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TERMINATION FOR CONVENIENCE OF THE GOVERNMENT: KEY ISSUES FOR CONTRACTOR RECOVERY

By Patricia A. Meagher, Greg S. Bingham, Oliya S. Zamaray, and Jeffrey DuVal

During the 10 years since the publication of the authors' March 2004 BRIEFING PAPER, *Administering Subcontracts After a Termination for Convenience*,¹ the U.S. defense budget steadily climbed, peaking in fiscal year 2011. Now, with military forces withdrawn from Iraq and operations in Afghanistan winding down, defense spending is beginning to decline. The Army, Navy, Air Force, and Marine Corps are downsizing their active duty members and reservists, although resources devoted to the support of special operations troops are set to increase slightly.

As threat assessments evolve, the trend of contracts being terminated for the Government's convenience persists. Programs such as the C-130 avionics modernization program have been restructured

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to meet budget constraints.² The proposed budget of the Department of Defense (DOD) for Fiscal Year 2015 includes termination of the Ground Combat Vehicle program.³ Its predecessor program, the Future Combat System, was canceled in 2009.⁴ Although the termination of a major program makes headlines, the DOD actually terminates hundreds of contracts for convenience in part or in whole each year.⁵

As an aid to contractors facing termination for the convenience of the Government, this BRIEFING PAPER discusses some key issues relating to the settlement of terminated cost-reimbursement contracts, commercial item contracts, fixed-price contracts,

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and time-and-materials and labor-hour contracts. It also addresses some critical issues affecting contractor recovery on nearly all contracts types when the Government terminates for convenience.⁶

Cost-Reimbursement Contracts

■ Recovery Of Fee

In the event of a termination for convenience of a cost-reimbursement contract, the Federal Acquisition Regulation (FAR) directs the Termination Contracting Officer (TCO) to determine the adjusted fee, if any, to be paid to the contractor “in the manner provided by the contract.”⁷ The FAR states that this determination is “generally based on a percentage of completion of the contract or of the terminated portion.”⁸

After the termination for convenience of a cost-plus-fixed-fee contract, the contractor typically receives a percentage of the fixed-fee amount. In contrast, cost-plus-award-fee contracts have detailed provisions (often many pages) specifying the criteria to be used to determine the award fee to be paid in each award fee period. Thus, the specific “manner” in which the contract addresses fee typically plays a more critical role when the cost-reimbursement contract terminated for convenience provides for award fee. For this reason, the method used to determine the fee to be paid the contractor after a cost-plus-award-fee contract is terminated for convenience typically differs from that used to determine fee to be paid the contractor after termination of a cost-plus-fixed-fee contract.

(a) *Recovery of Fee on Cost-Plus-Award-Fee Contracts*—It is difficult to generalize about the award

fee determination when it is based on “the manner provided by the contract” because the award fee provisions of contracts differ significantly. Indeed, the award fee provision of a contract may not address how to determine the fee payment in the event of a termination for convenience. In the absence of a contract provision addressing the adjustment of award fee after a termination for convenience, the contractor has some degree of flexibility in requesting fee in its termination settlement proposal (TSP).

In methodology, the fee proposal section of the TSP, which is often developed by program management and engineering personnel, can be very similar to fee proposals submitted as part of the ongoing performance of a cost-plus-award-fee contract. The factors that are considered in awarding fee during performance should be taken into account when requesting the adjusted award fee after a termination for convenience. In addition, the award fee proposal in the TSP should address the factors the FAR requires the TCO to consider in determining “extent and difficulty” of the work.⁹ These factors include:¹⁰

- (1) planning,
- (2) scheduling,
- (3) technical study,
- (4) engineering work,
- (5) production and supervision,
- (6) placing and supervising subcontracts,
- (7) work involved in stopping performance,
- (8) work involved in settling terminated subcontracts, and

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- (9) work involved in disposing of termination inventory.

By addressing these factors in its TSP, a contractor can put its fee proposal into the context of its particular contract and all of its complexities. This type of support in the TSP can be helpful in framing the fee negotiations going forward.

(b) *Recovery of Fee on Cost-Plus-Fixed-Fee Contracts*—When the “percentage of completion” basis is used to determine fee, the FAR makes clear that the analysis requires more than a simple determination of the ratio of costs incurred to the total estimated cost of performing the contract. Specifically, the FAR requires a comparison of “the extent and difficulty of the work performed by the contractor” with “the total work required by the contract or by the terminated portion.”¹¹ Consideration of the extent and difficulty of the work, in turn, requires analysis of the factors set forth above.¹² Accordingly, the actual percentage of completion may be determined to be greater or less than the percentage indicated by the ratio of costs, “depending upon the evaluation by the TCO of *other pertinent factors*.”¹³

(c) *Analysis of Percentage of Completion*—To maximize its fee recovery, a contractor must develop a well-supported analysis of the percentage of completion of the contract work. Following a termination for convenience, changes in the contractor’s program personnel are common. As a result of reassignments and possible reductions in the contractor’s work force, the contractor may find it challenging to prepare and present in its TSP a proper analysis of the percentage of completion of the contract work at the time of termination.

One approach that a contractor can take to maximize its fee recovery is to identify a program manager, engineer or other technical person, or a team if required by the circumstances, who is familiar with the contract and can perform a technical evaluation as soon as possible after the termination for convenience. The goal of such a technical evaluation would be to determine the percentage of completion of the contractor’s work as well as the work of lower-tier subcontractors and suppliers. The assigned person or team would review the scope of work, taking into

account all of the FAR factors listed above. Of particular importance in this review is the engineering and technical work performed prior to termination, as it is often the case that the most difficult work required by the contract is the work that is scheduled early in the contract period. A thorough and properly documented technical analysis conducted shortly after termination will be most helpful in negotiating fee recovery with the Government and lower-tier subcontractors and suppliers, especially when there is a significant period of time between the termination and the negotiation and settlement of the TSP.

In addition, many contractors employ an earned value management system (EVMS), which has been defined as “an integrated business management system consisting of the following five areas: Organization; Planning, Scheduling & Budgeting; Accounting; Analysis & Management Reports; and Revisions & Data Maintenance.”¹⁴ The monthly cost performance reports that are typical on contracts and subcontracts governed by the EVMS often provide a contemporaneous cost record and relevant project status information that can be used to provide one measure of the percentage of completion of the contract.¹⁵ Even when the EVMS data are not used to establish the percentage of completion, the EVMS data should be cross-checked to determine if the EVMS data are consistent with other measures of the percentage of completion. The EVMS data are often a credible source of information.

■ Application Of “Limitation Of Cost” & “Limitation Of Funds” Clauses

A contractor’s responsibilities under a contract do not end with the issuance of a notice of termination for convenience. Even if the termination for convenience is a full termination rather than partial termination for convenience, the FAR “Termination” clause requires that the contractor dispose of inventory, develop a TSP, terminate subcontracts, and process TSPs from subcontractors, among other things.¹⁶ In cost-reimbursement contracts, special clauses are used to protect both the Government and the contractor from incurring open-ended obligations in the termination context.

(1) *Operation of the Clauses*—The FAR “Limitation of Cost”¹⁷ and “Limitation of Funds” clauses¹⁸ are viewed as protecting both the Government and the contractor.¹⁹ The clauses protect the Government from paying more than it had anticipated paying for the product or service, unless and until the Government elects to permit additional costs. Moreover, the clauses protect a contractor by ending its obligation to continue performing a contract when funding or cost limits have been reached, unless and until the Government specifically provides additional funds or approves the incurrence of additional costs.²⁰ In the context of a termination for convenience, however, a contractor’s recovery of otherwise allowable costs may be limited by the “Limitation of Cost” and the “Limitation of Funds” clauses.

In a *fully funded cost-type contract*, a contractor’s recovery of otherwise allowable costs is limited by the “Limitation of Cost” clause.²¹ This clause requires that the contractor give the Government written notice when it has reason to believe that (a) the costs expected to be incurred in the next 60 days, when added to all costs previously incurred, will exceed 75% of the estimated cost of the contract or (b) the total cost of performance, exclusive of any fee, will be “either greater or substantially less” than previously estimated costs.²² If the contractor fails to provide written notice along with a revised estimate of costs, the contractor may be precluded from recovering any costs incurred in excess of estimated costs.

In an *incrementally funded cost-type contract*, a contractor’s recovery is limited by the “Limitation of Funds” clause.²³ The “Limitation of Funds” clause operates much like the “Limitation of Cost” clause; it requires that a contractor provide written notice to the Government when it has reason to believe that the costs expected to be incurred in the next 60 days, when added to all costs previously incurred, will exceed 75% of the of funds allotted to contract.²⁴ Along with this written submission, the contractor must include an estimate of the amount of additional funds required to continue performance.²⁵ Failure to provide the required notice may preclude recovery of costs.

Once the contractor provides the required notice, the Government has four options: (1) notify

the contractor that additional funds have been allotted, or that the estimated cost has been increased, in a specified amount, (2) advise the contractor that the contract will not be further funded and that it should submit a proposal for an adjustment of fee, (3) terminate the contract for convenience, or (4) notify the contractor that the Government is considering whether to allot additional funds or increase the estimated cost.²⁶

These clauses continue to apply to cost recovery after a cost-type contract is terminated for convenience.²⁷ Because a contractor is not obligated to incur costs in excess of the estimated cost in the contract, the Contracting Officer (CO) *must* ensure availability of funds for any directed actions after termination for convenience.²⁸ After a termination for convenience, the CO may adjust the contract cost or funding ceiling, though doing so is entirely discretionary. If the CO elects to proceed with the adjustment, the CO must make clear that any increase in the estimated cost or amount allotted to a contract must be used solely for funding post-termination activities or settlement expenses.²⁹

(2) *DOD “Special Termination Costs” Clause*—The Department of Defense (DOD) regulations provide for the use of a “Special Termination Costs” clause³⁰ that operates as an advance agreement between the contractor and the Government regarding the Government’s maximum liability for “special” costs the contractor may incur in the event of a termination.³¹ The clause may be used only in incrementally funded contracts³² and defines “special” termination costs to include:³³

(1) Severance pay, as provided in FAR 31.205-6(g);

(2) Reasonable costs continuing after termination, as provided in FAR 31.205-42(b);

(3) Settlement of expenses, as provided in FAR 31.205-42(g);

(4) Costs of return of field service personnel from sites, as provided in FAR 31.205-35 and FAR 31.205-46(c); and

(5) Costs in [(1), (2), (3), and (4)] to which subcontractors may be entitled in the event of termination.

The “Special Termination Costs” clause states that, notwithstanding the “Limitation of Cost”

and “Limitation of Funds” clauses in the contract, the contractor shall not include in its estimate of costs incurred or to be incurred, any amount for “special” termination costs to which the contractor may be entitled in the event the contract is terminated for the convenience of the Government.³⁴ Instead, the contractor and the CO must agree upon “an amount that represents their best estimate of the total special termination costs to which the contractor would be entitled in the event of termination.”³⁵ The contractor also agrees to perform in such a manner that its claim for special termination costs will not exceed the agreed-upon amount.³⁶ The Government has no obligation to pay the contractor any amount for special termination costs in excess of the agreed-upon amount.³⁷

For example, if the special termination costs are limited to a \$5 million ceiling, the Government’s liability is limited to this cap until the moment of full funding of the contract (when this clause becomes inapplicable³⁸). The Government is not obligated to reimburse the contractor for any termination costs in excess of this ceiling, even though funds remain. The Government Accountability Office (GAO) has explained that “[a]n agreement to pay ‘special termination’ costs under an incrementally funded contract creates a firm obligation, not a contingent liability, to pay the contractor because the contracting agency remains liable for the costs even if it decides not to fund the contract further.”³⁹ Research by the authors of this PAPER found no substantive discussion of the “Special Termination Costs” clause in any published decision by the boards of contract appeals or the U.S. Court of Federal Claims.

(3) *Boeing Co.*—A 2013 decision by the Armed Services Board of Contract Appeals (ASBCA), *Boeing Co.*,⁴⁰ serves as a reminder of the risks posed by the “Limitation of Funds” clause. Specifically, *Boeing* teaches that prime contractors (and, by parallel argument, subcontractors) must assure that funding on their contracts will be adequate not only for work underway but also for recovery of costs in the event of a termination for convenience. In this case, the ASBCA denied recovery of prime and subcontract costs incurred in excess of the funded amounts, holding that, if the contractor incurred costs in excess of the allotted

funding, “it was a volunteer and did so for its own account.”⁴¹ The lesson learned in *Boeing* is that the prime contractor should have included potential subcontract termination liability in its “incurred” costs when submitting the notification required by the “Limitation of Funds” clause in its contract. Upon approaching the calculated amount, Boeing should have stopped work. Because Boeing exhausted the funding before subcontractor termination settlement liability was incurred, it could not have its subcontractor settlements reimbursed, even though it had been terminated for the convenience of the Government.⁴²

(4) *Recovery of Costs Notwithstanding the “Limitation of Cost” and “Limitation of Funds” Clauses*—If a contractor submits a TSP requesting cost reimbursement and fixed-fee allowance in a total amount exceeding the funds allotted to the contract, it is likely that the CO will deny recovery of the excess amount on the ground that the Government’s liability for payments under the contract is limited to the total amount allotted to the contract.⁴³ Nevertheless, despite the language of the “Limitation of Cost” and “Limitation of Funds” clauses precluding the recovery of costs incurred above the limitation amount, contractors have been successful in recovering costs in excess of the cost or funding ceiling, especially where the facts indicated that it would be “inequitable” for the Government not to increase the ceiling.⁴⁴ This situation is often encountered in the context of a termination for convenience where the Government knew that allotted funds were exhausted but continued to direct the contractor to perform termination activities.⁴⁵

(5) *Subcontract Flowdown Clauses*—Carefully crafted subcontract flowdown clauses will limit the prime contractor’s obligation to subcontractors in the event of a termination for convenience. A prudent contractor will flow down to its cost-type subcontractors a clause that is substantively similar to either the “Limitation of Cost” or “Limitation of Funds” clause in its prime contract. If a subcontract is fully funded, the prime contractor might flow down to its subcontractor the entirety of the “Limitation of Cost” clause, making the necessary substitutions regarding party identifications. Where a subcontract is incrementally funded, the prime

contractor will often include in the subcontract a carefully revised version of the “Limitation of Funds” clause in order to limit its obligation. For example, the prime contractor might revise the clause to expressly state that the estimated cost to be reimbursed by the prime contractor for the performance of the subcontract will not exceed a certain ceiling, and that the subcontractor will use its best efforts to perform the work within such ceiling-limited cost. In addition, the clause might be revised to state the amount presently available for payment and allotted to the subcontract as well as the items and period of performance covered by the allotted amount. The clause should go on to explain that, from time to time, additional funds will be allotted to the subcontract up to the full estimated cost (exclusive of any fee). The clause might further be revised to direct the subcontractor to provide the prime contractor with written notification when it has reason to believe that the costs expected to be incurred in the next 30 days, when added to all costs previously incurred, will exceed 75% of the total amount then allotted to the subcontract. Lastly, the prime contractor might require its subcontractor to advise whether the funds available will permit it to perform beyond the period specified or whether certain estimated additional funds will be required for timely performance of the work.

Whether the resulting subcontract incorporates the entirety of the “Limitation of Cost” clause or a revised version of the “Limitation of Funds” clause, such a flowdown clause will function to protect the prime contractor, particularly in the event that the prime contract itself pushes up against the Government’s cost or funding limitations. After all, the prime contractor is not obligated to reimburse the subcontractor for costs incurred in excess of the total amount the prime contractor periodically allots to the subcontract. However, to the extent the amount allotted to the subcontractor exceeds the estimated cost set forth in the subcontract, such estimated cost shall be correspondingly increased.

It is important to note that the clause limiting the prime contractor’s obligation will not affect its right to terminate the subcontract. If the prime contractor issues a termination or other notice,

it may allot additional funds and direct that the increase is solely for the purpose of covering termination or other specified expenses.

(6) *Cautionary Note for Subcontractors*—Subcontractors must take heed. In the absence of the specified notice called for by the “Limitation of Cost” and “Limitation of Funds” clause flowdowns, the prime contractor is not obligated to reimburse the subcontractor for any costs in excess of the total amount then allotted to the subcontract, whether those excess costs were incurred during the course of subcontract performance or as a result of termination. At the same time, the subcontractor is not obligated to continue performance under the contract (including actions under the “Termination” clause) or otherwise to incur costs in excess of the amount allotted to the subcontract unless, and until, the prime contractor notifies the subcontractor in writing that such allotment amount has been increased.⁴⁶ If the subcontractor is not aware that the prime contractor has notified the Government that it is near the limitation of cost or funds for the prime contract, the subcontractor is at risk of the prime’s nonpayment; the subcontractor may seek recovery by suing the prime in the appropriate state court.

Commercial Item Contracts

■ Basis For Termination Recovery

Terminations for convenience in a commercial item setting are characterized by important differences and nuances. Of particular interest to prime contractors and subcontractors alike, the pertinent FAR clause—paragraph (1), “Termination for the Government’s convenience,” of the “Contract Terms and Conditions—Commercial Items” clause at FAR 52.212-4—explains how both price and fee may be recovered in the event of a termination for convenience. Specifically, FAR 52.212-4(1) directs that “[s]ubject to the terms of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard

record keeping system, have resulted from the termination.⁴⁷ This is a two-part formula: the first element is based on price (i.e., “a percentage of the contract price”); the second element is based on cost (i.e., “reasonable charges”). Notably, the FAR clause neither requires the contractor to comply with the Cost Accounting Standards or contract cost principles described in FAR Part 31 nor gives the Government any right to audit the contractor’s records.⁴⁸

As a result of the wide range of products and services purchased by the Government using commercial items contracting, there is not one standard method to determine the “percentage of work performed” or whether “charges” resulting from the termination are “reasonable.” Moreover, commercial item terminations are subject to the FAR Part 49, “Termination of Contracts,” fairness standard—that 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 profit allowance.⁴⁹

(a) *Case Law Regarding the “Percentage of the Work Performed”*—The decisions of the boards of contract appeals and the Court of Federal Claims provide guidance on acceptable methods for determining the percentage of the work performed prior to the termination notice. One method used by the ASBCA to determine the “percentage of the work performed” is to compare the length of time the contract was performed before it was terminated with the original forecasted contract period of performance. This method was applied to a commercial contract under which the contractor was to provide a U.S. flag vessel capable of carrying ammunition containers for charter services for 59 months.⁵⁰ The ASBCA determined that the “percentage of the work performed” should be measured by length of performance prior to the termination as compared to the originally forecasted contract period of performance or term.⁵¹ This method also was used by the Civilian Board of Contract Appeals (CBCA) to determine the percentage of the work performed after the termination for convenience of a contract for courier service. The CBCA determined the percentage of the work performed by comparing the months of service performed prior to termination

with the originally forecasted contract period of performance.⁵²

Another method for determining the percentage of the work performed is to identify the extent to which the work was completed prior to termination. This method is most easily applied where the work status can be measured objectively. For example, in one case, the Government awarded a commercial services contract to thin trees on 98 acres of federal land within a 90-day period of performance.⁵³ To determine percentage of completion, the CBCA identified the number of acres completed prior to the termination for convenience and compared that number to the 98 acres scope of work (e.g., X acres divided by 98 acres = Y% complete). In doing so, it rejected the “length of time” method proposed by the contractor: the number of days it performed the services as compared to the 90-day contract period.⁵⁴ The authors regard the CBCA’s method as more appropriate since the contract was for the thinning of trees on 98 acres of land, not for the thinning of trees for a 90-day period of time.

In yet another decision, the CBCA rejected the Government’s method for determining the percentage of the work performed based on the ratio of the number of crew hours estimated by the contractor to the number of hours actually spent by the crew prior to termination. The CBCA noted that estimated hours were just that—an estimate—and that “there is no basis, under a firm fixed-price contract, to restrict recovery to this measure.”⁵⁵ The CBCA instead relied on witness testimony to determine the percentage of the completion of the work.⁵⁶

The Court of Federal Claims has also been called upon to determine the “percentage of the work performed” in a case involving a terminated contract for the delivery and demolition of prefabricated commercial modular buildings.⁵⁷ After the contractor completed all work except the demolition of two buildings, the Government terminated the contract for default. The court converted the default termination into a termination for convenience and thereafter proceeded to calculate the “proportion of work performed prior to termination” in order to determine the sum owed to the contractor.⁵⁸ Finding that the

contractor was owed the cost of work performed plus profit, the court subtracted from the full contract price the anticipated price of the terminated work as well as the unit price of work that did not conform to contract requirements.⁵⁹ In so doing, the Court of Federal Claims contributed to the range of approaches previously taken by the boards of contract appeals in determining the percentage of work performed on a commercial item contract terminated for convenience.

(b) *Using Engineering Estimates and Looking to Parallel Models To Determine the “Percentage of the Work Performed”*—Considering the challenge of determining the percentage of the work performed on a terminated commercial item contract without the benefit of cost information, the authors of this PAPER have encountered multiple circumstances where the percentage of the work performed is estimated by engineers or project managers. Although typically somewhat subjective, these estimates are often the best information available to the parties. Engineering estimates have also been used to demonstrate the reasonableness of a percentage of the work performed determinations based on other approaches.

The “percentage of the work performed” also may be developed using a process similar to the “percentage of completion of work” calculation in a fee proposal for a cost-plus-award-fee contract terminated for convenience, which was discussed earlier in this PAPER.⁶⁰

(c) *Auditors Use of Cost Information To Verify “Percentage of the Work Performed”*—The FAR specifically states that a commercial item contractor is not required to provide cost information to the Government if its contract is terminated for convenience.⁶¹ Nevertheless, in circumstances encountered by the authors of this PAPER, Government auditors have requested cost information from a commercial item contractor for use in determining the percentage of the work performed prior to the notice of termination. This request may be a reflection of the fact that many Government auditors—for example, the Defense Contract Audit Agency (DCAA)—are accustomed to having access to cost information and evaluating cost information when auditing TSPs.

Commercial item contractors should think carefully before providing cost information to Government auditors. Commercial accounting systems and practices may not comply with the provisions of the FAR Part 31 Cost Principles and otherwise may not meet the expectations of Government auditors. For example, if the contractor does not separately identify and exclude from billings costs that are not allowable in accordance with the FAR 31 cost principles, the Government auditor will likely notice this in the cost data provided and may report that the contractor does not comply with Government regulations. Such visibility as a noncompliant contractor is not typically good for business.

■ Recovery Of “Reasonable Charges”

The recovery of “reasonable charges” by a terminated commercial item contractor⁶² has been defined as compensation “for settlement costs or costs reasonably incurred in anticipation of contract performance, provided such costs are not adequately reflected as a percentage of the work performed, and provided such costs could not have been reasonably avoided.”⁶³ The “reasonable charges” provision of the commercial item “Termination for the Government’s convenience” clause has been interpreted somewhat broadly by the boards of contract appeals. It has been held that recovery under the clause is not restricted to charges incurred subsequent to the termination for convenience. Moreover, the clause does not limit reasonable charges to settlement expenses as defined in FAR 31.205-42(g).⁶⁴ Thus, the “reasonable charges” provision allows contractors to recover costs incurred in anticipation of performing the contract⁶⁵ as well as costs incurred prior to the termination,⁶⁶ provided, of course, that such costs are not reflected in the percentage of completion.

Fixed-Price Contracts

■ Loss Ratio

When a fixed-price contract is terminated for convenience, the assessment of the profit or loss position of the contractor, had it not been terminated, is very important.⁶⁷ The FAR provides that in

the negotiation or determination of any settlement of a terminated fixed-price contract, the TCO will not allow profit if it appears that the contractor would have incurred a loss had the entire contract been completed. Moreover, the TCO will reduce the settlement to reflect the indicated rate of loss.⁶⁸ In general, a contractor is in a loss position if, at the time of termination, the final cost estimate at completion (EAC) is forecasted to exceed the contract price (as properly adjusted for contract changes prior to termination).

From a practical standpoint, the determination of the terminated contractor's EAC is the most important step of the loss ratio calculation. Due to personnel changes that often result from terminations (e.g., reductions in force), contractors may have difficulty ascertaining the exact EAC of their contracts. This is similar to the determination of percentage of completion for fee determination on a cost-plus-fixed-fee contract terminated for convenience, discussed above. A best practice for a terminated contractor is to ensure that a program manager or an engineer familiar with the contract performs a technical evaluation as soon as possible after termination to determine an EAC or evaluate the EAC provided by the lower-tier subcontractor.

■ Total Cost Basis Settlement Proposal On Fixed-Price Contracts

The total cost basis is the secondary termination proposal format that can be used on fixed-price contracts. (The FAR provides that use of the inventory basis for settlement proposals is "preferred.")⁶⁹ It is the only basis for which the FAR specifically requires the contractor to include all its costs from contract inception through termination in its termination proposal.⁷⁰ The total cost basis format, however, can be used only under specific circumstances and requires special TCO permission.⁷¹ In this regard, TCO permission should be obtained in advance; a terminated contractor or subcontractor that submits a TSP using the total cost basis without TCO permission may find it summarily rejected and the costs of its preparation disallowed.

The FAR specifies four situations in which the use of the total cost basis may be acceptable:⁷²

- (i) If production has not commenced and the accumulated costs represent planning and preproduction or "get ready" expenses.
- (ii) If, under the contractor's accounting system, unit costs for work in process and finished products cannot readily be established.
- (iii) If the contract does not specify unit prices.
- (iv) If the termination is complete and involves a letter contract.

Of these four situations, the second—where unit costs for work in process and finished products cannot readily be established under the contractor's accounting system—is most common based on the experience of the authors of this PAPER. Often, contractors that manufacture small parts at fixed prices in primarily commercial environments do not have the systems necessary to track their costs on a per-unit basis, as required in cost-reimbursement contracts. In these situations, it is incumbent on the contractor (or the subcontractor through the prime contractor) to notify the TCO promptly after termination that the contractor's (or subcontractor's) accounting system cannot accumulate the cost of particular items of inventory, including the cost of work in progress, in great detail, and therefore a total cost basis is appropriate for use. In addition, even if the contractor's accounting system may be able to establish unit costs, if it can only be done at great expense, the TCO should be advised so that he or she can determine if a total cost basis TSP is appropriate under the circumstances. The Government, after all, reimburses the contractor for its reasonable costs in preparing and submitting its TSP and likely does not want the contractor to incur time and expense to establish unit costs when it is unnecessary or unwarranted.

T&M Contracts

■ Treating Terminated T&M Contracts As Cost-Type Contracts

Because of the typical requirement on a time-and-materials or labor-hour contract (collectively "T&M" contracts) to invoice for labor based on hours incurred multiplied by the "price" for each hour, many contractors treat T&M contracts as a fixed-price contract. In keeping with this impression,

some contractors submit TSPs for T&M contracts on forms intended for fixed-price contracts (i.e., Standard Form (SF) 1435, “Settlement Proposal (Inventory Basis),” and SF 1436, “Settlement Proposal (Total Cost Basis”). Contrary to this common impression, the regulations indicate that T&M contracts are not fixed-price contracts.⁷³ As such, for T&M contracts, contractors should submit their TSPs on the SF 1437, “Settlement Proposal for Cost-Reimbursement Type Contracts”⁷⁴ and address all work from contract inception through termination.⁷⁵

For the purposes of termination and based on the regulations, a T&M contract should be treated as a cost-reimbursement contract, but with a twist—the cost of labor is not to be provided in the TSP. Instead, similar to invoices submitted prior to the termination, contractors should multiply the number of labor hours by the contract price of each labor category.⁷⁶ The “Termination” clause incorporated into T&M contracts is a variation of the standard “Termination” clause for cost-reimbursement contracts.⁷⁷ As such, a terminated contractor with a T&M contract can continue to submit invoices for six months after the termination.⁷⁸ If there are unpaid invoices or settlement costs to be recovered, these amounts can be addressed through the submittal of invoices⁷⁹ or a TSP following the guidelines in FAR Part 49 and the “Termination” clause included in T&M contracts.⁸⁰ If the terminated T&M contract has no outstanding costs, or the costs can be invoiced, the contractor is not required to submit a TSP and normal contract closeout procedures should be followed.

■ Recovery Of Settlement Expenses

There is a common misconception that the incurrence of costs on a T&M contract can necessarily be stopped immediately as of receipt of a termination notice, and that there will be no continuing costs or settlement expenses. However, many T&M contracts need some type of a wind-down period, although perhaps not as extensive as would be expected on a major fixed-price or cost-reimbursement contract. For example, a T&M contractor may need to cancel material orders, terminate employees for whom there is no additional work, prepare instruction

manuals, or complete inventory disposition for nondelivered items.

Under the FAR “Termination” clause for inclusion in T&M contracts, the following costs, if reasonable, are allowable: (1) costs of settling and paying TSPs under terminated subcontracts, (2) labor and material costs prior to termination, and (3) labor and material expenses incurred after the effective date of termination, with the approval of or as directed by the CO.⁸¹ Therefore, reasonable settlement expenses are allowable on T&M contracts that incorporate this clause; however, the contractor must show that it has made every effort to “discontinue these expenses as rapidly as practicable” as governed by the FAR provision.⁸²

Issues Relating To Nearly All Contract Types

■ What Costs To Include In The TSP

With one exception, the FAR is silent on whether the contractor, in preparing its TSP, is to include all costs incurred from contract inception through termination, or simply those costs incurred after the effective date of the termination. The one exception to the FAR’s silence on this issue applies to fixed-price contractors using a total cost basis settlement proposal (discussed above); in such cases, the contractor must itemize costs incurred under the contract up to the effective date of termination.⁸³ Most contractors include in the TSP all costs incurred since contract inception. Indeed, since a contract closeout audit is typically required on the terminated contract, a TSP that includes all contract costs may simplify the audit and closeout process.

■ Partial Payment Applications

Following a termination for convenience, issues may arise relating to partial payments and the calculation of allowable partial payment amounts based on what has been previously paid on the contract. Terminated contractors and subcontractors have the ability to submit a partial payment request.⁸⁴ This procedure is important to maintain cash flow to the contractor to cover its incurred

expenses as well as to allow a contractor to pay the termination settlements of its lower-tier suppliers pending final settlement. Partial payments are discretionary with the Government, but where authorized, provide for the contractor to be reimbursed for (a) up to 100% of contract price (less undelivered acceptable items), (b) up to 100% of subcontractor settlements approved by the Government and paid by the prime contractor, (c) up to 90% of work-in-progress, which may also include raw materials, purchased parts, supplies, and direct labor, (d) up to 90% of “other allowable costs,” including settlement expenses and indirect costs, and (e) up to 100% of partial payments made to lower-tier subcontractors.⁸⁵

A complicating factor in the submission of partial payment applications is that the interpretation of “90%” varies (e.g., 90% of what?). One position is that a contractor is only eligible for partial payments of up to 90% of the *total contract price*, while another position is that partial payments can be made of up to 90% of the costs unpaid as of the effective date of the termination. Although contractors are not limited in the number of partial payment requests they can submit, it is important to note that “[t]he total amount of all partial payments shall not exceed the amount that will, in the opinion of the TCO, become due to the contractor because of the termination.”⁸⁶ Contractors should be mindful that partial payments are provisional; therefore, if a partial payment is made and the TCO disallows any of a contractor’s costs, the Government can recover a credit on previously paid amounts.⁸⁷

■ “Subcontracts” With Affiliated Business Units Of The Same Contractor

Large contractors with multiple affiliated business units often issue intracompany work orders (IWOs) to govern the work between business units in lieu of formal subcontracts. While IWOs are convenient and typically require less contract administration than traditional subcontracts, it is important for contractors to document all contractual requirements and follow all the required compliance processes. In the event of a termination, undocumented or improperly documented IWOs can result in the disallowance of cost associated with the IWOs.

(1) *IWO or Subcontract?*—The primary difference between a subcontract and an IWO is that subcontracts are arm’s-length transactions, while IWOs are not. While subcontracts are often competitively bid, a contractor does not need to abide by the relevant FAR provisions in issuing IWOs. A common problem is the affiliated business unit’s conformity with the Cost Accounting Standards (CAS). For example, in one matter, an affiliated entity accumulated costs according to the prime contractor’s CAS Disclosure Statement practices, rather than its own, for the purposes of the IWO. When the prime contract was terminated and the affiliated unit submitted its TSP, the DCAA questioned significant costs due to the affiliated unit’s adherence to the prime’s CAS practices rather than its own. Although IWOs are not required to abide by subcontracting rules, contractors should assess the benefits of administering IWOs as subcontracts to guard against potential cost issues that may arise should a termination occur.

(2) *Transfer Pricing and Compounding of Profit*—Another issue that arises for contractors operating with IWOs is the ban on tiering of profit. It is unallowable to charge fee twice on the same contract, and the Government views a prime’s IWO as the same contract for fee purposes.⁸⁸ The prime contractor may owe profit to the affiliated unit under the IWO; however, that should be accounted for separately and not billed to the Government. Often, when a contract is terminated, the Government will request documentation from the contractor to verify that the prime contractor has not billed or been paid for tiered fee. This documentation is rarely available and can result in a portion of the prime’s profit being disallowed. Therefore, contractors must keep close track of fee billed and paid both to the affiliated unit and to the Government.

(3) *Flowdown Clauses*—The best practice when issuing IWOs is for the prime contractor to flow down to its affiliate all the same FAR clauses that it would typically flow down in a subcontract to a nonaffiliated entity. Contractors should take care to include the relevant FAR Part 49 flowdown clauses to ensure that, if the contract is terminated, the termination is flowed to the IWO and that the affiliated unit submits a TSP in

accordance with the requirements of FAR Parts 31 and 49 and the relevant clauses in FAR Part 52.

■ Ongoing Work On Fully Terminated Contracts

It is important for terminated contractors to develop a structure of accounts, or charge codes, for the recording of post-termination charges. For performance prior to the termination, the contractor may have a work breakdown structure or other system of charge codes that are either contractually specified or have been agreed to between the contractor and its Government customer. In a contract that has been fully terminated, the charge codes in effect prior to the termination will likely have no relevance to the termination activities undertaken after the effective date of the termination. The need for development of charge codes for use in accumulating costs for billing and other purposes, and obtaining agreement on the use of these job codes, is especially critical in circumstances where there is continuing work, such as technology transfer, directed by the Government customer. Continuing work is not uncommon on major contracts terminated for convenience, as described in a GAO report:⁸⁹

[B]oth the Comanche and Crusader were canceled programs in which DOD had invested billions of dollars. Yet following each of those cancellations, the government was able to transfer significant amounts of technology and property from those programs to other DOD programs.

* * *

[I]n the wake of the Crusader termination, the Army transferred almost 26,000 inventory line items (valued at more than \$150 million) from the Crusader to create the Non-Line-of-Sight-Cannon (NLOS-C) program. According to one Army official, the technology transfer also preserved DOD's technical and scientific expertise in its armored community. Moreover, an additional 9,800 inventory line items from the Crusader program, valued at \$25.8 million, were transferred to the NLOS-C program."

* * *

When the Army terminated the Comanche helicopter program, it transferred the Comanche's fly-by-wire flight control system technology and 70,000 line items of property to other DOD programs as a way to retain value for work performed as well as lower termination costs. Overall, the Army was able to reutilize more than 60 percent

of the Comanche's property, valued at more than \$360 million.

It is also noteworthy that it is necessary to accumulate costs into different categories or account codes to render it possible to add the appropriate overhead or general and administrative costs (e.g., in many companies the overhead costs added to direct labor are different from the overhead costs allocated to direct material; the fringe benefits and overhead allocated to settlement expenses will typically be different from other costs).⁹⁰ The careful accumulation of costs in different account codes is also often helpful in support of fee determination when fee is based on percentage of completion and the cost of continuing work is factored into the percentage of completion, as well as for the accumulation of costs for the different categories of the settlement proposal forms (e.g., SF 1436, SF 1437) and the application for partial payment (SF 1440).

■ Recovery Of Severance Costs By International Contractors

Severance costs are some of the more common costs incurred by a contractor as a result of a termination for convenience. As defined by the FAR, severance is "a payment in addition to regular salaries and wages by contractors to workers whose employment is being involuntarily terminated."⁹¹ The FAR includes a list of criteria that must be met before the cost of severance can be reimbursed (i.e., be an allowable cost) by the Government. These include demonstrating (1) that severance is required by law; (2) that an employer-employee agreement includes requirements to pay severance; (3) that an established policy constitutes, in effect, an implied agreement on the contractor's part to pay severance; or (4) that the circumstances of the particular employment require severance.⁹²

In the United States, severance payments most often are not governed by law, but by the contractor's "established policy."⁹³ Outside the United States, however, many companies do not have formal policies and procedures, but rather, comply with mandatory local and national laws governing severance payments. For example, in France, an employee dismissed for economic

reasons who has had a continuous period of employment of at least 2 years but less than 10 years must, by statute, be paid a severance that is equal to 2/10th of his or her net monthly salary for each year of employment. For each year over and above 10 years, the severance is increased by 2/15 of net monthly salary.⁹⁴ As a result, many international contractors, especially in Europe, pay severance amounts to terminated employees that are more generous than the severance amounts typically paid by U.S. companies. While base severance amounts of two weeks is a common practice among U.S. companies, six months' severance as a base amount is not uncommon in European countries, regardless of the length of the severed employee's service.

The challenge in cases in which a foreign subcontractor or supplier includes severance costs in a TSP is how to determine the reasonableness of the severance amount given the differences that exist between practices in the United States and other countries. The FAR provides the following regarding the determination of the allowability of severance to foreign nationals:⁹⁵

[T]he costs of severance payments to foreign nationals employed under a service contract performed outside the United States are unallowable to the extent that such payments exceed amounts typically paid to employees providing similar services in the same industry in the United States.

In a recent matter familiar to the authors of this PAPER, a Canadian subcontractor included a "global gross" severance in its TSP submitted

to its U.S. prime contractor. The "global gross" severance was negotiated between the Canadian subcontractor, as the employer, and the terminated employee, but was not governed by any company policy or procedure. The Canadian provincial law on termination of employment yielded no helpful guidance in determining the reasonableness of the settlement amount. Facing such a situation, a U.S. prime contractor can handle the situation in a few different ways. The contractor might first determine if a decrement to the proposed severance is required based on experience and the general practice in its industry within the United States. If necessary, the prime contractor can recalculate the foreign subcontractor's severance amounts using other sources as a baseline amount. In the Canadian contract instance described above, allowable severance could ultimately be determined by applying the weeks of severance provided in the severance policy of the U.S.-based prime contractor to the salary amount of the foreign nationals.

Foreign companies, or U.S. companies paying severance to foreign nationals outside the United States, may not recover severance costs to the extent such costs exceed what would have been paid to workers in the same industry located in the United States.⁹⁶ Therefore, when encountering severance paid to foreign employees, U.S.-based contractors should closely examine the proposed severance amounts in relation to the applicable laws, employee agreements, and policies in place to ensure the severance is recoverable.

GUIDELINES

These *Guidelines* are intended to assist you in understanding some key issues affecting contractor recovery following a termination for the convenience of the Government. They are not, however, a substitute for professional representation in any specific situation.

1. Be aware that a cost-plus-award-fee contract may not address how to determine the fee payment in the event of a termination for convenience. When requesting the adjusted award fee after a termination for convenience, the factors that are considered in awarding fee during performance should be taken into

account. In addition, the award fee proposal in the TSP should address the factors the FAR requires the TCO to consider in determining "extent and difficulty" of the work, including planning, scheduling, technical study, engineering work, production and supervision, placing and supervising subcontracts, work involved in stopping performance, work involved in settling terminated subcontracts, and work involved in disposing of termination inventory.

2. Keep in mind that after the termination for convenience of a cost-plus-fixed-fee contract, the contractor typically receives a percentage of

the fixed-fee amount based on the percentage of completion of the contract.

3. To maximize fee recovery, contractors must develop a well-supported analysis of the percentage of completion. Retain program management, engineering or other technical personnel to perform a technical evaluation of the percentage of completion of the contractor's work, as well as the work of subcontractors and suppliers, taking into account all of the FAR factors regarding extent and difficulty of the work.

4. Consider that EVMS data are often a credible source of information for determining the percentage of completion.

5. Remember that the "Limitation of Cost" and "Limitation of Funds" clauses continue to apply to cost recovery after a cost-type contract is terminated for convenience. If the CO elects to adjust the contract cost or funding ceiling after a convenience termination, the CO must make clear that any increase must be used solely for funding post-termination activities or settlement expenses.

6. Recognize that a prime contractor must assure that funding on its contract will be adequate not only for work underway but also for recovery of costs in the event of a termination for convenience. A prime contractor should include potential subcontract termination liability in its "incurred" costs when submitting the notification to the Government required by the "Limitation of Funds" clause in its contract in order to have its subcontractor settlements reimbursed.

7. Be aware that a contractor may be able to recover costs in excess of the cost or funding ceiling, especially where the facts indicate that it would be "inequitable" for the Government not to increase the ceiling—for example, following a termination for convenience where the Government knew that allotted funds were exhausted but continued to direct the contractor to perform termination activities.

8. Bear in mind that a prudent contractor will flow down to its cost-type subcontractors a clause that is substantively similar to either the "Limitation of Cost" or "Limitation of Funds" clause in its prime contract. Carefully crafted subcontract flowdown clauses will limit the prime

contractor's obligation to subcontractors in the event of a termination for convenience.

9. Keep in mind that commercial accounting systems and practices may not comply with the provisions of the FAR Part 31 cost principles and otherwise may not meet the expectations of Government auditors. Commercial item contractors should think carefully before providing cost information to Government auditors.

10. Ensure that an engineer familiar with the contract performs a technical evaluation as soon as possible after the termination of a fixed-price contract to determine the final cost EAC or evaluate the EAC provided by the lower-tier subcontractor in order to determine the contractor's profit or loss position.

11. Keep in mind that T&M contracts are not fixed-price contracts. T&M contractors should submit their TSPs on the SF 1437, "Settlement Proposal for Cost-Reimbursement Type Contracts" and address all work from contract inception through termination.

12. Remember that terminated contractors and subcontractors may submit partial payment requests. Be mindful that partial payments are provisional and if the TCO disallows any of the contractor's costs, the Government can recover a credit on previously paid amounts.

13. Be aware that in the event of a termination, undocumented or improperly documented IWOs can result in the disallowance of cost associated with the IWOs. When issuing IWOs, the best practice is for the prime contractor to flow down to its affiliate all the same FAR clauses it would flow down to an unaffiliated subcontractor.

14. Be cognizant that terminated contractors must develop a structure of accounts, or charge codes, for the recording of post-termination charges. Development of charge codes, and obtaining agreement on these charge codes, is especially critical in circumstances where there is continuing work, such as technology transfer, directed by the Government.

15. To ensure the severance severance paid to foreign employees is recoverable, U.S.-based contractors should closely examine the proposed

severance amounts in relation to the applicable laws, employee agreements, and policies in place. Foreign companies, or U.S. companies paying severance to foreign nationals outside the United

States, may not recover severance costs to the extent such costs exceed what would have been paid to workers in the same industry located in the United States.

★ REFERENCES ★

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| <p>1/ Meagher&Bingham, "Administering Subcontracts After a Termination for Convenience," Briefing Papers No. 04-4 (Mar. 2004).</p> | <p>8/ FAR 49.305-1(a).</p> |
| <p>2/ See also Carey, Boeing's C-130 AMP Chopped as USAF Announces More Cuts, AINonline (Feb. 10, 2012), http://www.ainonline.com/aviation-news/ain-defense-perspective/2012-02-10/boeings-c-130-amp-chopped-usaf-announces-more-cuts. Notably, both the House and Senate reports on the Department of Defense Appropriations Act, 2013, H.R. 5856, sought to limit the Air Force Secretary's ability to cancel or modify the avionics modernization program for the C-130 aircraft. See H.R. Rep. No. 112-493, at 183 (2012) and S. Rep. No. 112-196, at 206 (2013).</p> | <p>9/ FAR 49.305-1(a)</p> <p>10/ FAR 49.305-1(a)</p> <p>11/ FAR 49.305-1(a).</p> <p>12/ FAR 49.305-1(a).</p> |
| <p>3/ See DOD Press Release No. NR-111-14, DoD Releases Fiscal 2014 Budget Proposal and 2014 QDR (Mar. 4, 2014), http://www.defense.gov/releases/release.aspx?releaseid=16567.</p> | <p>13/ FAR 49.305-1(b) (emphasis added). See also FAR 49.305-2, which deals with construction contracts and also lists the factors to be considered in the fee adjustment determination.</p> |
| <p>4/ See DOD Press Release No. 451-09, Future Combat System (FCS) Program Transitions to Army Brigade Combat Team Modernization (June 23, 2009), http://www.defense.gov/releases/release.aspx?releaseid=12763.</p> | <p>14/ Defense Contract Management Agency, Defense Contract Audit Agency Earned Value Management System (EVMS) Program Analysis Pamphlet (PAP), DCMA-EA PAM 200.1, at 2 (Oct. 2012), available at http://www.dcmsa.mil/policy/200-1/PAM-200-1.pdf. See generally LeeVan & Willard, "A Beginner's Guide to Program Metrics," Briefing Papers No. 06-7 (June 2006).</p> |
| <p>5/ GAO, Defense Acquisitions: Termination Costs Are Generally Not a Compelling Reason To Continue Programs or Contracts That Otherwise Warrant Ending, GAO-08-379, at 8 (Mar. 14, 2008).</p> | <p>15/ See DFARS subpt. 234.2, 252.234-7002 ("Earned Value Management System" clause).</p> |
| <p>6/ See generally Seidman & Seidman, "Maximizing Termination for Convenience Settlements/Edition II—Part I," Briefing Papers No. 08-3 (Feb. 2008); Seidman & Seidman, "Maximizing Termination for Convenience Settlements/Edition II—Part II," Briefing Papers No. 08-5 (Apr. 2008).</p> | <p>16/ FAR 52.249-6 ("Termination (Cost-Reimbursement)" clause); see FAR 49.104.</p> <p>17/ FAR 52.232-20.</p> <p>18/ FAR 52.232-22.</p> |
| <p>7/ FAR 49.305-1(a).</p> | <p>19/ See <i>Advanced Materials, Inc. v. Perry</i>, 108 F.3d 307, 310 (Fed. Cir. 1997).</p> |

- 20/ Parsons-UXB Joint Venture, ASBCA No. 56481, 13 BCA ¶ 35,378.
- 21/ FAR 52.232-20; see FAR 32.706–2(a).
- 22/ FAR 52.232-20(b)(1)–(2).
- 23/ FAR 52.232-22; see FAR 32.706–2(b).
- 24/ FAR 52.232-22(c).
- 25/ FAR 52.232-22(c).
- 26/ FAR 32.704(a)(1).
- 27/ The authors here avoid the use of the phrase “termination costs,” which may inadvertently confuse costs incurred after termination (discussed here) with “settlement expenses” arising out of a termination, as defined at FAR 31.205-42(g).
- 28/ FAR 32.704(b).
- 29/ FAR 32.704(b).
- 30/ DFARS 252.249-7000.
- 31/ DFARS 249.501-70.
- 32/ DFARS 249.501-70.
- 33/ DFARS 252.249-7000(a).
- 34/ DFARS 252.249-7000(b).
- 35/ DFARS 249.501-70(c).
- 36/ DFARS 252.249-7000(c).
- 37/ DFARS 252.249-7000(c).
- 38/ DFARS 252.249-7000(e).
- 39/ GAO, Principles of Federal Appropriations Law: Annual Update of the Third Edition, GAO-14-163SP, at 6-8 (Mar. 13, 2014); see also Gill, “Special Termination Cost Clause: The Ultimate Tool, 43 Cont. Mgmt. 40 (May 2003).
- 40/ Boeing Co., ASBCA No. 57409, 14-1 BCA ¶ 35,474.
- 41/ Boeing Co., ASBCA No. 57409, 14-1 BCA ¶ 35,474.
- 42/ The authors were unable to locate any court filings in connection with the dispute between Boeing and its subcontractor, Honeywell. Nor do there appear to be any published decisions resolving the dispute. Under the facts articulated by the ASBCA, Boeing may have been deemed liable to its subcontractor, regardless of its inability to obtain reimbursement from the Government.
- 43/ Optical E.T.C., Inc., ASBCA No. 53350, 04-1 BCA ¶ 32,608.
- 44/ Parsons-UXB Joint Venture, ASBCA No. 56481, 13 BCA ¶ 35,378; Johnson Controls World Servs., Inc. v. United States, 48 Fed. Cl. 479, 486–87 (2001), 43 GC ¶ 55.
- 45/ See Gen. Elec. Co. v. U. S., 440 F.2d 420, 422–23 (1971) (holding that the CO did not have discretion to refuse additional funding on account of cost overrun, despite contractor’s failure to give prior notice, where, among other things, contractor could not have known of overrun in time to give notice).
- 46/ Importantly, no notice, communication, or representation in any other form, or from any person other than the prime contractor’s designee (usually the subcontract manager), shall affect the amount allotted to the subcontract.

- 47/ FAR 52.212-4(l).
- 48/ FAR 52.212-4(l); see also DCAA Contract Audit Manual ¶ 12-101(e).
- 49/ FAR 49.201(a); see FAR 12.403; ACM Constr. & Marine Group, Inc. v. Dep't of Transp., CBCA No. 2245 et al., 14-1 BCA ¶ 35,537 (“[T]he basic principles governing the purpose of a termination for convenience settlement apply to both commercial and non-commercial item contracts.”).
- 50/ Red River Holdings, L.L.C., ASBCA No. 56316, 09-2 BCA ¶ 34,304, at 169,456–57.
- 51/ Red River Holdings, L.L.C., ASBCA No. 56316, 09-2 BCA ¶ 34,304, at 169,456–57. This decision was later reversed on other grounds by the District Court of Maryland, exercising its jurisdiction over appeals involving maritime contracts. See Red River Holdings, L.L.C. v. United States, 802 F. Supp. 2d 648, 660–63 (D. Md. 2011).
- 52/ Corners & Edges, Inc. v. Dep't of Health & Human Servs., CBCA No. 693, 08-2 BCA ¶ 33,961.
- 53/ Dreamscapes, LLC v. Dep't of the Interior, CBCA No. 1331, 09-1 BCA ¶ 34,032.
- 54/ Dreamscapes, LLC v. Dep't of the Interior, CBCA No. 1331, 09-1 BCA ¶ 34,032, at 168,334.
- 55/ ACM Constr. & Marine Group, Inc. v. Dep't of Transp., CBCA No. 2245 et al., 14-1 BCA ¶ 35,537, at 174,157.
- 56/ ACM Constr. & Marine Group, Inc. v. Dep't of Transp., CBCA No. 2245 et al., 14-1 BCA ¶ 35,537, at 174,157.
- 57/ United Partition Sys. Inc. v. United States, 90 Fed. Cl. 74 (2009).
- 58/ 90 Fed. Cl. at 91–92.
- 59/ 90 Fed. Cl. at 91–94.
- 60/ See FAR 49.305-1.
- 61/ FAR 52.212-4(l); see also DCAA Contract Audit Manual ¶ 12-101(e).
- 62/ FAR 52.212-4(l).
- 63/ Red River Holdings, LLC v. United States, 802 F. Supp. 2d 648, 662 (D. Md. 2011). (emphasis deleted).
- 64/ ACM Constr. & Marine Group, Inc. v. Dep't of Transp., CBCA No. 2245 et al., 14-1 BCA ¶ 35,537.
- 65/ Red River Holdings, LLC v. United States, 802 F. Supp. 2d 648, 655–56 (D. Md. 2011) (reviewing and adopting the reasoning of board decisions finding that “reasonable charges” also encompass costs incurred in anticipation of performing the contract).
- 66/ Jon Winter & Assocs., AGBCA No. 2005-129-2, 2005 WL 1423636, at * 4 (June 20, 20015). Analyzing the Jon Winter decision, the district court in Red River Holdings explained “Jon Winter implicitly recognizes that [FAR] 52.212–4(l) establishes a two-component standard for contractor reimbursement following termination of a commercial items contract for the Government’s convenience: First, it establishes a presumption that a commercial items contractor whose agreement was terminated for the Government’s convenience will be adequately compensated by payment of ‘a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination.’ Second, recognizing that such a payment may not always adequately make a contractor whole with respect to expenses reasonably incurred in anticipation of performing the entire contract, [FAR] 52.212–4(l) also provides a ‘safety valve’ of sorts, one that provides the contractor with an opportunity to demonstrate its entitlement to other ‘reasonable charges,’ that are necessary to ensure that it will be made whole, i.e., to ensure that it will not ‘suffer as the result of a termination for convenience of the Government,’ nor be forced ‘to underwrite the Government’s decision to terminate.’” 802 F. Supp. 2d at 661 (internal citations omitted).
- 67/ Meagher & Bingham, “Administering Subcontracts After a Termination for Convenience,” Briefing Papers No. 04-4, at 12–13 (Mar. 2004); see FAR 49.203.

- 68/ FAR 49.203.
- 69/ FAR 49.206-2.
- 70/ FAR 49.206-2(b).
- 71/ FAR 49.206-2(b)(1).
- 72/ FAR 49.206-2(b)(1).
- 73/ FAR 16.600.
- 74/ FAR 49.303-1, 49.602-1.
- 75/ FAR 52.249-6 (“Termination (Cost-Reimbursement)” clause), alt. IV, para. (h)(1)(i) (requiring contractors to include “[a]n amount for...direct labor hours...expended before the termination...less any hourly rate payments already made to the Contractor”).
- 76/ FAR 52.249-6, alt. IV, para. (h)(1)(i).
- 77/ FAR 52.249-6, alt. IV.
- 78/ FAR 49.302.
- 79/ FAR Part 49.302(a) (“When the contract has been completely terminated, the contractor shall not use Standard Form 1034 (Public Voucher for Purchases and Services Other than Personal) after the last day of the sixth month following the month in which the termination is effective.”).
- 80/ FAR 52.249-6, alt. IV.
- 81/ FAR 52.249-6, alt. IV, para. (h).
- 82/ FAR 52.249-6, alt. IV, para. (h)(1)(iii).
- 83/ FAR 49.206-2(b).
- 84/ FAR 49.112-1(a); see Meagher & Bingham, “Administering Subcontracts After a Termination for Convenience,” Briefing Papers No. 04-4, at 18–19 (Mar. 2004).
- 85/ FAR 49.112-1(b).
- 86/ FAR 49.112-1(f).
- 87/ FAR 49.112-1(g).
- 88/ See FAR 31.205-6(e).
- 89/ GAO, Defense Acquisitions: Termination Costs Are Generally Not a Compelling Reason To Continue Programs or Contracts That Otherwise Warrant Ending, GAO-08-379, at 20, 22 (Mar. 14, 2008).
- 90/ See relevant discussion of allowable settlement expenses at FAR 31.205-42(g)(2)(iii), which states that “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.”
- 91/ FAR 31.205-6(g)(1).
- 92/ FAR 31.205-6(g)(2).
- 93/ FAR 31.205-6(g)(2).
- 94/ C.Trav.arts.L1234-9, R1234-2(Fr.); see An Introduction to Termination of Employment in France (Mar. 2009), available at http://www.laweurope-international.com/documents/men_04_practice_03_11.pdf.
- 95/ FAR 31.205-6(g)(6).
- 96/ FAR 31.205-6(g)(6).