the value of the contract may not be appreciated

2. **If the termination was intended, consider renegotiation**

   Would renegotiation make financial and business sense? Less profit, but a modified contract is better than no contract.

3. **If renegotiation is preferred, inform the contracting officer that you are willing to renegotiate price, terms, scope of work, etc.**

   Do not offer specific numbers or modifications until the Government expresses interest in renegotiation.

Government Contracts: Termination for Convenience

Proactively Responding to a Stop Work Order

- **Currently, large-scale acquisition pauses are in place**
  - 1/24/25: GSA Acquisition Pause
  - 1/27/25: Army acquisition pause, that was immediately rescinded
  - Will likely see pauses from additional agencies at some point
- **This will inevitably produce work stoppages on projects that the Government actually wants to proceed**
- **In those cases, you need to point this out to agency**
  - Speak in terms of the Government's interest
  - Note the benefits of the project

Government Contracts: Termination for Convenience

GSA Acquisition Pause Memo

FROM: STEPHEN EHIKIAN
ACTING ADMINISTRATOR
AND DEPUTY ADMINISTRATOR

DATE: January 24, 2025

SUBJECT: Acquisition Pause

Effective immediately, and until further notice, all contracting officers and lease contracting officers (1102s and 1170s) are instructed to suspend the execution of any new GSA-funded obligations, including new awards, task and delivery orders, modifications, and options except as noted below. Exceptions:

- Actions to support the President, Vice-President and the Secret Service in ensuring security any dollar level
- Actions in support of FEMA at any dollar level
- Emergency and urgent obligations below $50,000 (e.g. in response to a declared disaster, or to protect life and property)
- Assisted Acquisitions other than those for advisory and assistance services
- Reimbursable Work Authorizations below $50,000
- New awards for offers, modifications and options under the Federal Supply Schedule other than in support of Diversity, Equity and Inclusion
- Vehicles for the federal fleet other than zero emission vehicles
- Contract actions in support of GSA Global Supply and client support centers
- All options, bridges, and extensions (to include AbilityOne follow-on contracts as these are considered extensions of service) for services keeping buildings operational e.g, maintenance, custodial and landscaping/snow services.

Government Contracts: Termination for Convenience

Proactively Responding to a Stop-Work Order

- **Persuade the Government of the value of the work**
  - Speak in terms of administration's priorities
  - Is there a cost savings element (ESPCs) or does it generate efficiencies?
  - Law enforcement or national security nexus?
  - Disaster response nexus?
  - Necessary to keep buildings operational?
- **We have seen these strategies work and stop-work-orders lifted**
- **Minimal time and cost investment, but large potential upside**