

Terminations for Convenience: HOW TO *MAXIMIZE* CONTRACTOR RECOVERY

GEORGE WASHINGTON UNIVERSITY
SCHOOL OF BUSINESS ADMINISTRATION

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NOVEMBER 13, 2017, 7 pm E.S.T.
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WASHINGTON, DC

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RECOVERABLE COSTS – BASIC FORMULA

TRADITIONAL GOVERNMENT CONTRACTS



- Allowable cost + profit + settlement expense
- Subject to loss adjustment
 - Recovery = incurred costs X contract price/incurred costs + settlement expense

FAR PT 12 COMMERCIAL ITEM CONTRACTS

- % of price reflecting % of completion + reasonable charges resulting from T/C
- Loss adjustment implicit in Prong 1



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RECOVERABLE COSTS
FAR PT 12 COMMERCIAL ITEM CONTRACTS
ALLOWABLE COST SUMMARY

- **Prong 1 [price reflecting % of completion]** requires payment for:
 - ***TriRad Technologies, Inc., ASBCA 58885, 15-1 BCA ¶ 35898***
 - **Completed items/work** at contract price
 - **Partially completed items/work** based on % of physical completion
- **Prong 2 [reasonable charges resulting from T/C]**
 - ***SWR, Inc, ASBCA 56708, 15-1 BCA ¶ 35832 states:***
 The second prong . . . refers to the recovery of those charges incurred that "do not relate to work completed" but should be reimbursed to fairly compensate the contractor whose contract has been terminated.
 - **At least coextensive with FAR 31.205-42**
 - **Other charges may also be recoverable**



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RECOVERABLE COSTS
FAR PT 12 COMMERCIAL ITEM CONTRACTS
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RECOVERABLE COSTS
TRADITIONAL GOVERNMENT CONTRACTS
FAR 49.201 FAIR COMPENSATION RULE

“(a) A settlement should compensate the contractor fairly for the work done and the preparations made for the terminated portions of the contract, including a reasonable allowance for profit. * * * *

* * * *

(c) * * * * The amount of recordkeeping, reporting, and accounting * * * should be kept to a minimum compatible with the reasonable protection of the public interest.”



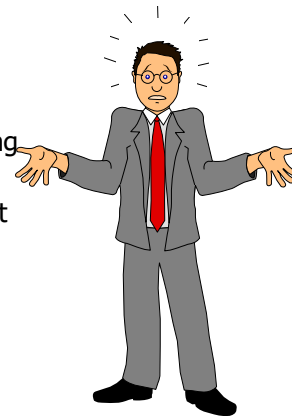
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RECOVERABLE COSTS
TRADITIONAL GOVERNMENT CONTRACTS
FAR 49.201 FAIR COMPENSATION RULE

- ***Codex v. U.S.*, 226 Ct. Cl. 693 (1981)**
 - Contractor developed improvements to communications system for purpose of obtaining government contract
 - T/C just after award. CO disallows development expense as unallowable pre-contract cost
 - Court holds disallowance improper if it would have deprived contractor of fair compensation
- [***SWR, Inc. ASBCA 56708, 15-1 BCA ¶135,832***
 - Holds Fair Compensation Principle Applicable to Commercial Item Contracts]



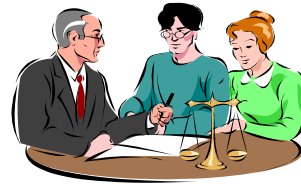
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**TRICKS OF THE TRADE –
MAXIMIZING CONTRACTOR RECOVERY-
GENERAL STRATEGIES**
1. DETERMINE IF REDUCTION A BREACH

- **Breach entitles contractor to anticipatory profits**
- **Some Scenarios**
 - No Termination Clause in Subcontract
 - Failure to Order Guaranteed Minimum
 - Failure to Order Needs Under Requirements Contract



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**TRICKS OF THE TRADE –
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GENERAL STRATEGIES**
2. CHARGE INDIRECT COSTS DIRECTLY



- **Direct charging necessary for “fair compensation”**
- **Traditional Government Contracts**
 - **No conflict with CAS 402**
 - Not “like circumstances”
 - DCAA Audit Manual, ¶ 12-105c
- **FAR PT 12 CI Contracts**
 - CAS and Cost Principles Inapplicable



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**TRICKS OF THE TRADE –
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GENERAL STRATEGIES
3. SEEK FAIR COMPENSATION**

- Claim cost if disallowance is unfair
- Provide explanation referencing FAR 49.201 fair compensation principle
- *Codex v US, supra.*



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**TRICKS OF THE TRADE –
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GENERAL STRATEGIES
4. AVOID GOVERNMENT SECOND GUESSING**



- Costs are often disallowed because auditor or CO would have acted differently
- Government may not substitute its judgment for that of the contractor
- Costs are allowable unless a clear abuse of discretion



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**TRICKS OF THE TRADE –
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GENERAL STRATEGIES**

5. REJECT IMPRACTICAL PROOF REQUIREMENTS

Traditional Government Contracts

- **Not Required to Have Documentation for Cost-Reimbursement Contract**
- Liberal Approach to Proof of Costs
- **Higher Burden of Proof for:**
 - Settlement Expense
 - Costs Incurred After Termination

FAR PT 12 CI Contracts

- Cost Principles and CAS Inapplicable
- Proof from Regular Accounting System
- No Govt Audit Rights
- **Higher Burden of Proof for:**
 - Settlement Expense
 - Costs Incurred After Termination



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**TRICKS OF THE TRADE –
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GENERAL STRATEGIES**

6. CLAIM ALL ALLOWABLE COSTS

Traditional Government Contracts

- **T/C converts fixed price contract to cost contract**
- **Contractor entitled to costs up to contract price**
 - Contract price = award price + undefinitized equitable adjustments
- **No need to show entitlement to equitable adjustments to recover up to contract price**

FAR PT 12 CI Contracts

- **T/C does not convert to cost contract**
- **Contract price does not limit prong 2 recovery**



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**TRICKS OF THE TRADE –
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GENERAL STRATEGIES
7. AVOID LOSS ADJUSTMENTS**

TRADITIONAL GOVERNMENT CONTRACTS

- **Make government meet burden of proof**
 - Must prove loss contract and the amount of loss
 - % of completion analysis is insufficient
 - Contractor is not required to provide EAC or ETC
 - DCAA Audit Manual ¶ 12-307a(3)
- **Submit REAs to raise contract price**



FAR PT 12 COMMERCIAL ITEM CONTRACTS

- **Submit REAs to raise contract price**



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**TRICKS OF THE TRADE –
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GENERAL STRATEGIES
8. DON'T LET GOVT LIMIT PROFIT TO THAT BID**



- **Profit bid a factor of competitive forces**
- **FAR 15.404-4(b) Favors Structured Approach**
 - **Early work often entitled to higher profit** because:
 - More difficult
 - Greater risk
- **Estimate at completion (“EAC”)** can be used to show what profit would have been if contract was completed



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**TRICKS OF THE TRADE –
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GENERAL STRATEGIES**

9. REQUEST PARTIAL PAYMENT

TRADITIONAL GOVERNMENT CONTRACTS

- **With interim or final settlement proposal**
- **Consider asking TCO to submit on a total cost basis even if settlement proposal submitted on inventory basis**
- **Amounts**
 - 100% for items completed or to be completed
 - 100% for subcontractor settlements and partial payments
 - 90% of other allowable costs



FAR PT 12 COMMERCIAL ITEM CONTRACTS

- **No partial payment provision in FAR PT 12**
- **Request under FAR 12.210 “Contract financing”**



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**TRICKS OF THE TRADE –
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GENERAL STRATEGIES**

10. SCHEDULE ALL INVENTORY

Traditional Government Contracts **FAR PT 12 CI Contracts**

- | | |
|---|--|
| <ul style="list-style-type: none"> • Plant Clearance Officer (“PCO”) is authorized representative of contracting officer • If contracting officer or PCO accepts inventory the Government bought it | <ul style="list-style-type: none"> • No requirement to turn over inventory • CO may request as condition of paying inventory costs • If contracting officer or PCO accepts inventory the Government likely bought it |
|---|--|



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**TRICKS OF THE TRADE –
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GENERAL STRATEGIES**

11. SUBMIT A TIMELY PROPOSAL

TRADITIONAL GOVERNMENT CONTRACTS

- **Time limits**
 - Prime Contracts
 - 1 year from effective date of termination
 - Partial T/C – 90 days to submit equitable adjustment on nonterminated work
 - Subcontracts
 - See subcontract
- **Missed deadline = no judicial review**



FAR PT 12 COMMERCIAL ITEM CONTRACTS

- **No time limit in regulations or CI clause**
- **Could be time barred by**
 - Laches
 - 6 year statute of limitations on submitting claims to CO



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**TRICKS OF THE TRADE –
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GENERAL STRATEGIES**

12. OBTAIN PROFESSIONAL HELP



- Arcane legal and accounting issues
- Expertise necessary to maximize recovery
- Professional fees recoverable as settlement expense



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**TRICKS OF THE TRADE –
MAXIMIZING CONTRACTOR RECOVERY-
SPECIFIC COSTS**

1. NONCONFORMING WORK

Traditional Government Contracts FAR PT 12 CI Contracts

- **Claim cost of defective or nonconforming work**
- **T/C converts fixed-price contract to cost contract**
 - Includes cost for defective or nonconforming work
- **Limitation**
 - Willful misconduct or gross negligence
- **FAR provisions on damaged inventory are inapplicable**
 - FAR 49.204 AND 52.249-2, ¶ (G)
- **Not compensable under prong 1**
- **Claim under prong 2 as a reasonable charge resulting from termination**
- **T/C does not convert to cost contract**



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**TRICKS OF THE TRADE –
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SPECIFIC COSTS**

2. CONTRACTOR CAUSE DELAYS

- ***Worsham Construction Co., ASBCA 25907, 85-2 BCA ¶ 18016***
 - “Even assuming . . . delayed performance was caused in part by [the contractor], under the [termination for convenience clause] clause the contractor is entitled to recover all allowable costs.”
- ***Nicon, Inc., 331 F.3d 878 (Fed. Cir. 2003)***
 - “If the contractor itself played a role in the delay or if the delay was . . . Beyond the government’s control, then there is no entitlement to damages for unabsorbed overhead . . .”



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**TRICKS OF THE TRADE –
MAXIMIZING CONTRACTOR RECOVERY-
SPECIFIC COSTS
3. PRECONTRACT COSTS**

Traditional Government Contracts **FAR PT 12 CI Contracts**

- **Rules**
 - **Precontract costs FAR 31.205-32**
 - Allowable “when such incurrence is necessary to comply with proposed delivery schedule”
 - **Fair compensation rule – FAR 49.201(a)**
 - Depends on extent of performance prior to T/C
- **Use “Fair Compensation” Principle to Recover Precontract Costs**
- **Cost principles inapplicable**
- **Claim under prong 2 as a reasonable charge resulting from termination**
- **Invoke “fair compensation” principle if necessary**



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**TRICKS OF THE TRADE –
MAXIMIZING CONTRACTOR RECOVERY-
SPECIFIC COSTS**

4. IDLE FACILITIES AND IDLE CAPACITY

Traditional Government Contracts **FAR PT 12 CI Contracts**

- **Pertinent Provisions**
 - FAR 31.205-17 “Idle Facilities and Idle Capacity and FAR 31.205-42(b) “Costs Continuing After Termination”
 - “maintenance, repair, housing, rent, and other related costs, e.g. property taxes, insurance and depreciation”
- **Bogus DCAA Defenses**
 - Period claimed > one year
 - Facilities not completely idle
 - Sales have increased
 - The facilities are not special tooling
- **Cost principles inapplicable**
- **Claim under prong 2 as a reasonable charge resulting from termination**



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**TRICKS OF THE TRADE –
MAXIMIZING CONTRACTOR RECOVERY-
SPECIFIC COSTS
6. COMMON ITEMS**

Traditional Government Contracts **FAR PT 12 CI Contracts**

- **FAR 31.205(a)**
- **How to rebut disallowances**
 - Demonstrate items cannot be retained at cost without a loss
- **Cost principles inapplicable**
- **Not reasonable to charge for items that can be retained at cost without a loss**
- **Demonstrate items cannot be retained at cost without a loss**



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**TRICKS OF THE TRADE –
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SPECIFIC COSTS
7. FIRST ARTICLE COSTS**

- **FAR 52.209-3 "First Article Approval" clause**
 - Contractor cannot recover costs for production units it T/C prior to first article exception
- **Judicially crafted exceptions**
 - Minimum order quantities
 - Waiver
 - First Article subsequently approved
 - Costs also necessary for production articles
 - Long lead time materials necessary to meet delivery schedule - MAYBE
 - *Switlik Parachute*, ASBCA 18,024, 75-2 BCA ¶ 11434 -EXCEPTION
 - "... a contractor is not bound by this risk provision when it would be impossible to wait until first article approval before ordering production materials, and still to meet the delivery schedule."
 - *Rex Systems*, ASBCA 59,624, 16-1 BCA ¶ 36350 – NO EXCEPTION
 - "Although this long lead time concern could explain why Rex *initially* expected to make an early diode order . . . it does not provide us a basis for ignoring the plain terms of the contract when determining what compensation is owed to Rex for the termination."
- **Recovery limited to "total contract price" – not first article price**



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**TRICKS OF THE TRADE –
MAXIMIZING CONTRACTOR RECOVERY-
SPECIFIC COSTS**

8. G&A ON SUBCONTRACTOR SETTLEMENTS

**Traditional Government FAR PT 12 CI Contracts
Contracts**

- Contractors entitled to G&A on subcontractor settlements
- ***Don't be misled by the forms***
- Cost principles inapplicable
- Claim under prong 2 as a reasonable charge resulting from termination



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**TRICKS OF THE TRADE –
MAXIMIZING CONTRACTOR RECOVERY-
SPECIFIC COSTS**

8. G&A ON SUBCONTRACTOR SETTLEMENTS (cont.)

| SECTION II - PROPOSED SETTLEMENT | | | | | |
|----------------------------------|---|---|---|-------------------------------------|---|
| NUMBER | ITEM (a) | <small>(Use Columns (b) and (c) only where previous proposal has been used)</small> | | TOTAL PROPOSED TO DATE (d) | FOR USE OF CONTRACTING AGENCY ONLY (e) |
| | | <small>TOTAL PREVIOUSLY PROPOSED</small> (b) | <small>INCREASE OR DECREASE BY THIS PROPOSAL</small> (c) | | |
| 1 | METALS | | | | |
| 2 | RAW MATERIALS <i>(other than metals)</i> | | | | |
| 3 | PURCHASED PARTS | | | | |
| 4 | FINISHED COMPONENTS | | | | |
| 5 | MISCELLANEOUS INVENTORY | | | | |
| 6 | WORK-IN-PROCESS | | | | |
| 7 | SPECIAL TOOLING AND SPECIAL TEST EQUIPMENT | | | | |
| 8 | OTHER COSTS <i>(from Schedule B)</i> | | | | |
| 9 | GENERAL AND ADMINISTRATIVE EXPENSES <i>(from Schedule C)</i> | | | | |
| 10 | TOTAL <i>(items 1 to 9 inclusive)</i> | | | | |
| 11 | PROFIT <i>(explain in Schedule D)</i> | | | | |
| 12 | SETTLEMENT EXPENSES <i>(from Schedule E)</i> | | | | |
| 13 | TOTAL <i>(items 10 to 12 inclusive)</i> | | | | |
| 14 | SETTLEMENTS WITH SUBCONTRACTORS <i>(from Schedule F)</i> | | | | |
| 15 | ACCEPTABLE FINISHED PRODUCT | | | | |
| 16 | GROSS PROPOSED SETTLEMENT <i>(items 13 thru 15)</i> | | | | |
| 17 | DISPOSAL AND OTHER CREDITS <i>(from Schedule G)</i> | | | | |
| 18 | NET PROPOSED SETTLEMENT <i>(item 16 less 17)</i> | | | | |
| 19 | ADVANCE, PROGRESS & PARTIAL PAYMENTS <i>(from Schedule H)</i> | | | | |
| 20 | NET PAYMENT REQUESTED <i>(item 18 less 19)</i> | | | | |

(When the space provided for any information is insufficient, continue on a separate sheet.)

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**TRICKS OF THE TRADE –
MAXIMIZING CONTRACTOR RECOVERY-
SPECIFIC COSTS**

9. SETTLEMENT EXPENSE

**Traditional Government FAR PT 12 CI Contracts
Contracts**

- **Keep time sheets**
- **Indirect costs on settlement expense**
 - Full burden on outside fees and in-house personnel normally charged direct
 - Reduced burden on in-house personnel normally charged indirect
- **Keep time sheets**
- **Claim with G&A under prong 2 as a reasonable charge resulting from termination**



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**TRICKS OF THE TRADE –
MAXIMIZING CONTRACTOR RECOVERY-
SPECIFIC COSTS**

10. INTEREST

- **Reflectone> Ellet> Rex**
- **Include REAs in settlement proposal**
- Certify and request final decision if Government delays or disputes costs
- Consider filing suit or threatening suit to obtain interest as part of a settlement
- Settlement expense and interest not always an either/or proposition



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**TRICKS OF THE TRADE –
MAXIMIZING CONTRACTOR RECOVERY-
SPECIFIC CONTRACT TYPES – IDIQ CONTRACTS
1. “LET SLEEPING DOGS LIE”**



- Government required to purchase the guaranteed minimum
- Failure to order a breach
 - Entitles contractor to anticipatory profits or in some cases the price of the items not purchased
- Contractor’s recovery limited by T/C clause if T/C during contract period
- Therefore, “let sleeping dogs lie”



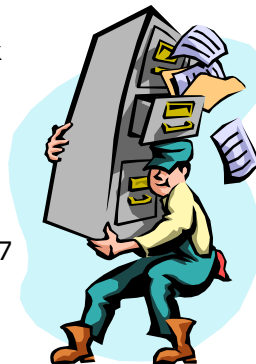
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**TRICKS OF THE TRADE –
MAXIMIZING CONTRACTOR RECOVERY-
SPECIFIC CONTRACT TYPES – IDIQ CONTRACTS
2. SUBMIT REA FOR PARTIAL T/C IF MINIMUM NOT MET**

- **T/C clause**
 - Entitles contractor to equitable adjustment increasing price of nonterminated portion of work
- **Equitable adjustment**
 - Computed by increasing price of nonterminated work by costs that would have been recovered in the prices of the terminated work.
- **What if Minimum Quantity Satisfied?**
 - *Deval Corp.*, ASBCA No. 47132, 95-1 BCA ¶ 27,537
 - Partially terminated contractor entitled to equitable adjustment on nonterminated portion even if minimum quantity purchased if costs of nonterminated work increased



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**TRICKS OF THE TRADE –
MAXIMIZING CONTRACTOR RECOVERY-
SPECIFIC CONTRACT TYPES – SERVICE CONTRACTS
BE SURE YOU HAVE THE RIGHT CLAUSE**

- **FAR 52.249-4 Short Form Service Contracts T/C clause**
 - Limits recovery to price of services rendered
 - To be used only when CO reasonably determines no substantial preparation costs
- **If short form improperly used it may be judicially replaced by standard clause.**
 - *DWS, Inc.*, ASBCA 29742, 90-2 BCA ¶ 22,696



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**TRICKS OF THE TRADE –
MAXIMIZING CONTRACTOR RECOVERY-
SPECIFIC CONTRACT TYPES –
COST TYPE CONTRACTS**



- **Pertinent rules**
 - Recovery is limited by the LOF clause
 - Limitation is waived where contractor is required to turn over *severable* termination inventory resulting from overrun
 - T/C may reopen prior cost agreements
- **Fairness doctrine**
 - Not in regulations but judicially applied
 - *Jacobs Eng'g Group, Inc. v. U.S.*, 434 F.3d 1378 (Fed. Cir. 2006)
- **Strategy**
 - Include all severable work in termination inventory
 - If Government accepts severable work, they bought it
 - Reopen prior cost agreements after T/C
 - Use same strategies as fixed price contract



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TRICKS OF THE TRADE – MAXIMIZING CONTRACTOR RECOVERY- FURTHER READING

- For a discussion of strategies for maximizing recovery see P. Seidman and D. Seidman, “Maximizing Termination for Convenience Settlements/Edition II – Part I, *Briefing Papers* 08-03 (Feb. 2008) and 08-05 (Apr. 2008)
 - PT I covers **General Strategies**
 - PT 2 covers **Specific Costs and Contract Types**
- For a discussion of evolving case law concerning commercial item terminations see -
 - P. Seidman, “Termination for Convenience of Commercial Item Contracts – Is Fair Compensation Required?”, 24 N&CR ¶ 37 (Aug. 2010)
 - R. Nash and P. Seidman, “Postscript: Termination for Convenience of Commercial Item Contracts”, 25 N&CR ¶ 37 (Aug. 2010)
 - P. Seidman, “Postscript II: Termination for Convenience of Commercial Item Contracts”, 29 N&CR ¶ 21 (Apr. 2015)
- Available at www.seidmanlaw.com

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