

## Border Wall Terminations for Convenience

***Don't Take the Risk!** Excell's Administrative Costs Associated with Preparation of the Border Wall Contract Termination Settlement Proposals are 100% Recoverable! (i.e., bottom line settlement negotiation situations)*

### INTRODUCTION

On January 20, 2021, President Joe Biden signed an Executive Order terminating the construction of a border wall along the southern border of the United States, with the intent to redirect the associated funds to other Government programs.

With this Executive Order, numerous Federal contracts are being Terminated for the Convenience of the Government under FAR 52.249, the Termination for Convenience provision. For this reason, Excell finds it imperative to **refresh contractor's minds** as to what the Termination for Convenience process looks like, the aspects of cost that contractors can expect to submit and negotiate throughout the process, and the **critical importance** of having a Termination for Convenience ("T4C") be **guided by professionals** who *know the Government contracting world inside and out*.

***Failure to do so all but guarantees that your money will be left on the table!***

Before discussing T4C fundamentals, it is important to note that most federal agencies, acting as owners of these projects, are cooperating with contractors at the initial stages of the T4C process. However, this will likely change. Therefore, every contractor (**prime OR sub; supplier OR service provider**) needs to carefully consider the following:

- Many of the Border Wall contracts are being *partially* Terminated for Convenience, which brings added complexity and nuance to correctly identifying **ALL** recoverable costs. (*Contractors need to clearly pre-specify the monetary lines and boundaries within which recovery is available.*) Example: Bid & Proposal Costs ARE recoverable despite what the Government may tell you! Additionally, staff costs, restocking charges, "Loss of Value" on fixed products, and numerous other items including consultant and attorney fees are 100% recoverable, under a T4C scenario (*see below*). **Bet you didn't know that!**
- For small business contractors, USACE has allowed submittal of an "interim settlement proposal" prior to submittal of a final proposal. The same holds true for **subcontractors** and **suppliers**. The intent of this is to maintain cash flow for small businesses. **Bet you didn't know that!**
- Agencies typically establish a deadline for terminated contractors to report all **materials** remaining on the project site, how they propose to handle those materials, and a list of action items needed from the contractor's side to "close out" the project. **Bet you didn't know that!**

### WHAT IS A TERMINATION FOR CONVENIENCE?

For many contractors impacted by this Executive Order, it may very well be the first Termination for Convenience they and their organizations have ever or will ever experience. If that is the case, it is even more important that the contractor understand that a Termination for Convenience is, why they are used in situations like these, and how they differ from other means by which the Government can end performance on a contract.

Firstly, the Executive Order explicitly declares that all Government contracts associated with the construction of the wall will be “considered for termination or repurposing” with the most likely outcome for most contracts being the utilization of a “Termination for the Convenience of the Government” action and/or reuse of materials or components therein.

**Pro Tip #1:** You can *buy back* materials the Government has already paid for as part of your T4C settlement proposal for pennies on the dollar. **Bet you didn’t know that!**

A Termination for Convenience (T4C) is a means by which a Government agency can effectively declare that efforts associated with a particular contract are no longer needed, and can direct a contractor to cease work on the identified contract. There is no animosity or penalty intended when the Government issues a T4C, and while the contractor(s) involved won’t be able to complete their work on the contract, the T4C process is designed to ensure that the contractors are adequately paid for efforts completed to date and for any and all associated fees they incurred during the life of the project.

## WHAT COSTS CAN BE RECOVERED?

Contractors should be aware that a Termination for Convenience is not the same as a Breach of Contract. As such, recoverable costs are not the same under a Termination for Convenience (FAR 52.249-2(1-3)) as they would be in a Breach scenario.

When the Government terminates a contract for its convenience, a contractor is fully entitled to recover the following costs associated with the Termination:

- Costs incurred for work completed and accepted (or in progress) at the time of the Termination;
- Overhead, G&A, Profit, & Interest on the above costs incurred;
- Bid & Proposal costs, Architect & Engineering efforts, and negotiation efforts (*Note: Outside costs associated with B&P are all recoverable IF they can be documented and supported*);
- Other associated costs that are considered allowable, allocable, and reasonable;
- Close-out and demobilization costs; and
- **Settlement proposal costs associated with preparing a final cost proposal for submission to the Government (Ex: outside Attorney and Legal fees, to include CPAs & other professional services).** Once again Excell reiterates: **Bet you didn’t know that!**

**These items may seem straightforward**, but accurately identifying every possible cost, gathering the data to support said costs, and presenting same to the Government as part of a Termination for Convenience Settlement Proposal is a task best left to those with plenty of experience in the Government contracting realm.

**Pro Tip #2: Cost Codes** - This comment is nothing but easy money, and it is yours if you want it. Effective immediately, all contractors involved in a T4C scenario should establish a separate cost code for handling the T4C process, as well as a structured system to plug every dollar (administrative or physical) into the cost tracking system. This is a fool-proof way to prove up and support your T4C matter. Note to Reader: You will very rarely (if ever) be able to get anticipatory profits regarding work yet to be performed. However, this cost code is nothing but cash in your bank. It becomes evidence of intent to track, manage, and assert, both ethically and legally, your rights to a full recovery within the T4C process. **Bet you didn’t know that!**

## CONSULTING FEES AND ADMINISTRATIVE COSTS FOR PREPARING T4C SETTLEMENT PROPOSALS (EXCELL'S FEES) ARE 100% RECOVERABLE!

One of the best aspects of the current situation with border wall contracts (and any Termination for Convenience situation, for that matter) is that consulting fees and administrative costs incurred when a contractor hires experts to assist in preparing their Settlement Proposals are completely recoverable, dollar for dollar!

Case law supports the recoverability of such costs. **The *Bill Strong* decision<sup>1</sup> (1995) first established the recoverability and allowability of consulting costs**, and Excell's then-Vice President, Judi Mattox, litigated the case on behalf of **Excell's client**, Bill Strong Enterprises, Inc. *Bill Strong* was the seminal case establishing recoverability of consulting costs under FAR 31.205-33. This case has since been applied consistently by the Federal Courts and remains good law today<sup>2</sup>.

The *Bill Strong* case specifically discusses three distinct categories of legal, accounting and consulting costs:

- (1) costs incurred in connection with the **work performance** of a contract;
- (2) costs incurred in connection with the **administration** of a contract; and
- (3) costs incurred in connection with the prosecution of a CDA claim. 49 F.3d at 1549.

The opinion further explained that:

“[in] classifying a particular cost as either a contract administration cost or cost incidental to the prosecution of a claim, contracting officers, the Board, and courts should examine the objective reason why the contractor incurred the costs. If a contractor incurred the cost **for the genuine purpose of materially furthering the negotiation process**, such cost should normally be a contract administration **allowable expense** under FAR 31.205-33, **even if** negotiation eventually fails and a CDA claim is later submitted. On the other hand, if a contractor's underlying purpose for incurring a cost is to permit the prosecution of a CDA claim against the Government, then such cost is unallowable under FAR 31.205-33.” *[emphasis added]*

## CONCLUSION

The monetized value of an experienced consultant in a situation such as this cannot be over-emphasized. It is often the seemingly minor details that are overlooked in preparing a settlement proposal, but these items can and do end up representing **REAL MONEY** to the bottom line of all contractors and subcontractors alike.

Far too often Excell sees contractors literally leaving money lying on the table when negotiating their settlement proposals, but with the backing of the *Bill Strong* decision and the complete recoverability of consulting costs, there is **absolutely no reason for that to happen**.

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<sup>1</sup> In *Bill Strong Enterprises, Inc. v. Shannon*, 49 F.3d 1541 (Fed. Cir. 1995), the Federal Circuit Court of Appeals first upheld the allowability of consulting costs and attorney fees.

<sup>2</sup> See *Tip Top Construction, Inc. v. Patrick R. Donahoe*, 2012 U.S. App. LEXIS 19683 (Federal Circuit, September 19, 2012)

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**CRITICAL NOTE TO READER:** Termination for Convenience settlement proposals have a **STRICT** submission deadline of **ONE YEAR** from the Termination notification, so time is absolutely of the essence and **contractors have very little time to waste.**

If you have a Termination for Convenience situation on your hands, give Excell a call today to discuss your situation. Consultation calls with Excell are always FREE, and Excell **can** and **will** help to **maximize your recovery!** Flights have never been cheaper and Excell is standing by to assist, no matter the location. **CALL TODAY! (719) 599-8336!**

***EXCELL CONSULTING:  
“HERE TODAY FOR YOUR TOMORROW.”***

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