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¶ 64 FEATURE COMMENT: A Federal Contractor's Survival Guide To Executive Actions And DOGE-Related Impacts: Part 1—Unpaid Invoices And Terminations For Convenience

Introduction—In recent months, federal contractors have seen an uptick in very specific types of contracting activity. As a result of various Executive Orders, and DOGE directives for agencies to conduct contract reviews and engage in mass contract cancellations, there has been a flurry of terminations for convenience, suspensions/stop-work orders, and contract modifications. Payments—even those undisputedly due and owing—have been delayed, and other EO- and DOGE-related impacts (as well as mass federal employee layoffs) have given rise to various claim issues. Many contractors have been left confused, and unsure how to proceed in response to these developments. This Comment seeks to address those concerns and provide contractors with a guide on how to navigate recent challenges, with a focus on preserving claim rights and maximizing recovery. Because of the breadth and complexity of the issues faced by Federal Government contractors in the current climate, this Comment has been drafted in two parts. This, the first of two installments, addresses the issue of unpaid invoices, and discusses terminations for convenience. Next month's follow-up will discuss suspensions and stop-work orders, as well as the potential for other types of claims arising out of EOs, DOGE-related impacts, and tariffs.

Non-Payment of Undisputedly Due and Owing Invoices—In recent months, one unfortunate reality faced by many contractors is a lack of payment. In some cases, contractors have even been expressly advised by agency officials that they will not be paid at all for the foreseeable future. This is true despite the fact that the work being invoiced for was properly performed, there is no allegation of delayed or deficient performance, and the amounts due are undisputedly owing to the contractor. Regrettably, non-payment seems to be an increasingly common situation, likely (at least partially) due to the Implementing the President's "Department of Government Efficiency" Cost Efficiency Initiative Executive Order (Feb. 26, 2025), available at *www.whitehouse.gov/presidential-actions/2025/02/implementing-the-presidents-department-of-government-efficiency-cost-efficiency-initiative/*. It would seem that certain agencies are taking the position, based on that EO, that no payments can be made to contractors until the agency sets up and gets running a new "centralized technological system," meant to track and justify payments. In the meantime, contractors have been directed to continue to perform and absorb the costs. In other words, the Government is basically directing contractors to "throw it on my tab." Alternately, contractors have been told to "file a claim." Contractors facing this situation should do the following: First—contractors should check their contract(s)

and review the clauses relating to payment. Confirm the invoicing requirements, and make sure that all invoices meet all applicable requirements. This will likely be governed by the Federal Acquisition Regulation Part 32, as well as the Prompt Payment Act and its implementing regulations; these laws cumulatively provide guidance on what constitutes a "proper invoice," and require the Government to accelerate payments to small businesses. Contractors should also check the applicable deadlines, make sure that they are submitting invoices in the correct way and through the correct systems, and familiarize themselves with the provisions relating to payment disputes.

Next—contractors should reach out to the agency, nicely, to see if they can determine what the underlying reason for the delay is. It is possible, even in the current climate, that the delay in payment is nothing more than an administrative error that can be easily resolved. Even if that is not the case, the contractor may at least be able to get some additional information about the reason the agency is withholding payment. If it is, in fact, due to the February 26 EO referenced above, the contracting officer might be able to offer some insight into the expected timeframe in which the agency expects to complete its "centralized technological system" and resume payments.

Finally, contractors should consider exercising their right to submit a formal claim under the Contract Disputes Act. Like in any other CDA claim, a claim in this context should lay out in detail the relevant facts and law and demonstrate the contractor's entitlement to the monies owed. If there is no dispute as to the fact that the work being invoiced for was successfully completed, and it is simply a matter of non-payment due to EOs or other DOGE initiatives, this should be a comparatively easy lift as compared to other types of claims. Indeed, the Government's failure to pay monies that are undisputedly due and owing is generally considered a breach of contract. Still, contractors will want to make sure to submit all appropriate supporting documentation showing that they are entitled to payment, and the amount of such payment. They should also (if necessary) certify their claims.

The CO should issue its response—called a "Contracting Officer's Final Decision" or "COFD"—in 60 days. (Technically, the Government could, rather than issue a COFD within 60 days, state that it needs more time to consider the claim. In such a case, the agency still must issue a response in a "reasonable time." In these extenuating circumstances, and given the relative simplicity of the issues in a claim for non-payment of sums undisputedly due and owing, 60 days should arguably be considered reasonable). Should the COFD deny the claim in whole or in part, or should the agency fail to issue a COFD within a reasonable time, contractors can appeal that denial to the Civilian Board of Contract Appeals, Armed Services Board of Contract Appeals, or the U.S. Court of Federal Claims and litigate. They should keep in mind that they would almost certainly be entitled to interest under the CDA and possibly also the Prompt Payment Act, to the extent it is ultimately determined that the Government breached its obligation to timely pay amounts due and owing under a "proper invoice" for work performed.

Terminations for Convenience—Perhaps the most common issue faced by contractors at the moment is that of termination, and more specifically termination for convenience. That is likely to further increase in coming weeks, as the February 26 EO directs many agencies to review all existing covered contracts and grants with an eye towards, among other things, termination.

Pursuant to FAR Part 49 (and several different varieties of Termination for Convenience (T4C) clauses included in different types of Government contracts, see FAR 52.249-1 through -5; FAR 52.212-4(l)), the Government has a right to completely or partially terminate performance of work under a Government contract when it is "in the Government's interest." Virtually all Government contracts contain a T4C clause. (Fun fact—even if they *don't*, the clause might be read in anyway, pursuant to something called "the Christian Doctrine"). Unlike a termination for default, which is a black mark against a contractor, a T4C is not an indication that the contractor did anything wrong. It is simply the case that the Government did not feel it was in the Government's interest for the contractor to continue performance. Because, in a T4C situation, the contractor has not done anything wrong,

they can (unlike in many termination for default situations) recover certain monies. The key to navigating this situation is to terminate subcontractors immediately, otherwise mitigate and minimize costs, segregate and carefully track those costs, and prepare and submit a properly analyzed and documented Termination Settlement Proposal (TSP) as quickly as reasonably possible. More on each of these pieces below, but first we should talk about some threshold considerations and questions contractors should be asking when they first receive notice of termination.

A Justified *Termination?*: The first thing a contractor should ask when receiving a notice of termination is whether the termination was proper. As outlined above, the Government can terminate any contract, so long as the agency determines that such termination is "in the Government's interest." One might ask what constitutes "the Government's interest" so as to justify such a termination. The answer is that an agency's discretion is very broad, but it is not entirely unfettered. While courts have generally deferred to agencies' judgment in these matters, there are certain limited situations where courts have found that an agency's termination of a contract for convenience was improper. For the most part, these involve cases where the Government was found to have acted arbitrarily or capriciously or in bad faith, or had terminated a contractor in an effort to extricate itself from a bad deal or in an attempt to cover up/fix a procurement mistake made by the agency.

It is possible—given the current, chaotic flurry of termination (and rescission and re-termination) activity, and the fact that many of these terminations are being made *very* quickly and seemingly without a lot of analysis, together with the fact that many terminations are being made solely on the basis of preemptive budget cuts—that not every termination being issued right now is entirely proper. Accordingly, the first thing a contractor should do, upon receiving a termination notice, is assess whether it has any basis to challenge the termination. If such a challenge succeeds, the case becomes a breach of contract matter; in such a case, the contractor may be able to recover lost profits (in addition to normal termination settlement costs).

Termination for convenience challenges have, historically speaking, never been very common. But this will be a space to watch in coming weeks, as it is quite possible that—given the volume of contracts being terminated—some contractors will start to challenge their terminations.

Is Reinstatement Possible?: Though very few contractors are aware of its existence, there is a section of a FAR clause that allows a federal contract to be reinstated following a termination. Specifically, FAR 49.102(d) provides that the CO (with the consent of the contractor) may reinstate a terminated portion of a contract in whole or part if it has been determined that (1) circumstances clearly indicate a requirement for the terminated items, and (2) reinstatement is advantageous to the Government. There is very little case law on this section (d), though what is out there confirms that the agency is given enormous amounts of discretion as to when utilization of this mechanism is appropriate. That said, while contractors have not tried to avail themselves of this provision very often in the past, as above, this might be an area where we start to see more contractors testing the water. If terminated, contractors should assess, and work with their attorneys to determine, whether any argument exists that they satisfy these criteria, such that reinstatement would be appropriate.

Say "No" to the No-Cost Settlement: In recent weeks, many contractors have received agency communications advising contractors that they are being terminated, and at the same time declaring that the termination will be a "no-cost settlement," despite the fact that a no-cost settlement is simply *not* appropriate or in keeping with the regulations. A no-cost settlement is—as the name would imply—when the contractor getting terminated gets *nothing*. This is obviously a less than desirable outcome for most terminated contractors.

As set forth in FAR 49.109-4, no-cost settlement is only appropriate where:

(a) The contractor has not incurred costs for the terminated portion of the contract or
(b) The contractor is willing to waive the costs incurred and
(c) No amounts are due the Government under the contract.

Presumably, the majority of contractors out there

would not accept that they fall into these categories when terminated for convenience.

Contractors who receive correspondence from an agency indicating that a "no-cost settlement" is the next step should push back! The pre-emptive decision to improperly classify something as a no-cost settlement is likely not enforceable, but failing to object likely would gum up the works on the settlement negotiation process outlined below. At the very least, it would almost certainly delay things. Accordingly, contractors who are faced with this situation should advise the Government immediately that they are not accepting a "no-cost settlement," and that such "no-cost settlement" is not appropriate.

A Prime's Obligations: FAR 49.104 lays out a list of duties that a prime must complete after receiving a termination for convenience notice. Specifically, it provides that the contractor must do the following:

> (a) Stop work immediately on the terminated portion of the contract and stop placing subcontracts thereunder;
> (b) Terminate all subcontracts related to the terminated portion of the prime contract;
> (c) Immediately advise the [termination CO (TCO)] of any special circumstances precluding the stoppage of work;
> (d) Perform the continued portion of the contract and submit promptly any request for an equitable adjustment of price for the continued portion, supported by evidence of any increase in the cost, if the termination is partial;
> (e) Take necessary or directed action to protect and preserve property in the contractor's possession in which the Government has or may acquire an interest and, as directed by the TCO, deliver the property to the Government;
> (f) Promptly notify the TCO in writing of any legal proceedings growing out of any subcontract or other commitment related to the terminated portion of the contract;
> (g) Settle outstanding liabilities and proposals arising out of termination of subcontracts, obtaining any approvals or ratifications required by the TCO;
> (h) Promptly submit the contractor's own settlement proposal, supported by appropriate schedules; and
> (i) Dispose of termination inventory, as directed or authorized by the TCO.

A couple of key takeaways from this list:

- Terminations can be total (i.e., a cancellation of the entire contract) or partial (removing or de-scoping only certain contract line items, or certain aspects of the work). If a contract is terminated in full, the contractor must stop all work, except for those limited tasks expressly enumerated in FAR 49.104. If the termination is only partial, the contractor must continue to prosecute the work that has not been terminated. To the extent that the termination of part of the work impacts the remaining work, either in terms of duration or price, contractors should segregate and track those costs for later recovery efforts, outlined below.

- Interfacing with subcontractors is a critical part of the termination process. When a prime is terminated, it must immediately terminate its subcontractors (at least to the extent those subcontractors are performing portions of the prime contract that has been terminated). A prime's ability to terminate its subs, the manner and timeframe in which the prime must do so, and what costs are owed the subcontractor in the event of a termination, are going to depend on the specific terms included in the applicable subcontracts. In an ideal world (from a prime contractor's point of view), the prime flowed termination for convenience clauses down to its subcontractors and can simply terminate them. (If not, the contractor might need to confer with its legal team and get a little creative). It then becomes a question of settling any outstanding costs and wrapping those and any other termination-related costs into the TSP.

- Terminated contractors also need to take whatever actions necessary to protect the work done on the project so far and deliver property to the Government. This can become especially important in construction projects, where one might need to put interim protection work in place to avoid storm damage, other weather impacts, animal intrusion, etc. Contractors with questions about this should discuss with their TCO to ensure that everyone is on the same page and taking whatever measures they think are necessary.

- Overall, contractors have a duty to minimize the costs they incur after termination, in

wrap-up efforts, inventory disposal, and subcontractor settlement. They should be keeping the agency apprised of any unusual circumstances that are forcing them to continue to incur costs.

Termination Settlement Proposal and Settlement Methods: Arguably, the most important piece of the termination process is the TSP—Termination Settlement Proposal. This is the mechanism through which contractors can seek payment from the Government for their termination costs. FAR 49.103, Methods of Settlement, explains that settlement of terminated contracts can be effected by a negotiated agreement, costing-out under vouchers using Standard Form (SF) 1034 (for cost-reimbursable contracts), unilateral determination by the TCO, or a combination of these methods. The preference is for some sort of agreement; the TCO shall settle a settlement proposal by determination only when it cannot be settled by agreement.

The overarching principle here is that of "fair compensation." The idea that the contractor should be made whole and fairly compensated for the work performed and preparations made to perform. That said, what goes into a TSP, or how a contractor ultimately settles and for what costs, is a highly individualized analysis. Generally speaking, under the standard non-commercial T4C clauses—FAR 52.249-2 (Fixed-Price) and FAR 52.249-6 (Cost-Reimbursement)—a contractor may recover:

- The contract price for completed supplies or services that have been accepted by the Government but not yet paid for;
- Costs incurred in performance of terminated work, including initial costs and preparatory expenses;
- The cost of settling terminated subcontracts;
- Profit on costs incurred (unless determined that contractor would have sustained a loss on the contract); and
- The reasonable costs of settlement of the work terminated (including (1) internal and external accounting, legal, clerical and other costs involved with preparation of the TSP, (2) costs associated with TSPs (excluding amounts of such settlements themselves), and (3) storage, transportation and other costs associated with the preservation, protection or disposition of the termination inventory).

Absent extraordinary circumstances (like bad faith on behalf of the Government) there is no recovery of anticipatory profits, or consequential damages. Other limitations may also apply, depending on individual factual circumstances.

In contrast, consider FAR 52.249-4. This is a special "Short Form" clause, which is designed to be used for service contracts when "[t]he Contracting Officer determines that because of the kind of services required, the successful offeror will not incur substantial charges in preparation for and in carrying out the contract, and would, if terminated for the convenience of the Government, limit termination settlement charges to services rendered before the date of termination." If this clause is in your contract, recovery is limited to payment for services rendered before the effective date of the termination only. Commercial product or service contracts containing FAR 52.212-4 are also different. For contracts containing this clause, contractors are entitled to recover "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."

All of the above said, what should go into any one contractor's specific TSP is a highly individualized question that depends on the clauses in their specific contract, the type of contract they have, the nature and timing of the termination, and the types of costs they are seeking. Contractors should consult legal and/or accounting professionals if they have questions about how to prepare a TSP.

Subcontractor Considerations: One thing that prime contractors need to analyze when putting together their TSP is their subcontractors' costs. As set forth above, in an ideal world, the subcontract agreement executed by a prime and its subcontractors will address terminations for convenience, and

what costs may and may not be recovered by the subcontractor in connection with same. Guidance on negotiating with subcontractors, entering into settlement agreements, and incorporating the costs due to subcontractors into a prime's TSP are laid out in FAR 49.108 Settlement of subcontract settlement proposals.

Each prime will need to navigate this process on a case-by-case basis, depending on the terms of its subcontracts. Experienced Government contract attorneys can help guide you through this "middle man" position to ensure you are not simultaneously fighting a battle on two fronts, or paying your subcontractor when you are no longer getting paid.

When to Submit a TSP: The question of TSP timing implicates some big potential pitfalls with regard to the terminations for convenience coming out lately, even if not usually the case. That is because a lot of the recent T4Cs have been accompanied by false deadlines. For example, contractors have been getting termination notices purporting to require TSPs within two weeks, with no further revisions to be permitted after that time. However, contractors are not legally obligated to put together an entire settlement proposal in two weeks. It is simply not feasible, and it is certainly not what is required under the regulations.

Pursuant to the applicable regulations, contractors must submit their final TSP to the CO (in the form and with the certification prescribed by the CO "promptly, but no later than 1 year from the effective date of termination." Moreover, generally speaking (though cases can vary, and cases should be analyzed individually), contractors have 120 days to submit complete termination inventory schedules, while requests for equitable adjustments/claims arising out of *partial* terminations should generally be asserted within 90 days from the effective date of the termination. Contractors should, of course, have their legal teams specifically analyze their specific situation, and determine the applicable deadlines to ensure nothing is missed. If the deadline is wrong, they should push back. That said, if a contractor feels like an agency is giving a false deadline, the deadline should not simply be ignored. It would be wise for the contractor (after checking with counsel) to respond, if only to object to the improper deadline and explain why it is entitled to more time pursuant to the applicable regulations.

On a more practical note: Despite the longer timelines outlined above, given the current climate, and the amount of T4C proposals that every agency is likely to be analyzing in coming months, it may be wise for contractors to accelerate their timelines as much as possible. No one wants to be the last one at the table when money might be scarce and the possibility of recovery fleeting.

Settlement Negotiations and Successful Settlement; Payment: After the settlement proposal is finished and submitted, then consideration of the proposal begins. Pursuant to FAR 49.111, each agency is required to establish procedures for the administrative review of proposed termination settlements. Negotiations then follow. Pursuant to the regulations, "[w]hen 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." Assuming that negotiations are successful, several things then occur.

First "[t]he TCO shall, at the conclusion of negotiations, prepare a settlement negotiation memorandum describing the principal elements of the settlement for inclusion in the termination case file and for use by reviewing authorities." FAR 49.110. Once a termination settlement has been negotiated and all required reviews have been obtained, the contractor and the TCO shall execute a settlement agreement on SF 30. The settlement shall cover (a) any setoffs that the Government has against the contractor that may be applied against the terminated contract, and (b) all settlement proposals of subcontractors, except proposals that are specifically excepted from the agreement and reserved for separate settlement. FAR 49.109-1. In addition, the TCO shall (1) reserve in the settlement agreement any rights or demands of the parties that are excepted from the settlement, (2) ensure that the wording of the reservation does not create any rights for the parties beyond those in existence before execution of the settlement agreement, (3) mark each applicable settlement agreement with "This settlement agreement contains a reservation"

and retain the contract file until the reservation is removed, (4) ensure that sufficient funds are retained to cover complete settlement of the reserved items, and (5) at the appropriate time, prepare a separate settlement of reserved items and include it in a separate settlement agreement. FAR 49.109-2(a). A recommended format for settlement of reservations appears in FAR 49.603-9. FAR 49.109-2(b).

As for payment, it is governed by FAR 49.112-2, which provides that "[a]fter execution of a settlement agreement, the contractor shall submit a voucher or invoice showing the amount agreed upon, less any portion previously paid. The TCO shall attach a copy of the settlement agreement to the voucher or invoice and forward the documents to the disbursing officer for payment." (Though note that, for construction contracts, before forwarding the final payment voucher, the CO must ascertain whether there are any outstanding labor violations. If so, the CO shall determine the amount to be withheld from the final payment).

Settlement by Determination and Claims: Discussed above are the procedures used when contractors and agencies are able to successfully negotiate a settlement and enter into an agreement on what the contractor should be paid. But what happens if the parties are unable to reach such an agreement? Remember from above that settlement of terminated cost-reimbursement contracts and fixed-price contracts terminated for convenience may be effected by negotiated agreement, costing-out under vouchers, ***or*** by determination by the TCO, the last being what is done when the parties cannot reach an agreement. FAR 49.109-7 outlines what occurs in a "Settlement by determination" situation. It provides, in relevant part:

> 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. The TCO shall comply with 49.109-1 through 49.109-6 in making a settlement by determination and with 49.203 in making an adjustment for loss, if any. Copies of determinations shall receive the same distribution as other contract modifications.
>
> … Before issuing a determination of the amount due the contractor, the TCO shall give the contractor at least 15 days notice by certified mail (return receipt requested) to submit written evidence, so as to reach the TCO on or before a stated date, substantiating the amount previously proposed.

The contractor then has the burden of establishing, "by proof satisfactory to the TCO," the amount proposed.

After reviewing the information available, the TCO shall determine the amount due and shall transmit a copy of the determination to the contractor. The determination shall specify the amount due the contractor and will be supported by detailed information. The TCO shall explain each major item of disallowance. The TCO need not reconsider any other action relating to the terminated portion of the contract that was ratified or approved by the TCO or another CO.

A contractor who accepts the determination should, consistent with FAR 49.112-2(b)(1), submit a voucher or invoice showing the amount determined due, less any portion previously paid. But to the extent that a contractor *disagrees* with the determination of the TCO, it has remedies, so long as it timely submitted its TSP. Specifically, pursuant to FAR 49.109-7(f):

> The contractor may appeal, under the Disputes clause, any settlement by determination, 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. 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.

The appeal would then be litigated similarly to any other CDA claim before the applicable board of contract appeals (i.e., the CBCA or the ASBCA), or the COFC. See *mccarter.zoom.us/rec/play/j_ueYDboeS8J3YRj9Lv4ljR7WdeeVYXMUmA7xTltmBtGahUq27A7dh66GMMBYflnGT9p8EZnXFRljWlR.mqLUOaSjv9lccTDI.*

Conclusion and Preview—More to come next time on how to deal with suspensions and stop-work orders, as well as potential claim strategies relating to costs/delays incurred as a result of EO/DOGE-related impacts and tariffs. But in the meantime, some key takeaways about terminations for convenience and non-payment:

- Check emails and alerts several times a day and act immediately if you receive a notice of termination.
- Assess whether you have any argument for reinstatement.
- Double check that agency actions are proper and consistent with law. Raise the issue when agencies cite the wrong contract clauses. Push back on unjustified terminations, improper suggestions regarding "no-cost" settlement, and false deadlines that are inconsistent with the regulations.
- If you are a prime, manage your subcontractors as appropriate, and in accordance with the terms of your subcontract, as soon as you receive any notice of termination.
- If you are a subcontractor, work cooperatively with your prime to make sure you can recover costs incurred.
- Track, segregate, and document all costs associated with terminations, and keep an eye on your deadlines to recover costs.
- If you are not getting paid, and there is no relief on the horizon, file a claim.
- Be proactive! Stay informed! Seek legal assistance when you need it. You likely need it earlier than you think you do.

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