BRIEFING PAPERS® SECOND SERIES

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PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

MAXIMIZING TERMINATION FOR CONVENIENCE SETTLEMENTS/EDITION II—PART II

By Paul J. Seidman and David J. Seidman

This Edition II BRIEFING PAPER is the second of two PAPERS that update and expand BRIEFING PAPERS No. 95-5, "Maximizing Termination for Convenience Settlements," which focused on fixed-priced contracts. These BRIEFING PAPERS provide new strategies and cover new topics such as cost-reimbursement contracts, indefinite delivery/indefinite quantity contracts, Federal Acquisition Regulation Part 12 commercial item contracts, and avoiding the "Termination for Convenience" clause prohibition on the recovery of anticipatory profits. Part I, BRIEFING PAPERS No. 08-3, provided a background discussion of the purpose and effect of the "Termination for Convenience" clause and a review of the standard "Termination for Convenience" clauses for various types of contracts, compared the cost-based formula used for traditional Government contracts with the modified price-based formula used in FAR Part 12 commercial item contracts, summarized pertinent cost principles, and presented general strategies for maximizing recovery.[1] This Part II addresses how to recover specific costs and provides strategies for specific contract types such as IDIQ, cost-type, and FAR Part 12 commercial item contracts.

These two BRIEFING PAPERS focus on *what* costs to claim. They are companions to "Preparing Termination for Convenience Settlement Proposals for Fixed-Priced Contracts," an earlier PAPER by one of the authors, which focused on *how* to claim costs by putting together an effective termination for convenience settlement proposal.[2]

IN BRIEF

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Contractor-Caused & Concurrent Delays

The Government takes the position that a terminated contractor is not entitled to recover for periods of delay where the contractor is solely responsible, where both the Government and contractor are responsible (concurrent delay), where neither party is responsible, such as in the case of strikes, unusually severe weather, floods, fires, or epidemics, or where the Government is responsible in its sovereign capacity. Such a disallowance appears to be insupportable to the extent a contractor does not seek compensation in excess of the contract price.

As discussed in Part I, a termination for convenience in effect converts a fixed-price contract into a cost-reimbursement contract.[3] A contractor is therefore entitled to recover all of its allowable (reasonable and allocable) costs up to the contract price, which includes any equitable adjustments to which a contractor is entitled.[4] There is no reason to exclude delay costs from this rule. As explained by the Armed Services Board of Contract Appeals in *Worsham Construction Co.*: "Even assuming that the delayed performance of the contract was caused in part by [the contractor], under the [Termination for Convenience] clause the contractor is entitled to recover all allowable costs."[5]

Thus, if there is a sufficient contract price ceiling, a contractor should be able to recover for all days of delay irrespective of responsibility. If there is not sufficient contract price for such a recovery, the contractor can still recover for delays for which it is entitled to an equitable adjustment (delays caused solely by the Government in its contractual capacity).

Since there is no need to show entitlement to an equitable adjustment unless the contractor seeks to recover an amount in excess of the contract price,[6] the total time method could be used to calculate days of delay. Under this approach, the number of days of delay is the difference between (1) the number of days in the original contract schedule to reach the stage of performance at the time of termination, and (2) the number of days between the time of award and the termination for convenience.

You should therefore claim all delay costs associated with the terminated effort up to the contract ceiling regardless of responsibility and costs for Government-responsible delays as equitable adjustments to raise the contract ceiling. Recoverable delay costs include the increased cost of performance in a later time period (inflation), disruption, and unabsorbed overhead.

Absent special circumstances, the U.S. Court of Appeals for the Federal Circuit requires that the *Eichleay* formula be used to calculate unabsorbed overhead for *Government*-responsible delays.[7] The following steps are used in the *Eichleay* formula to calculate the amount of recoverable overhead:

Step 1

$$\frac{\text{Contract billings}}{\text{Total billings for actual contract period}} \times \text{Total overhead for actual contract period} = \text{Overhead allocable to contract}$$

Step 2

$$\frac{\text{Overhead allocable to contract}}{\text{Actual days of contract performance}} = \text{Daily contract overhead}$$

Step 3

$$\text{Daily contract overhead} \times \text{Days of delay} = \text{Amount recoverable as unabsorbed overhead}$$

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BRIEFING PAPERS

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There is no reason to use a different formula to calculate the cost of non-Government-caused delays. However, in *Nicon, Inc. v. United States*, the Federal Circuit suggested in dictum that a terminated contractor could claim unabsorbed overhead for costs incurred for terminated work under the provisions of the FAR "Termination costs" cost principle governing the allowability of "initial costs."[8] Under this cost principle, a terminated contractor can recover initial costs, including "[s]tarting load costs not fully absorbed because of termination…and *related overhead costs*…result[ing] from factors such as… [*i*]*dle time* and subnormal production due to testing and changing production methods."[9]

The Federal Circuit's statement is significant because the FAR "Termination costs" cost principle does not require a terminated contractor to prove Government-responsible delay to recover initial costs. Furthermore, the *Eichleay* formula is not used to calculate initial costs. As stated in the cost principle:[10]

> (4) If initial costs are claimed and have not been segregated on the contractor's books, they shall be segregated for settlement purposes from cost reports and schedules reflecting that high unit cost incurred during the early stages of the contract.
>
> (5) If the settlement proposal is on the inventory basis, initial costs should normally be allocated on the basis of total end items called for by the contract immediately before termination; however, if the contract includes end items of a diverse nature, some other equitable basis may be used, such as machine or labor hours.

Nevertheless, the Government may be expected to argue that (a) the Federal Circuit has held that *Eichleay* is the only permissible method for calculating unabsorbed overhead, and (b) in *Applied Cos.*,[11] the ASBCA, relying on *Nicon*,[12] held that a terminated contractor cannot recover unabsorbed overhead under the *Eichleay* formula without proving a Government-responsible delay. This argument is flawed.

First, the requirement to prove Government-caused delay to recover up to the original contract price is inconsistent with the "Termination for convenience" clause. As noted above, a termination for convenience converts a fixed-priced contract into a cost-reimbursement contract. There is no need for a contractor to prove entitlement to an equitable adjustment up to the original contract price.[13]

Second, although *Applied Cos.* and *Nicon* concerned contracts that were terminated for convenience, the contractors based their claims for unabsorbed overhead on legal theories other than the termination for convenience. Namely, the contractor in *Applied Cos.* claimed unabsorbed overhead based on a negligent Government estimate[14] and, in *Nicon,* based on a Government-caused delay.[15] As previously noted, the Federal Circuit in *Nicon* suggested that a terminated contractor could claim unabsorbed overhead in the form of "initial costs" under the contract's "Termination for Convenience" clause relying on the FAR "Termination costs" cost principle.[16]

Third, the terminated contractor in *Applied Cos.* claimed unabsorbed overhead based on a negligent Government estimate and did not allege or seek compensation for a contractor-responsible or concurrent delay. As stated by the board: "Appellant does not cite, and we are unaware, of any precedent supporting that approach to recovery of unabsorbed overhead where, as here, performance has begun and there was no delay."[17]

Finally, the Federal Circuit recognizes that terminations for convenience are different. In *Nicon*, it permitted a contractor to deviate from the *Eichleay* formula where the Government terminated a contract for convenience before performance commenced.[18] In *James M. Ellett Construction Co. v. United States*, it held that due to rules unique to terminations for convenience, a termination settlement proposal cannot be submitted as a Contract Disputes Act claim.[19]

Defective Or Nonconforming Work

Because a termination for convenience converts a fixed-price contract into a cost-type contract, a contractor is entitled to recover for all of its costs, including costs for defective or nonconforming work.[20] A contractor can recover for defective or nonconforming work so long as it was not the result of willful misconduct or gross negligence. Mere negligence does not bar contractor recovery.[21]

The Government may attempt to disallow the cost of defective work based on the FAR requirement that the Contracting Officer must deduct the "fair value" of termination inventory that is "destroyed, lost, stolen, or so damaged as to become undeliverable" before title or the risk of loss transfers to the Government.[22] However, this requirement applies only to termination inventory—"property purchased, supplied, manufactured, furnished, or otherwise acquired for the performance of a contract subsequently terminated."[23] It does not deny a contractor the right to claim its incurred costs for defective or nonconforming work.[24] You should therefore claim the cost of defective or nonconforming work in your settlement proposal.

Precontract Costs

The allowability of precontract costs, in the absence of a termination for convenience, is governed by the FAR "Precontract costs" cost principle, which provides as follows:[25]

> Precontract costs means costs incurred before the effective date of the contract directly pursuant to the negotiation and in anticipation of the contract award when such incurrence is necessary to comply with the proposed contract delivery schedule. These costs are allowable to the extent that they would have been allowable if incurred after the date of the contract.

From this FAR definition, the U.S. Claims Court (now renamed the U.S. Court of Federal Claims) developed a three-part test to determine when precontract costs are allowable outside the context of a termination for convenience:[26]

(1) The costs must be incurred to meet the contract delivery schedule.

(2) The costs must be incurred directly pursuant to the negotiation and in anticipation of the award.

(3) The costs would have been allowable if incurred during contract performance.

These limitations on the allowability of precontract costs may not apply strictly after a contract is terminated for convenience, however. As discussed in Part I, the FAR cost principles must be reconciled with and are "subject to" the general policy that the termination settlement should compensate the contractor fairly.[27] After a termination, a CO may not ignore the "fair compensation" principle and summarily disallow precontract costs that are viewed as unallowable under the "Precontract costs" cost principle.[28] In addition, the ASBCA has stated that the earlier during contract performance the termination occurs the more likely the precontract costs should be allowed.[29]

Costs Continuing After Termination

Under the FAR "Termination costs" cost principle, a terminated contractor is entitled to recover "[c]osts continuing after termination" that "despite all reasonable efforts by the contractor…cannot be discontinued immediately after the effective date of termination"[30] The cost principle further states that "any costs continuing…due to the negligent or willful failure of the contractor to discontinue the costs shall be unallowable."[31] Examples of costs continuing after termination are idle facilities and idle capacity costs, employee compensation and severance pay costs, and warranty and hardware or software upgrade costs.

■ Idle Facilities & Idle Capacity

Idle facilities or idle capacity often result from a termination for convenience. Although these costs are allowable and often substantial, many contractors surprisingly fail to claim them. A contractor can recover for idle facilities or idle capacity resulting from a termination under the FAR "Idle facility and idle capacity costs" cost principle[32] or the "Termination costs" principle for "costs continuing after termination."[33]

Idle facilities and idle capacity costs are "costs such as maintenance, repair, housing, rent, and other related costs; *e.g.*, property taxes, insurance, and depreciation."[34] "Facilities" are the contractor's "plant" or "any portion" of the plant including land and equipment whether leased or owned by the contractor.[35] "Idle facilities" are "completely unused" facilities; "idle capacity" is the "unused capacity of partially used facilities."[36]

Several legally insupportable grounds are often advanced by the Government to avoid paying a con-

tractor its allowable idle facilities and idle capacity costs following a convenience termination.

(a) *The period claimed exceeds one year.* The Government often disallows idle facilities and idle capacity costs on the ground that the contractor is claiming the costs for more than one year. The "Idle facility and idle capacity costs" cost principle states that idle facilities costs "are allowable for a reasonable period, *ordinarily* not to exceed 1 year, depending upon the initiative taken to use, lease, or dispose of the idle facilities."[37] The Defense Contract Audit Agency and COs often argue that one year is the maximum period for which these costs can be recovered. This approach is improper. Contractors are entitled to recover idle facilities costs for reasonable periods exceeding one year as long as reasonable steps are taken to eliminate the costs. In allowing recovery for a period of two years, seven-and-a-half months, the ASBCA stated that "[n]o more is necessary to establish a 'reasonable period' for the allowability of idle facilities costs beyond a year than a showing of diligent or reasonable efforts with respect to 'the initiative taken to use, lease, or dispose of such facilities.'" The board recognized that "such initiative may be exercised unsuccessfully for several years" and thus extended the allowability of the costs for the longer period.[38]

(b) *The facilities are not completely idle.* The DCAA sometimes mislabels "idle capacity" as "idle facilities" and disallows the amount claimed because the "facilities" were not completely idled. Disallowance on this basis is improper. If a contractor manages to find some use for facilities left idle by a termination, the idle facilities become, by definition, "idle capacity" or partially used facilities. Underutilization is all that is required to recover for the costs of "idle capacity."[39]

(c) *Sales have increased.* The DCAA often disallows all costs claimed for idle facilities or idle capacity if the contractor has experienced an increase in sales. This approach begs the question. The issue is whether the contractor experiences idle facilities or idle capacity as a result of the termination—not whether the contractor's sales volume has changed.

(d) *The facilities are not "special tooling."* The Government sometimes disallows idle facility or capacity costs because the facility at issue is not "special tooling." The FAR defines "special tooling" as tooling, machinery, or equipment of such a specialized nature that its use is "limited to the development or production of particular supplies or parts" or "performance of particular services."[40] Although facilities must qualify as "special tooling" to recover for "loss of useful value" under the FAR "Termination costs" cost principle,[41] there is no similar requirement to recover for idle capacity or idle facilities.

■ Employee Compensation

Employee compensation is another type of cost continuing after termination. Just as with any other cost continuing after termination, the contractor must demonstrate it could not reasonably discontinue the cost for the cost to be allowable.[42] Post-termination employee compensation is generally not recoverable unless an employee is needed to wind up the terminated contract.[43] A "moral obligation" does not make costs recoverable.[44] Payment for the time it takes to reassign employees working on the terminated contract to other work would appear to be allowable.

■ Severance Payments

Another type of "costs continuing after termination" allowable under the FAR "Termination costs" cost principle is severance pay. Under the "Compensation for personal services" cost principle, severance pay is allowable to the extent it is required either by (1) law, (2) employer-employee agreement, (3) established policy, or (4) circumstances of the particular employment.[45] This appears to be substantially identical to the "Termination costs" cost principle provision for "costs continuing after termination," which, as noted above, limits allowability to costs that cannot be discontinued "[d]espite all reasonable efforts by the contractor."[46]

■ Warranties & Hardware/Software Upgrades

As discussed in Part I, the FAR suggests COs consider the inclusion of a provision in a settlement of a "complete termination" preserving the Government's rights "concerning defects, guarantees, or warranties" and imposing other contractor obligations concerning terminated

work.[47] A contractor should not agree to any continuing obligations in a *complete termination* other than those in the "Termination for Convenience" clause without adequate compensation. The Government could agree to compensate a contractor for such costs as a cost continuing after termination. Alternatively, a contractor could protect itself by obtaining a release from all post-termination performance obligations. Such a release should expressly include but not be limited to warranty services, repair or replacement of defective work, providing software or other upgrades, and similar efforts. A termination for convenience is *partial* if the Government does not terminate the contractor's obligations to provide warranties and hardware or software upgrades. When a termination is partial, a contractor is entitled to an equitable adjustment for the increased cost of performing the nonterminated portion of the contract.[48] If you find yourself in such a situation, you should claim the increased cost of performing the nonterminated portion of the contract, as discussed in Part I.

Rental Costs

Under the FAR "Termination costs" cost principle, rental costs under unexpired leases are allowable in a termination settlement when the rental is shown to have been "reasonably necessary for the performance of the terminated contract."[49] After the termination, the contractor must make reasonable efforts to minimize the costs to the Government.[50]

Rental costs are not limited to the contract period. They are allowable for the contract period existing before the termination and "such further period as may be reasonable."[51] A lease period exceeding the contract period is reasonable where the contractor obtained the shortest available lease term for necessary facilities.[52] As with other cost issues, you should avoid Government second-guessing, as addressed in Part I. The reasonableness of the lease term is determined by the contractor's judgment and circumstances existing at the time of the lease—not the post-termination hindsight of a Government official.

The DCAA sometimes limits unexpired lease costs for terminated contracts to ownership costs based on the FAR "Rental costs" cost principle. This nontermination cost principle limits rental charges between related organizations to ownership costs.[53] Ownership costs will be materially below fair market value where rented facilities have been depreciated by the related party. Such a disallowance appears to be improper. As stated in the "Rental costs" cost principle, "The allowability of rental costs under unexpired leases in connection with terminations is treated in [the "Termination costs" cost principle]."[54] Unlike the "Rental costs" cost principle, the "Termination costs" cost principle does not limit rental costs paid to a related organization to ownership costs.[55] Such a disallowance would also be improper if it deprived a terminated contractor of fair compensation. As discussed in Part I, a terminated contractor's right to fair compensation under FAR 49.201 is paramount and trumps all other cost principles.[56]

Facilities Capital Cost Of Money

Following a termination for convenience, you may be entitled to recover "facilities capital cost of money" (FCCOM) under the FAR "Cost of money" cost principle.[57] Unfortunately, terminated contractors often overlook this cost.

FCCOM is an imputed amount for the cost of capital for facilities allocable to the contract.[58] Recovery of FCCOM does not depend on whether the contractor used borrowed funds or equity capital for the facilities.[59] FCCOM is calculated under Cost Accounting Standard 414 for each accounting period by multiplying the net book value of facilities capital allocable to the contract by the interest rate set by the Secretary of the Treasury.[60]

The allowance for FCCOM is designed to encourage contractors to invest in capital assets that improve contract performance. FCCOM is not interest on borrowing that is unallowable under the "Interest and other financial costs" cost principle.[61]

The "Cost of money" cost principle states that for FCCOM to be allowable, it must be "specifically identified and proposed in cost proposals relating to the contract under which this cost is

to be claimed."[62] Under a strict application of this rule, a contractor would only be entitled to FCCOM if it was claimed under all prior cost proposals. If the termination for convenience settlement proposal is the first cost proposal, FCCOM can and should be claimed to maximize contractor recovery.[63] You should note that the ASBCA has allowed FCCOM under the overriding "fair compensation" principle even though not all the requirements of a prior "Cost of money" cost principle were met.[64]

"Cost of money as an element of capital assets under construction" is another type of "cost of money" allowable under the FAR cost principle.[65] This type of "cost of money" is rarely an issue in termination cases since it is added to the cost of the capital assets under construction rather than expensed.

Common Items

Often the Government will disallow recovery for materials, tooling, or other inventory on the ground that they are "common items" usable on the contractor's other work. The FAR "Termination costs" cost principle provision covering "common items" states that the "costs of items reasonably usable on the contractor's other work shall not be allowable unless the contractor submits evidence that the items could not be retained at cost without sustaining a loss."[66]

Merely because the items are of a type the contractor uses on other work does not justify disallowance as common items. For disallowance to be justified, the contractor must have existing projects for the materials or be in a position to hold the materials for future projects without incurring a loss.[67] You can rebut a "common items" disallowance by demonstrating that the items cannot be retained at cost without sustaining a loss.

Costs Under First Article Contracts

Under a first-article contract, the contractor produces a prototype of a new product—the "first article." If the Government approves the first article and exercises its purchase option under the contract, the contractor produces and delivers the production units.[68] When a contract is terminated before first article approval, the FAR "First Article Approval" clause would appear to preclude any recovery for the costs of production units. The clause states:[69]

> Before first article approval, the acquisition of materials or components for, or the commencement of production of, the balance of the contract quantity is at the sole risk of the Contractor. Before first article approval, the costs thereof shall not be allocable to this contract for (1) progress payments, or (2) termination settlements if the contract is terminated for the convenience of the Government.

Although this rule appears harsh, there are several judicially crafted exceptions. For example, where a contractor must order more material than necessary for manufacture of a first article because of minimum order quantities imposed by a supplier, the costs of the excess materials that are set aside for production have been held to be allowable.[70]

Costs relating to production units may also be allowable if their incurrence before first article approval was necessary to meet the delivery schedule. For example, in one case,[71] the ASBCA held that the cost of special steel for production units purchased before first article approval was allowable where 30 days were required for its delivery and production units were due 25 days after first article approval. In another case,[72] the ASBCA allowed recovery of the cost of one long-lead-time component requiring advance purchase to meet the delivery schedule but denied recovery for the costs of other components and production effort not necessary to meet the schedule. Although the board in these two cases only allowed costs for long-lead-time materials, the language and rationale used appear to extend to other production costs that must be incurred before first article approval to meet the contract delivery schedule.

In addition, the Government can waive, either expressly or by its conduct, the application of the risk provision of the "First Article Approval" clause. The Government waives the risk provision through its conduct by insisting on a delivery schedule that requires production before first article approval,[73] approving progress payments

for production items,[74] and taking possession of production units.[75] If a review of all the facts and circumstances indicates the Government waived application of the "First Article Approval" clause, a contractor may recover for all costs associated with production quantities.[76]

You should note that where a contractor incurs costs for production units before first article approval, the first article is subsequently approved, and the contract is then terminated for convenience, the contractor may recover production unit costs in the termination settlement.[77]

The Government may contend that the first article costs are unallowable because they were also necessary for production units. For example, the Government sometimes disallows the costs of special tooling built by the contractor for the manufacture of the first article on the ground that the special tooling would have been used for production units had the contract not been terminated for convenience before first article approval. Disallowance on this basis is improper. The "First Article Approval" clause does not preclude the recovery of costs necessary for manufacture of the first article. Whether the costs are also necessary for production is irrelevant.[78]

The Government may also contend that the "First Article Approval" clause limits contractor recovery in terminations issued before first article approval to the first article price. The ASBCA has rejected this argument, holding that recovery in a termination for convenience is limited by the "total contract price" rather than the line item price for the first article.[79]

G&A Expense On Subcontractor Settlements

The FAR "Termination costs" cost principle provides that an "appropriate share of the contractor's indirect expense may be allocated to the amount of settlements with subcontractors."[80] Contractors, however, sometimes do not claim general and administrative expense on subcontractor settlements because the G&A expense block of the Standard Form 1435, "Settlement Proposal (Inventory Basis)," SF 1436, "Settlement Proposal (Total Cost Basis)," and SF 1437, "Settlement Proposal for Cost-Reimbursement Contracts," is before the block for subcontractor settlements.[81] You should not fail to claim these allowable costs simply because of the layout of the Government's standard form. G&A expense is an allowable cost of subcontractor termination settlements even if the Government negotiates the final settlement with the subcontractor.[82]

Settlement Expenses

Under the "Termination costs" cost principle, a contractor is entitled to recover as "settlement expenses" the accounting, legal, clerical, and similar costs of preparing and negotiating its settlement proposal, of terminating and settling subcontracts, and of storing, transporting, and disposing of termination inventory.[83] The settlement expenses you may recover include the reasonable fees of outside professionals, as well as your in-house personnel costs. As discussed in Part I, in the event of a termination for convenience, you should obtain professional help from qualified Government contract attorneys and accountants. Terminations for convenience present arcane legal and accounting problems, and the use of qualified professionals can greatly increase your recovery.

The FAR advises that if settlement expenses are "significant," the contractor must establish "a cost account or work order…to separately identify and accumulate them."[84] Nevertheless, the ASBCA has paid in-house settlement expenses based on a contractor's after-the-fact estimates of time expended.[85] However, to avoid the compromises incident to estimates or possible disallowance, you should keep contemporaneous time sheets. As discussed previously, the costs of in-house personnel may be charged as direct costs even though such costs normally are included in indirect cost pools.[86]

You should set up a separate account to accumulate settlement expenses for in-house personnel.[87] To avoid double counting, in-house personnel costs charged directly as settlement expenses should be removed from indirect cost pools.

The FAR provides that "indirect costs" for settlement expenses for in-house personnel "normally…shall be limited to payroll taxes, fringe benefits, occupancy costs, and immediate

supervision costs."[88] The DCAA at one time took the position that this provision limited indirect charges for all personnel irrespective of whether the costs are normally charged directly or indirectly. By Memorandum dated November 22, 1996, the DCAA revised its Contact Audit Manual to conform with cases holding that the FAR limitation only applies to employee costs normally charged as indirect costs.[89] The DCAA no longer disputes that a contractor is entitled to follow its normal overhead practices for employee costs normally charged as direct costs.

A contractor is entitled to charge its normal G&A expense rate to settlement expense for outside professionals such as lawyers and accountants. However, if such charges are normally in the G&A expense pool, the pool and rate must be reduced to reflect these normally indirect costs charged as direct costs.

A contractor is not precluded from recovering settlement expense because litigation has been filed. If the purpose of the effort is settlement, a contractor is entitled to settlement expense even if the matter is in litigation.[90] A contractor has also been held to be entitled to the costs of attempting to convince a CO to convert a termination for default to a termination for convenience.[91]

You should not use contingent fee arrangements to compensate your professionals for costs that may be recoverable as settlement expense. Contingent fees are not recoverable under the FAR.[92]

A cost-reimbursement contractor should also claim settlement expenses in excess of cost or funding ceilings where appropriate, as discussed below.

CDA Interest

■ Requirements For A "Claim"

A contractor is entitled to interest from the date of submission of a Contract Disputes Act "claim."[93] For a submission by a contractor to the CO to qualify as a CDA "claim," it must (1) be in writing, (2) request payment of a sum certain, (3) be other than an invoice or other routine request for payment,[94] (4) be certified if for over $100,000,[95] and (5) request a final decision.[96]

A termination settlement proposal prepared on the required forms such as SF 1435, SF 1436, SF 1437, and SF 1438 for traditional Government contracts readily meets requirements (1) through (3). (There is no required form for submitting termination settlement proposals for FAR Part 12 contracts for commercial items.)

To satisfy requirement (4), a CDA certification is required if you claim over $100,000 in your settlement proposal.[97] Such certification must state as follows: [98]

> I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the contractor.

If the certification is defective and the CO so notifies the contractor within 60 days after claim submission, the CO need not issue a final decision.[99] Otherwise the CO must, within 60 days of claim submission, issue a final decision or advise the contractor when a final decision will be issued.[100]

The preprinted "Certificate" appearing before the signature block on required termination forms such as SF 1435, SF 1436, SF 1437, and SF 1438 does not meet CDA certification requirements.[101] Accordingly, a CO could refuse to issue a final decision within the 60-day window. If the CO ignores such a "defective certification" and issues a final decision, the defect is correctable anytime up to the entry of final judgment in the litigation of the claim.[102]

Under the plain language of the CDA, a termination proposal would qualify as a CDA "claim" entitling the contractor to interest if requirements (1) to (4) are met and the contractor satisfies requirement (5) by requesting a final decision. However, in addition, the Federal Circuit has imposed the requirement of (6) an "impasse."[103]

In *James M. Ellett Construction Co. v. United States*, the Federal Circuit held that a termination settlement proposal, when initially submitted, is not a "claim" because "it is for the purpose of negotiation, not a contracting officer's decision."[104] However, a termination settlement proposal ripens into a CDA "claim" that accrues interest if negotiations

reach an "impasse."[105] *Ellett* concerned a termination for convenience settlement proposal and request for equitable adjustment under the same contract. Each was separately submitted as a CDA claim. The court held that the separate request for equitable adjustment was a claim when submitted.[106] In a subsequent decision, *Rex Systems, Inc. v. Cohen*, the Federal Circuit held that there is no impasse converting a settlement proposal into a CDA claim entitling a contractor to interest if a settlement is ultimately reached.[107]

Thus, to recover interest under a pure termination for convenience settlement proposal—i.e., one that does not include a request for equitable adjustment—a contractor should submit the required certification and request a final decision at the first indication of an impasse. If a contractor is entitled to an undefinitized equitable adjustment on the terminated contract, it could recover interest on its equitable adjustment by submitting it separately as a CDA claim as the contractor did in *Ellett*. However, this may make the cost of preparing the request for equitable adjustment unallowable claim preparation costs, as discussed below.

A contractor should insist on the payment of interest as part of any settlement. The Federal Circuit's decision in *Rex* poses the question of what came first, the chicken or the egg. If there is no settlement, there is an impasse. To extricate itself from the impasse, the Government must therefore pay interest.

If a contractor is entitled to an equitable adjustment on the terminated contract, it should consider submitting its equitable adjustment separately as a CDA claim as the contractor did in *Ellett*. If the termination settlement proposal includes a request for equitable adjustment that could be submitted as a CDA claim or follows a termination for default that is being challenged, the contractor should consider certifying it and submitting it separately as a CDA claim.

■ Interest vs. Settlement Expenses/REA Preparation Costs

A contactor wants to recover both its (a) cost of preparing a termination settlement proposal and (b) interest on such submission. However, steps taken to recover proposal preparation costs can preclude the recovery of interest and vice versa.

In recent years, the U.S. Court of Appeals for the Federal Circuit has issued a series of decisions that has made this a confusing and rapidly changing area of the law. With that said the current state of the law can be summarized as follows:

(1) Attorneys' fees and other costs of preparing and negotiating a termination for convenience settlement proposal are recoverable as settlement expense.[108]

(2) Attorneys' fees and other costs of preparing and negotiating a request for equitable adjustment incident to contract performance are recoverable as part of the equitable adjustment.[109]

(3) Attorneys' fees and other costs of preparing and pursuing a CDA claim against the Government are unallowable.[110]

(4) Interest is allowable on CDA claims from the time of submission.[111]

(5) A termination for convenience settlement proposal is submitted for negotiation and therefore is not a claim when submitted.[112]

(6) Certification and a request for final decision after an impasse arises on a termination for convenience settlement proposal converts the termination settlement proposal into a CDA claim.[113]

(7) Certification and request for a final decision of an REA converts it to a CDA claim.[114]

(8) The ASBCA has held the cost of efforts to reach a negotiated resolution of termination for convenience settlement proposal after it becomes a CDA claim are recoverable as settlement expense.[115]

(9) The ASBCA has held the cost of efforts to reach a negotiated resolution of an REA after it becomes a CDA claim are allowable,[116] while the Court of Federal Claims has held such costs are not allowable.[117]

(10) A contractor is not precluded from recovering settlement expense because litigation has been filed. If the purpose of a post-litigation effort is settlement a contractor is entitled to settlement expense.[118]

(11) If a negotiated resolution is reached of a termination settlement proposal that was converted to a claim, interest is not allowable because the negotiated resolution renders it no longer a claim.[119]

It is impossible to concoct a single strategy to deal with all scenarios. What is in a contractor's best interests will depend upon balancing the amount recoverable as settlement expense or REA preparation cost against the amount recoverable as CDA interest.

With that said, a potential strategy that may be appropriate for some situations is as follows:

(a) File an REA separately and as part of a termination for convenience settlement proposal. To avoid allegations of fraud, be sure to indicate in each submission that although recovery based on the same facts is sought in separate submissions, only one recovery is sought.

(b) Convert the submissions into a CDA claim if the Government disputes them or fails to act within a reasonable time.

(c) Refuse to settle without payment of CDA interest.

This strategy may enable a contractor to maximize recovery of both settlement expenses/REA preparation costs and CDA interest.

This is a rapidly changing area of law. Before deciding on a course of action, you should check the most recent judicial pronouncements, especially those by the Federal Circuit.

Specific Contract Types

■ IDIQ Contracts

As noted in Part I, the Government's failure to order the guaranteed minimum in an IDIQ contract is a breach of contract unless the Government terminates the unordered portion of the guaranteed minimum for convenience during the contract period.[120] Often contractors will notify the Government of its failure to order the guaranteed minimum before the end of the performance period in order to obtain additional business. This is not to the contractor's advantage since the Government can avoid liability for anticipatory profits by terminating for convenience.[121] The contractor could recover more if it lets sleeping dogs lie and files a claim for breach of contract, including anticipatory profits, after the period for performance has expired.

■ Service Contracts

Service contracts, other than FAR Part 12 contracts for commercial services, may contain either the FAR 52.249-2 "Termination for Convenience of the Government (Fixed-Priced)" clause, which is not limited to services, or the FAR 52.249-4 "Termination for Convenience of the Government (Services) (Short Form)" clause.

Whether the "Termination for Convenience of the Government (Services) (Short Form)" clause is used has a significant effect on contractor recovery. Under the other "Termination for Convenience" clauses for noncommercial items, a contractor is generally entitled to recover its allowable costs (which, as discussed in these PAPERS, include certain costs continuing after termination), settlement expense, and profit.[122] Under the "Termination for Convenience of the Government (Services) (Short Form)" clause, the Government is "liable only for payment…for services rendered before the effective date of termination."[123]

The FAR limits the use of the "Termination for Convenience of the Government (Services) (Short Form)" clause to instances where the CO determines 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.[124]

After a termination for convenience, a service contractor is faced with two issues. First, does the contract include the short form services clause,

which limits recovery to services rendered? If the short form clause is not included, the contractor's termination for convenience recovery is not limited to services rendered. Second, if the short form clause is included, was its inclusion reasonable under the standards set forth in the FAR?

As previously discussed in Part I, under the *Christian* doctrine, clauses required by law or regulation will be "read into" a Government contract even though not actually included in the contract.[125] Where the inclusion of the "Termination for Convenience of the Government (Services) (Short Form)" clause is an abuse of discretion, judges have used the *Christian* doctrine to substitute the appropriate "Termination for Convenience" clause. For example, the ASBCA found an abuse of discretion in the inclusion of the short form clause in a guard service contract where the contractor was required to provide weapons and uniforms. The board reasoned that such items provided the basis for a claim for "other than services rendered."[126] Similarly, the General Services Administration Board of Contract Appeals held erroneous the use of the short form clause in a contract for maintenance services. The board stated that because of startup costs, a determination could not be made that a termination for convenience claim would not result in a claim for "other than services rendered."[127]

■ Cost-Type Contracts

(1) *Invoke the "fair compensation" principle.* The general principle that a contractor whose contract is terminated for convenience is entitle to "fair compensation," discussed in Part I, is set forth in FAR 49.201. FAR 49.201 is a part of FAR Subpart 49.2, "Additional Principles for Fixed-Priced Contracts Terminated for Convenience." It would therefore appear to apply only to fixed-priced contracts. However, the Federal Circuit has applied the "fair compensation" principle to a cost-reimbursement contract.[128] A cost-reimbursement contractor terminated for convenience should therefore invoke the "fair compensation" principle and use the techniques set forth in these BRIEFING PAPERS where necessary to recover fair compensation.

(2) *Avoid disadvantageous advance cost agreements.* Cost-type contractors often enter into advanced cost agreements with the Government concerning the allowability of costs. Such agreements often unfairly restrict the allowability of termination costs. The Federal Circuit has held that the "Termination for Convenience" clause in a cost-reimbursement contract overrides advance cost agreements.[129] A cost-reimbursement contractor terminated for convenience should therefore not limit termination costs proposed to those allowable under an advanced cost agreement.

(3) *Claim settlement expense in excess of LOC and LOF cost ceilings where appropriate.* A cost-type contractor's recovery is limited by the "Limitation of Cost" (LOC) clause in nonincrementally funded contracts[130] and "Limitation of Funds" (LOF) clause in incrementally funded contracts.[131] The LOC and LOF clause cost limitations apply to termination costs.[132]

The Government waives cost limitations for settlement expense where it terminates a cost-reimbursement contract for convenience with knowledge that cost limitations have been exceeded.[133] Should you find yourself in such a situation, be sure to claim settlement expense in excess of the LOC and LOF ceilings.

■ FAR Part 12 Commercial Item Contracts

The "Termination for Convenience" clause for Government purchases of commercial items appears as paragraph (l) of the FAR 52.212-4 Terms and Conditions—Commercial Items" clause. Paragraph (l) provides as follows:

> (l) Termination for the Government's convenience. The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject 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. The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give the Government any right to audit the Contractor's records. The Contractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

The formula for recovery is (1) the percentage of the work performed before the notice of the termination, plus (2) any charges the contractor can demonstrate directly resulted from the termination.[134] As discussed in Part I, this modified price-based formula appears to be a departure from the cost-based formula for traditional Government contracts, which permits recovery of (a) allowable costs incurred in the performance of the work, (b) certain "continuing" (post-termination) costs, (c) a reasonable profit for work performed, and (d) reasonable settlement expenses.[135] A terminated commercial item contractor is required to mitigate costs. As the clause states, "The Contractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided."[136]

The FAR provides that COs may use FAR Part 49, which applies to noncommercial item contracts, "as guidance" to the extent that it does not conflict with FAR Part 12 and the "Contract Terms and Conditions—Commercial Items" clause at FAR 52.212-4.[137] Unlike the FAR clauses and implementing rules for traditional Government contracts, the commercial items clause and rules do not provide a deadline for submitting a termination settlement proposal[138] or proposal for costs resulting from a partial termination for convenience,[139] do not limit recovery to the contract price (including undefinitzed equitable adjustments),[140] do not provide for partial payments before settlement,[141] and do not require submission of settlement proposals on required forms with certifications.[142] There has been little case law regarding the applicability of the FAR Part 49 requirements governing traditional Government contracts to commercial item contracts.

In *Jon Winter & Associates*, the Department of Agriculture Board of Contract Appeals stated in dictum that "[c]osts incurred are not the measure of relief…rather relief is to reflect the percentage of work performed and reasonable charges that have resulted from the termination." The board held that amounts due for deliverables under the "Payments" clause do not necessarily reflect the percentage of work performed. It also stated in dictum that reasonable charges include "reasonably incurred costs in anticipation of performing the entire contract." Such cost would be allowable as initial costs under the FAR 31.205-42 cost principle for traditional Government contracts.[143] Based on this rationale, it would appear that unamortized costs allowable under traditional Government contracts such as loss of useful value and alterations of leased property would also be allowable under a commercial item contract.

In *Individual Development Associates, Inc.*,[144] the ASBCA addressed the partial termination for convenience of a FAR Part 12 commercial item contract. The contractor did not submit evidence of percentage of completion at termination or costs incurred as a result of the termination. Based on this failure of proof, the ASBCA denied the contractor's appeal and ordered the contractor to make a partial refund.

There is insufficient case law to provide definitive guidance on the applicability of the FAR Part 49 provisions to commercial item contracts. Nevertheless, several observations can be made.

First, there is nothing in the FAR commercial item provisions inconsistent with a contractor's right to "fair compensation" as set forth in FAR 49.201. Therefore, the same techniques for maximizing convenience termination recovery would appear to apply to contracts for commercial items subject to the FAR Part 12 rules.

Second, questions remain to be resolved regarding application of the formula for contractor recovery following termination for convenience of a commercial item contract, such as (1) how to measure the "percentage of the work performed" and (2) how to determine what charges "directly resulted from the termination."[145] For example, is percentage of performance to be mechanically calculated based on units delivered or physical progress or does it include initial costs allowable as under noncommercial item contract terminations? Are charges resulting "directly" from termination limited to settlement expenses or do they include "continuing" (post-termination) costs that are expressly allowable for noncommercial item contracts? Although the commercial item formula for recovery is ambiguous, as noted above, the FAR permits COs to continue to use FAR Part 49 for guidance to the extent it does not conflict with FAR Part 12.[146] There appears to be no authority permitting a CO to reduce a contractor's recovery below costs allowable under FAR Part 49.

Third, there is much similarity between the principles for commercial item and traditional Government contracts. Payment of the portion of the contract price reflecting the percentage of work performed in a commercial item contract results in a loss adjustment like that in traditional Government contracts. Costs resulting from the termination in a commercial item contract may be similar to traditional Government contract termination costs such as unamortized initial costs, loss of useful value, rental under unexpired leases, alterations of leased property, and settlement expense.[147] In the event of a partial termination for convenience, costs resulting from the termination may be the same as costs of an equitable adjustment on the nonterminated portion of the contract or unamortized initial costs in a traditional Government contract.

Fourth, although there is much similarity between the commercial item and traditional Government contract formulae for recovery following a convenience termination, failure to present the amount claimed using the commercial item formula verbiage may result in a Government refusal to pay.

Fifth, although the commercial items clause does not set forth a time limit for submitting a termination settlement proposal, such a submission could be time barred by the CDA statute of limitations on claims[148] and the doctrine of *laches.* The CDA requires that contractor claims be submitted within six years of accrual.[149] The FAR defines the date of accrual as "the date when all events, that fix the alleged liability…and permit assertion of a claim were known or should have been known."[150] The Government might argue this is the date of termination since estimates can be used for costs resulting from the termination. A contractor could argue that the claim does not accrue until actual cost data for all costs are available. Such a time period is arguably open-ended since a contractor can incur costs resulting from the termination such as settlement expense indefinitely. *Laches* is a judicial doctrine that bars claims where the claimant's delay in bring suit prejudices the defendant. Elements are (a) unreasonable delay (b) that causes economic prejudice or injures the defendant's ability to present its defense.[151]

Sixth, although the FAR Part 12 rules do not provide for partial payments as part of the termination process, partial payments appear to be available. Such payments could be made under the FAR Part 49 provisions for traditional Government contracts,[152] and, as previously noted, the FAR permits COs to continue to use FAR Part 49 for guidance to the extent it does not conflict with FAR Part 12.[153] A partial payment could also be made under the provisions in FAR Part 12 for commercial item financing.[154]

Seventh, a commercial item contractor has the same good faith obligations even though submission is not on standard forms with certifications. Misrepresentation could subject the contractor to severe penalties for civil[155] and criminal fraud.[156] Also, as previously noted, a certification is required to convert the settlement proposal into a CDA claim if an impasse arises.[157]

Eighth, the Government often relies on the FAR Part 49 rules to deny recovery of post-termination unabsorbed overhead in convenience termination settlements under traditional Government contracts. The stated reason is that such costs are for a contractor's ongoing business rather than the terminated contract.[158] This rationale may not apply to FAR Part 12 commercial item contracts. Post-termination unabsorbed overhead is clearly a cost resulting directly from the termination within the meaning of the FAR's formula for recovery for commercial item contracts.[159] The argument for allowability of these costs is further buttressed by (a) Uniform Commercial Code § 2-708(2), which defines "damages" as including "reasonable overhead," (b) commercial law cases awarding unabsorbed overhead,[160] and (c) the fact that the limitations on allowability in the FAR Part 31 cost principles are expressly inapplicable in the settlement of commercial item contract convenience terminations.[161]

Finally, the commercial item contract provisions deprive the Government of its right to audit the contractor's records after a termination for convenience.[162] However, a contractor still has the burden of proving its costs. If a CO issues a final decision denying the costs, thus forcing the contractor to litigate, the Government would be entitled to obtain the information in discovery in litigation.

★ GUIDELINES ★

These *Guidelines* are intended to assist a contractor in maximizing its recovery after a contract has been terminated for convenience. They are not, however, a substitute for professional representation in any given situation.

1. Keep in mind that a termination for convenience converts a fixed-price contract to a cost-reimbursement contract. As a result, a contractor is entitled to recover all allowable costs up to the contract price without demonstrating entitlement to an equitable adjustment. The contract price includes any equitable adjustments to which a contractor is entitled.

2. Remember that because of the conversion to a cost-reimbursement contract, a fixed-priced contractor should be entitled to recover all delay costs, including those for contractor-caused or concurrent delays up to the contract price. Be aware of the arguments to counter the Government position that such costs are unallowable.

3. Bear in mind that because of the conversion to a cost-reimbursement contract, a fixed-priced contractor is similarly entitled to recover the cost of defective or nonconforming work.

4. Remember that although precontract costs are sometimes unallowable under the FAR cost principles, they are allowable in the context of a termination for convenience if necessary for "fair compensation."

5. Claim any idle facilities or idle capacity costs incurred despite your unsuccessful efforts to discontinue them. Remember that recovery of these costs is not limited to one year but to a "reasonable period," and that the facilities need not be completely idle or qualify as "special tooling."

6. Be aware that the FAR suggests that a CO consider including a provision in a settlement agreement for a complete termination that would require contractors to correct defects, provide warranty work on delivered items, and perform other terminated work. You should not agree to such a provision without adequate compensation.

7. Claim unexpired lease costs if the lease cannot be terminated or the property sublet and the leased property and the lease term were necessary when acquired.

8. Be aware that (a) you are entitled to facilities capital cost of money under the FAR if you claimed cost of money in prior cost proposals or the termination settlement proposal is the first cost proposal, and (b) the ASBCA has held a terminated contractor was entitled to FCCOM under the "fair compensation" principle when all requirements under a prior version of the regulation were not met.

9. Do not accept "common items" disallowances for items you cannot use or hold without incurring a loss.

10. Bear in mind that production costs incurred before first article approval are allowable if (a) the costs were incurred due to a supplier's requirements for minimum order quantities or were necessary to meet the production schedule, (b) the "First Article Approval" clause is waived, or (c) the costs were also necessary for manufacture of the first article. The recovery of costs incurred before first article approval is not limited to the line item price of the first article.

11. Remember to claim G&A expenses on subcontractor settlements. Do not be confused by the layout of the standard forms for termination settlement proposals for traditional Government contracts. Note that there are no forms for FAR Part 12 commercial item contracts.

12. Remember that you are entitled to recover settlement expense for attorneys, accountants, and other costs of preparing and presenting your termination settlement proposal. It is to your advantage to retain knowledgeable professionals since this is an arcane area of law where knowledge and experience can make a significant difference in the amount of recovery.

13. Do not use contingent fee arrangements for the preparation and presentation of your termination settlement proposal. Contingent fees are unallowable under the FAR.

14. To facilitate recovery of settlement expenses, make sure that in-house personnel keep time

sheets. Charge the time of in-house personnel directly in your termination settlement proposal.

15. Remember to claim the cost of post-litigation efforts to reach a negotiated resolution of a termination settlement proposal as settlement expense.

16. Follow normal G&A expense practices on settlement expense for in-house personnel normally charged directly and outside professionals. The FAR limitation on G&A expense on settlement expense only applies to normally indirectly charged personnel charged directly.

17. Be aware of the tradeoff between the recovery of settlement expense/REA preparation costs and CDA interest. Settlement expense and REA preparation costs are generally allowable before a termination settlement proposal and/or REA are converted into a CDA claim by certification and request for a final decision. However, interest is not recoverable until a termination settlement proposal and/or REA are converted into a CDA claim.

18. Keep in mind that a termination for convenience settlement proposal cannot be a CDA claim when submitted unless the contractor is simultaneously attempting to convert a default termination to a convenience termination.

19. Remember that efforts to reach a negotiated resolution after suit is filed may be recoverable as settlement expense or allowable contract administration costs in the case of an REA not combined with a termination settlement proposal.

20. Be aware of possible strategies for maximizing the amount recovered for the combined total of settlement expense/REA preparation costs and interest.

21. Let sleeping dogs lie. The failure to order the guaranteed minimum on an IDIQ contract is a breach of contract entitling a contractor to anticipatory profits unless the contract is terminated for convenience during its performance period. If you do not call the failure to order the guaranteed minimum to the Government's attention during the performance period, it is less likely to terminate for convenience.

22. Do not let the FAR 52.249-4 "Termination for Convenience of the Government (Services) (Short Form)" clause for services limit recovery if it has been improperly included in the contract. The clause limits recovery to payment for services rendered and can be used only if the CO determines the contractor would not incur significant costs in preparing to perform and in performing the contract. Where the short form clause has been inappropriately included, judges have used the *Christian* doctrine to substitute the appropriate termination for convenience clause.

23. Remember that the Federal Circuit has extended the "fair compensation" principle to cost-reimbursement contracts. A cost-type contractor should therefore use it and other strategies set forth in these BRIEFING PAPERS to maximize recovery.

24. Keep in mind that a "Termination for Convenience" clause overrides advance cost agreements that may be disadvantageous to a contractor following a termination for convenience.

25. Remember that when the Government terminates a FAR Part 12 commercial item contract for convenience, the contractor is entitled to recover (a) the percentage of contract price reflecting the percentage of work performed before the notice of termination and (b) any charges the contractor can demonstrate resulted directly from the termination. This is a modified price-based formula different from the cost-based formula used to determine recovery in traditional Government contracts.

26. Remember that when a commercial item contract is terminated for convenience, the CO may use principles applicable to traditional Government contracts in determining recovery if not inconsistent with the FAR commercial item provisions.

27. A contractor should use the same techniques for maximizing recovery in commercial item contracts as in traditional Government contracts. There is nothing in the FAR commercial item provisions inconsistent with a contractor's right to fair compensation.

28. Remember that although the commercial item clause does not set forth a time limit for the submission of a settlement proposal, submission

may be barred by the six-year statute of limitations on claims against the Government or the judicial doctrine of laches.

29. Be aware of the potential similarity between the principles for commercial item and traditional Government contracts. Payment of the portion of the contract price reflecting the percentage of work performed in a commercial item contract results in a loss adjustment like that in traditional Government contracts. Costs resulting from the termination in a commercial item contract appear to be similar to traditional Government contract termination costs such as unamortized initial costs, loss of useful value, rental under unexpired leases, alterations of leased property, and settlement expense. In the event of a partial termination, costs resulting from the termination appear to be similar to an equitable adjustment on the nonterminated portion or unamortized initial costs in a traditional Government contract.

30. Keep in mind that although there is much similarity between the commercial item and traditional Government contract formulae, failure to present the amount claimed using the commercial item formula verbiage may result in a Government refusal to pay.

31. Be aware that the termination for convenience of a commercial item contract is not subject to the cost principles and the Government does not have a right to audit.

★ REFERENCES ★

1/ Seidman & Seidman, "Maximizing Termination for Convenience Settlements/Edition II—Part I," Briefing Papers No. 08-3 (Feb. 2008).

2/ Seidman & Banfield, "Preparing Termination for Convenience Settlement Proposals for Fixed-Price Contracts," Briefing Papers No. 97-11 (Oct. 1997).

3/ See, e.g., Durette, GmbH, ASBCA 34072, 91-2 BCA ¶ 23756.

4/ See, e.g., FAR 52.249-2, para. (f); see also FAR 49.207, 52.243-1 ("Changes—Fixed-Price" clause), 52.243-2 ("Changes—Cost-Reimbursement" clause); Agrinautics, ASBCA 21512 et al., 79-2 BCA ¶ 14149, 22 GC ¶ 200.

5/ Worsham Constr. Co., ASBCA 25907, 85-2 BCA ¶ 18016, at 90,369, 28 GC ¶ 243 (Note).

6/ See, e.g., Durette, GmbH, ASBCA 34072, 91-2 BCA ¶ 23756.

7/ Nicon, Inc. v. United States, 331 F.3d 878 (Fed. Cir. 2003), 45 GC ¶ 262; see Eichleay Corp., ASBCA 5183, 60-2 BCA ¶ 2688, 2 GC ¶ 485, aff'd on recons., 61-1 BCA ¶ 2894, 3 GC ¶ 138(a).

8/ Nicon, Inc. v. United States, 331 F.3d at 885; see FAR 31.205-42(c); see also FAR 52.249-2(g)(2)(i).

9/ FAR 31.205-42(c) (emphasis added). See generally Manos, Government Contract Costs & Pricing ch. 49 (Thomson West 2004 & Supp. 2007).

10/ FAR 31.205-42(c).

11/ Applied Cos., ASBCA 54506, 06-1 BCA ¶ 33269, 48 GC ¶ 182.

12/ Nicon, Inc. v. United States, 331 F.3d 878.

13/ Worsham Constr. Co., ASBCA 25907, 85-2 BCA ¶ 18016, at 90,369, 28 GC ¶ 243 (Note).

14/ Applied Cos., ASBCA 54506, 06-1 BCA ¶ 33269, 48 GC ¶ 182.

15/ Nicon, Inc. v. United States, 331 F.3d 878.

16/ Nicon, Inc. v. United States, 331 F.3d at 885; see FAR 31.205-42(c); see also FAR 52.249-2(g)(2)(i).

17/ Applied Cos., ASBCA 54506, 06-1 BCA ¶ 33269, at 164,881, 48 GC ¶ 182.

18/ Nicon, Inc. v. United States, 331 F.3d 878.

19/ James M. Ellett Constr. Co. v. United States, 93 F.3d 1537 (Fed. Cir. 1996), 38 GC ¶¶ 426, 477, 574.

20/ Caskel Forge, Inc., ASBCA 7638, 1962 BCA ¶ 3318, 4 GC ¶ 258.

21/ Morton-Thiokol, Inc., ASBCA 32629, 90-3 BCA ¶ 23207, 32 GC ¶ 254.

22/ FAR 49.204, 52.249-2, para. (h).

23/ See FAR 2.101.

24/ See Youngstrand Surveying, AGBCA 90-150-1, 92-2 BCA ¶ 25017.

25/ FAR 31.205-32. See generally Manos, Government Contract Costs & Pricing ch. 39 (Thomson West 2004 & Supp. 2007).

26/ Penberthy Electromelt Int'l, Inc. v. United States, 11 Cl. Ct. 307 (1986), 29 GC ¶ 40; see also Radant Techs., Inc., ASBCA 38324, 91-3 BCA ¶ 24106, 33 GC ¶ 253. See generally Wiener, "The Allowability of Precontract Costs," 91-11 Costs, Pricing & Acct. Rep. 3 (Federal Publications Inc., Nov. 1991).

27/ FAR 49.113, 49.201(a); see Kasler Elec. Co., DOTCAB No. 1425, 84-2 BCA 17374; Codex Corp. v. United States, 226 Ct. Cl. 693 (1981), 23 GC ¶ 239.

28/ RHC Constr., IBCA 2083, 88-3 BCA ¶ 20991; see also Bennie J. Meeks t/a Lawn Grooming Serv., GSBCA 6605-REM, 85-2 BCA ¶ 17947.

29/ See Metered Laundry Servs., Inc., ASBCA 21573, 78-2 BCA ¶ 13451.

30/ FAR 31.205-42(b).

31/ FAR 31.205-42(b).

32/ FAR 31.205-17. See generally Manos, Government Contract Costs & Pricing ch. 24 (Thomson West 2004 & Supp. 2007).

33/ FAR 31.205-42(b); see Fiesta Leasing & Sales, Inc., ASBCA 29311, 87-1 BCA ¶ 19622, aff'd on recons., 88-1 BCA ¶ 20499.

34/ FAR 31.205-17(a).

35/ FAR 31.205-17(a).

36/ FAR 31.205-17(a).

37/ FAR 31.205-17(b)(2) (emphasis added).

38/ General Dynamics Corp., ASBCA 19607, 78-1 BCA ¶ 13203, at 64,582 (quoting Aerojet Gen. Corp., ASBCA 15703 et al., 73-1 BCA ¶ 9932, 15 GC ¶ 355).

39/ Fiesta Leasing & Sales, Inc., ASBCA 29311, 87-1 BCA 19622, aff'd on recons., 88-1 BCA ¶ 20499

40/ FAR 2.101.

41/ FAR 31.205-42(d).

42/ See FAR 31.205-42(b).

43/ Engineered Sys., Inc., ASBCA 18241, 74-1 BCA ¶ 10492.

44/ Kay & Assocs., Inc. GSBCA TD-17, 76-2 BCA ¶ 12127.

45/ FAR 31.205-6(g)(2). See generally Manos, "FAR 31.205-6, 'Compensation for Personal Services,'" Briefing Papers No.07-13 (Dec. 2007).

46/ FAR 31.205-42(b).

47/ FAR 49.603-1(b)(7).

48/ E.g., FAR 52.249-2, para. (l).

49/ FAR 31.205-42(e).

50/ FAR 31.205-42(e)(2).

51/ FAR 31.205-42(e)(1).

52/ See TDC Mgmt. Corp., DOTBCA 1802, 91-3 BCA ¶ 24091.

53/ FAR 31.205-36(b). See generally Manos, Government Contract Costs & Pricing ch. 43 (Thomson West 2004 & Supp. 2007).

54/ FAR 31.205-36(c) (citing FAR 31.205-42(e)).

55/ FAR 31.205-42(e).

56/ FAR 49.113, 49.201(a).

57/ FAR 31.205-10. See generally Manos, Government Contract Costs & Pricing ch. 17 (Thomson West 2004 & Supp. 2007).

58/ FAR 31.205-10(a); see 48 C.F.R. § 9904.414.

59/ FAR 31.205-10(a)(1).

60/ 48 C.F.R. § 9904.414-50.

61/ FAR 31.205-10(a)(1); see FAR 31.205-20.

62/ FAR 31.205-10(b)(3).

63/ See Spectrum Leasing Corp. v. General Servs. Admin., GSBCA 12189, 95-1 BCA ¶ 27317.

64/ See Fiesta Leasing & Sales, Inc., ASBCA 29311, 87-1 BCA ¶ 19622, aff'd on recons., 88-1 BCA ¶ 20499.

65/ FAR 31.205-10(a)(3)(ii); see 48 C.F.R. § 9904.417.

66/ FAR 31.205-42(a).

67/ Essex Electro Engrs., Inc., DOTCAB 1025 et al., 81-1 BCA 14838, recons. denied, 81-1 BCA ¶ 15109, aff'd, 702 F.2d 998 (Fed. Cir. 1983), 27 GC ¶ 101 (Note); Fiesta Leasing & Sales, Inc., ASBCA 29311, 87-1 BCA ¶ 19622, aff'd on recons., 88-1 BCA ¶ 20499.

68/ See generally Ewing, Lawrence & Zenner, "First-Article Contracts," Briefing Papers No. 93-6 (May 1993).

69/ FAR 52.209-3, para. (g) ("First Article Approval—Contractor Testing" clause), 52.209-4, para. (h) ("First Article Approval—Government Testing" clause).

70/ See Switlik Parachute Co., ASBCA 18024, 75-2 BCA ¶ 11434.

71/ Young Metal Prods., Inc., ASBCA 15701, 71-1 BCA ¶ 8827.

72/ Century Elecs., ASBCA 29123, 85-3 BCA ¶ 18232.

73/ AVCO Corp., ASBCA 15252, 73-1 BCA ¶ 9958.

74/ AVCO Corp., ASBCA 15252, 73-1 BCA ¶ 9958.

75/ Marvin Eng'g Co., ASBCA 18356, 74-1 BCA ¶ 10587.

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77/ Varo, Inc., ASBCA 16606, 72-2 BCA ¶ 9720.

78/ Cape Tool & Die, Inc., ASBCA 46433, 95-1 BCA ¶ 27465, 36 GC ¶ 482.

79/ Concord Elec. Co., ASBCA 31012, 85-3 BCA ¶ 18484, 28 GC ¶ 243 (Note).

80/ FAR 31.205-42(h).

81/ FAR 53.301-1435, -1436, -1437. See generally Seidman & Banfield, "Preparing Termination for Convenience Settlement Proposals for Fixed-Price Contracts," Briefing Papers No. 97-11 (Oct. 1997).

82/ Worsham Constr. Co., ASBCA 25907, 85-2 BCA ¶ 18016, 28 GC ¶ 243 (Note); Bolinders Co., ASBCA 5740, 60-2 BCA ¶ 2746, 2 GC ¶ 562.

83/ FAR 31.205-42(g). See generally Manos, "Allowability of Legal Costs," Briefing Papers No. 05-5 (Apr. 2005); Vacketta, Yesner & Snyder, "Recovery of Legal Costs," Briefing Papers No. 93-12 (Nov. 1993).

84/ FAR 31.205-42(g)(2).

85/ American Elec., Inc., ASBCA 16635, 76-2 BCA ¶ 12151.

86/ See Baifield Indus., Div. of A-T-O, Inc., ASBCA 20006, 76-2 BCA ¶ 12096, aff'd on recons., 76-2 BCA ¶ 12203.

87/ See FAR 31.205-42(g)(2).

88/ See FAR 31.205-42(g)(1)(iii).

89/ DCAM ¶ 12-309 (Nov. 16, 2007); see Celesco Indus., ASBCA 22460, 84-2 BCA ¶ 17295, 26 GC ¶ 326; Condec Corp., ASBCA 14234, 73-1 BCA ¶ 9808, 15 GC ¶ 295.

90/ Acme Process Equip. Co. v. United States, 171 Ct. Cl. 251, 347 F.2d 538, as corrected 171 Ct. Cl. 251, 351 F.2d 656 (1965); Baifield Indus., Div. of A-T-O, Inc., ASBCA 20006, 76-2 BCA ¶ 12096.

91/ Baifield Indus., Div. of A-T-O, Inc., ASBCA 20006, 76-2 BCA ¶ 12096, aff'd on recons., 76-2 BCA ¶ 12203.

92/ See FAR 31.205-33(b).

93/ 41 U.S.C.A. § 611; FAR 33.208.

94/ FAR 2.101; see Reflectone, Inc. v. Dalton, 60 F.3d 1572 (Fed. Cir. 1995), 37 GC ¶ 411 (interpreting FAR "claim" definition regarding requirements 1, 2, and 3).

95/ FAR 2.101; 41 U.S.C.A. § 605(c)(1); see FAR 33.207(a).

96/ See FAR 33.206; 41 U.S.C.A. § 605(a); see James M. Ellett Constr. Co. v. United States, 93 F.3d 1537 (Fed. Cir. 1996), 38 GC ¶¶ 426, 477, 574 (requiring at least an implicit request for final decision for a claim to exist).

97/ 41 U.S.C.A. § 605(c)(1); FAR 2.101, 33.207(a).

98/ FAR 33.207(c); see 41 U.S.C.A. § 605(c)(1).

99/ 41 U.S.C.A. § 605(c)(6); FAR 33.211(e); see FAR 33.201 (defining "defective certification").

100/ 41 U.S.C.A. § 605(c)(2); FAR 33.211(c).

101/ FAR 53.301-1435, -1436, -1437, -1438. See generally Seidman & Banfield, "Preparing Termination for Convenience Settlement Proposals for Fixed-Price Contracts," Briefing Papers No. 97-11 (Oct. 1997).

102/ 41 U.S.C.A. § 605(c)(6); FAR 33.207(f).

103/ See Cibinic, "Contractor Claims: The Need for Definitions," 16 Nash & Cibinic Report ¶ 58 (Dec. 2000).

104/ James M. Ellett Constr. Co. v. United States, 93 F.3d 1537, 1543–44 (Fed. Cir. 1996), 38 GC ¶¶ 426, 477, 574.

105/ James M. Ellett Constr. Co. v. United States, 93 F.3d at 1544. See generally Cibinic, "The Ellett Case: What's All the Fuss About?," 11 Nash & Cibinic Rep. ¶ 8 (Feb. 1997).

106/ James M. Ellett Constr. Co. v. United States, 93 F.3d at 1546.

107/ Rex Sys., Inc. v. Cohen, 224 F.3d 1367 (Fed. Cir. 2000), 42 GC ¶ 405.

108/ FAR 31.205-42(g).

109/ Bill Strong Enters., Inc. v. Shannon, 49 F.3d 1541 (Fed. Cir. 1995), 37 GC ¶ 141.

110/ FAR 31.205-47(f)(1).

111/ FAR 33.208.

112/ James M. Ellett Constr. Co. v. United States, 93 F.3d 1537 (Fed. Cir. 1996), 38 GC ¶¶ 426, 477, 574.

113/ James M. Ellett Constr. Co. v. United States, 93 F.3d 1537.

114/ FAR 33.206, 33.207.

115/ Information Sys. & Network Corp., ASBCA 42659, 00-1 BCA ¶ 30665, 41 GC ¶ 522.

116/ Bill Strong Enters., Inc., ASBCA 42946, 96-2 BCA ¶ 28428 (on remand); Grumman Aerospace Corp., ASBCA 50090, 01-01 BCA ¶ 31316, 43 GC ¶ 122.

117/ Plano Builders Corp v. United States, 40 Fed. Cl. 635 (1998), 40 GC ¶ 208.

118/ Acme Process Equip. Co. v. United States, 171 Ct. Cl. 251, 347 F.2d 538, as corrected, 171 Ct. Cl. 251, 351 F.2d 656 (1965); Baifield Indus., Div. of A-T-O, Inc., ASBCA 20006, 76-2 BCA ¶ 12096.

119/ Rex Sys., Inc. v. Cohen, 224 F.3d 1367 (Fed. Cir. 2000), 42 GC ¶ 405.

120/ See Maxima Corp. v. United States, 847 F.2d 1549 (Fed. Cir. 1988).

121/ See FAR 49.202(a).

122/ See, e.g., FAR 52.249-2, paras. (f), (g), (i); see also FAR 49.113, 49.201, 49.202, 31.205-42.

123/ FAR 52.249-4.

124/ FAR 49.502(c), 52.249-4.

125/ G. L. Christian & Assocs. v. United States, 160 Ct. Cl. 1, 312 F.2d 418, reh'g denied, 160 Ct. Cl. 58, 320 F.2d 345, cert. denied, 375 U.S. 954 (1963).

126/ Guard-All of Am., ASBCA 22167, 80-2 BCA ¶ 14462, 23 GC ¶ 128.

127/ Carrier Corp., GSBCA 8516, 90-1 BCA ¶ 22409.

128/ Jacobs Eng'g Group, Inc. v. United States, 434 F.3d 1378 (Fed. Cir. 2006), 48 GC ¶ 49.

129/ Jacobs Eng'g Group, Inc. v. United States, 434 F.3d 1378; see also Edwards, "Termination of Cost-Reimbursement Contracts: A Novel Interpretation of the Termination Clause," 20 Nash & Cibinic Rep. ¶ 17 (Apr. 2006).

130/ FAR 52.232-20.

131/ FAR 52.232-22. See generally Feldman, "Cost Overruns," Briefing Papers No. 03-8 (July 2003).

132/ FAR 52.232-20, para. (d)(2); FAR 52.232-22, para. (f)(2).

133/ HTC Indus., Inc. ASBCA 40562, 93-1 BCA ¶ 25560; TDC Mgmt. Corp., DOTBCA 1802, 91-2 BCA ¶ 23815, recons. denied 91-2 BCA ¶ 24061.

134/ FAR 12.403(d), 52.212-4, para. (l).

135/ See, e.g., FAR 52.249-2, paras. (f), (g), (i); see also FAR 49.113, 49.201, 49.202, 31.205-42.

136/ FAR 52.212-4, para. (l).

137/ FAR 12.403(a).

138/ Cf. FAR 49.206-1(a), 49.303-1; e.g., FAR 52. 249-2, para. (e) (requiring the prime contractor to submit its "final" termination settlement proposal to the Government within one year of the effective date of the termination).

139/ Cf. FAR 52.249-2, para. (l) (requiring a prime contractor to submit any request for an equitable adjustment following a partial termination within 90 days unless this period is extended in writing by the CO).

140/ Cf. FAR 49.207, 52.249-2, para. (f).

141/ Cf. FAR 49.112-1(a), 52.249-2, para. (m)(1).

142/ Cf. FAR subpt. 49.6.

143/ Jon Winter & Assocs., AGBCA 2005-129-2, 2005 WL 1423636 (June 20, 2005).

144/ Individual Dev. Assocs., Inc., ASBCA 55174, 2007 WL 4565893 (Dec. 20, 2007).

145/ See FAR 12.403(d), 52.212-4, para. (l).

146/ FAR 12.403(a).

147/ See Jon Winter & Assocs., AGBCA 2005-129-2, 2005 WL 1423636 (June 20, 2005).

148/ 41 U.S.C.A. 605(a).

149/ 41 U.S.C.A. 605(a); see FAR 52.233-1 ("Disputes" clause).

150/ FAR 33.201.

151/ A.C. Aukerman Co. v. R.L. Chaides Constr. Co., 960 F.2d 1020 (Fed. Cir. 1992).

152/ See FAR 49.112-1(a), 52.249-2, para. (m)(1).

153/ FAR 12.403(a).

154/ FAR 12.210. See generally Chierichella & Gallacher, "Financing Government Contracts/Edition II—Part II," Briefing Papers No. 04-13 (Dec. 2004).

155/ 31 U.S.C. § 3729. See generally Wimberly, Plunkett & LaSalle, "The Presentment Requirement Under the False Claims Act," Briefing Papers No. 07-12 (Nov. 2007); Brackney & Solomson, "Current Issues in False Claims Litigation," Briefing Papers No. 06-10 (Sept. 2006); Silberman, "False Claims Issues in Subcontracting," Briefing Papers No. 06-8 (July 2006); Huffman, Madsen & Hamrick, "The Civil False Claims Act," Briefing Papers No. 01-10 (Sept. 2001); Goddard, "Business Ethics in Government Contracting—Part II," Briefing Papers No. 03-7 (June 2003).

156/ 18 U.S.C. § 287.

157/ James M. Ellett Constr. Co. v. United States, 93 F.3d 1537 (Fed. Cir. 1996), 38 GC ¶¶ 426, 477, 574.

158/ See J.W. Cook & Sons, Inc., ASBCA 39691, 92-3 BCA ¶ 25053.

159/ See FAR 12.403(d).

160/ See, e.g., Jericho Sash & Door Co. v. Building Erectors, Inc., 286 N.E.2d 343 (Mass. 1972); Distribu-Dor, Inc. v. Karadanis, 90 Cal. Rptr. 231 (Cal. Ct. App. 1970); Vitex Mfg. Corp. v. Caribtex Corp., 377 F.2d 795 (3d Cir. 1967); Huffman Towing, Inc. v. Mainstream Shipyard & Supply, Inc., 388 F. Supp. 1362 (N.D. Miss. 1975) (relying on U.C.C. § 2-708(2) for recovery of overhead in a maritime case).

161/ FAR 12.403(d)(1)(ii), 52.212-4, para. (l).

162/ FAR 12.403(d)(1)(ii), 52.212-4, para. (l).