



CONSTRUCTION LAW ALERT

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Terminations for Convenience of Government Contractors

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Most government contracts contain a "Termination for Convenience" clause, also known as a "T4C" or "T/C" clause. A typical T4C clause provides: "The Government may terminate performance of work in whole or in part if the Contracting Officer determines that a termination is in the Government's interest. The Contracting Officer shall terminate by delivering to the contractor a Notice of Termination specifying the extent of termination and the effective date."

A T4C provision allows the government to terminate a contract at any time for any reason (and not only for the fault of the contractor), subject only to payment of certain expenses and profit. The government does not need a particular reason to terminate a contract for convenience, other than the termination is in its best interests.

Is a Contractor Who is Terminated for Convenience Entitled to Compensation?

If the government terminates a contract, it will furnish a contract termination notice. The contract termination notice will indicate the contract termination date, the length of the termination and any special procedures that the

contractor is required to follow. The contract termination notice will instruct the contractor to stop working on the project or that portion of the contract that is terminated, and terminate any subcontracts that are affected.

After the termination, the government is required to settle all claims related to the termination. Generally, a contractor who is terminated for convenience is entitled to receive as compensation various "costs" arising from the termination and profit on work done. The government may also compensate the terminated contractor some of its costs associated with the preparation and presentation of claims, and costs associated with the termination of the contractor's subcontracts, if any.

Most Terminations for Convenience Are Upheld

Courts apply a highly deferential standard when reviewing the government's decision to terminate for convenience. The case law holds that the government is entitled to considerable latitude in making a decision to terminate a contract for convenience and there is a presumption that public officials

act in good faith in discharging their duties.

Even if the circumstances of the bargain or the expectation of the parties have changed, this will not invalidate a termination for convenience. There must be proof of bad faith or a clear abuse of discretion on the part of the government.

Accordingly, most terminations for convenience are upheld. Courts have upheld terminations for convenience in which irregularities in the original solicitation had an impact upon competitiveness of the bidding process. For example, in one case, the Federal Circuit upheld a contracting officer's decision to terminate a contract for convenience based on an ambiguity in the bid solicitation. The ambiguity increased the actual cost of the contract by between \$200,000 to \$300,000, and led the contracting officer to conclude that the ambiguity of the specifications impeded full and open competition.

In another case, the Federal Circuit determined that the contracting officer did not act in bad faith when he terminated a contract for the convenience of the government based upon the

discovery that the contract would cost more than expected because of a misestimate in the original invitation for bids.

The Federal Circuit also allowed a contracting officer to terminate for convenience and issue a second solicitation based upon the discovery of an error in the original solicitation that increased the price of the contract and had an impact upon the integrity of the procurement process. In that case, the estimated scope of a Navy requirements contract for automobile parts and accessories was substantially increased so that the value of the contract increased by 450%.

Wrongful Terminations

Under some circumstances, the government's termination of a contract for its convenience is considered wrongful because the government clearly abused its discretion or acted in bad faith.

A potential avenue of relief for the contractor faced with such a termination for convenience is to sue for breach of contract damages, which includes anticipatory profits.

The plaintiff challenging a termination for convenience has a substantial burden. It must

provide the court with evidence that the government had a specific intent to harm the plaintiff to support its claim of bad faith. Evidence of the government's knowledge before an award is an important factor in determining whether the government acted in bad faith in terminating a contract.

In one case, a court held that the termination of an indefinite delivery/indefinite quantity contract for travel services was improper where the scope of work identified in the solicitation was based on estimates that the government knew were faulty prior to award. Procurement officials learned prior to award that a major federal agency group would not be ordering services through the contract, as originally contemplated. However, the officials did not change the estimate provided to offerors of the quantity of services to be required to reflect this new information. Thus, the court found that the government had entered into the contract with no intention of fulfilling the promises expressed in the knowingly faulty government estimates. A termination made on the basis of information known before the contract award is grounds for finding that the termination was made in bad faith.

A bad faith termination for convenience have also been found when the contracting officer knew at the time of contracting that he would terminate the contract for convenience once another contractor for the government could take over the work, but did not disclose this intent to the plaintiff.

Conclusion

When doing business with the government, contractors should be aware of the possibility that the government can terminate a contract for its convenience. Termination for convenience clauses are valid and enforceable. A valid termination for convenience will preclude recovery of anticipatory profit. Absent bad faith or an abuse of discretion by the government, such a termination will likely be upheld. A contractor who is terminated for convenience, however, may still be entitled to recover certain compensation, such as costs incurred and profit on the work completed. ■

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