

Partial and Full Terminations for Convenience: What are you forgetting?

Terminations for Convenience (T4Cs) on Government contracts are becoming more and more common in today's contracting arena. When they do occur, many contractors don't have much in the way of experience in handling them and the intricacies associated with what costs are recoverable and what costs are not. Thus, many Terminations for Convenience end with the contractor not recovering nearly as much as they are entitled to.

That's where an expert firm like Excell comes in; with the knowledge and experience to ensure that your company captures every last dime it is entitled to in a T4C situation. And by the way, federal law provides for the FULL recovery of consulting and administrative fees for the preparation of T4C settlements! For that reason alone, it would be crazy to approach a T4C settlement without the expert guidance of Excell!

INTRODUCTION

All Government contracts are subject to the Termination for Convenience Clause ([FAR 49.502](#)). This clause allows the Government to terminate a contract whenever "...it is in the Government's interest." ([FAR 52.249-1](#)).

All this means is that the Government has an "exit strategy" that it can use in the event that it needs to discontinue a contract. The discontinuation can be for just about any reason; technological developments that make continued work on the contract outmoded, lack of funding due to budgetary restrictions or, in some instances, because the work is simply no longer needed (i.e., work during war-time that is no longer necessary). The Government can even terminate a contract for literally no reason at all! Ultimately, this clause exists purely as a means to **avoid liability for a Breach of Contract action** against the Government.

On a related note, contractors should be aware that the government may terminate a contract for Convenience even if the Termination for Convenience clause isn't actually included in the contract. This is according to the "[Christian Doctrine](#)," which states that:

"...where governing regulations require inclusion of various clauses into government contracts, ...several decisions have read into contracts missing but mandatory procurement provisions, treating mandatory contract clauses as part of the contract even if not expressly stated in the contract itself."

Thankfully, Termination for Convenience scenarios aren't nearly as one-sided as they may seem. Having a contract cancelled in the middle of its performance can certainly be a pain, but contractors have numerous rights and opportunities for recovery that need to be utilized to maximize the amount of recovery possible.

First and foremost, when the Government terminates a contract for Convenience, contractors are entitled to an equitable adjustment, with the entire and express purpose of this adjustment being to "place the contractor as nearly as possible in the position in which it would have been absent the changes."

Barring a highly unique situation, this means that if a contractor leaves a T4C situation in a loss position, **they are not utilizing all of their rights to recovery correctly.**

T4Cs ARE RARE. WHY SHOULD I PREPARE FOR ONE?

While it's true that Terminations for Convenience are fairly rare occurrences, their usage has begun to rise in recent years. In fact, Excell is predicting that Government contractors will continue to see a rise in the number of Terminations for Convenience, in part due to a shifting of priorities both within the Department of Defense and civilian agencies. With the Biden administration's recent announcement that the United States will be fully withdrawing from Afghanistan later this year, an action that includes contractors. Additionally, construction has also been cancelled on the border wall, meaning nearly all contracts associated with that project will be terminated for convenience as well. These are two high profile examples, but it's likely you will see pockets of terminations across Government agencies as priorities shift and they move on to new things.

TERMINATION FOR CONVENIENCE SETTLEMENT PROPOSALS (TSPs)

When the Government terminates a contract for its convenience (either full or partial termination), the contractor immediately becomes eligible to submit what is called a “**Termination Settlement Proposal**” (TSP). Contractors have **one year** from the date of termination to assemble this proposal, and it is meant to capture any and all costs needed to restore the contractor to the financial situation it would have been in had the contract never occurred.

WHAT IS RECOVERABLE AS PART OF A TSP?

When the government terminates a contract for its convenience, a contractor is **ENTITLED** to recover the following costs associated with the Termination:

- Costs incurred for work **completed** and **accepted** at the time of the Termination;
- Costs that are considered **allowable, allocable, and reasonable**;
- **Profit** on the above costs incurred;
- **Close-out costs**;
- **Demobilization costs**; and
- **Settlement proposal costs** associated with preparing a final cost proposal for submission to the government.

For Fixed-Price Contracts specifically, the clause at FAR 52.249-2, “Termination for Convenience of the Government (Fixed-Price),” is almost always incorporated into the contract as well. This clause allows for recovery of:

- “The contract price for completed supplies or services accepted by the government...[and] not previously paid for”;
- “The costs incurred in the performance of the work terminated, including initial costs and preparatory expense allocable thereto, but excluding any costs attributable to supplies or services paid or to be paid....”;
- “The cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the contract....”; and
- “A sum, as profit on [the terminated work], determined by the contracting officer under [FAR 49.202], in effect on the date of this contract, to be fair and reasonable; however, if it appears that the contractor would have sustained a loss on the entire contract had it been completed, the contracting officer shall allow no profit...and shall reduce the settlement to reflect the indicated rate of loss.”

For partial terminations, FAR 52.249-2 provides that “the contractor may file a proposal with the contracting officer for an equitable adjustment of the price(s) of the continued portion of the contract.”

WHAT DO CONTRACTORS TYPICALLY FORGET ABOUT?

There are numerous aspects of a termination for convenience settlement that, in our experience, contractors seem to frequently forget about. These items represent real and sometimes significant costs to the contractor, but can often be overlooked or forgotten about when preparing a settlement proposal. The following is a list of items that Excell has successfully recovered for its clients in the past under Termination for Convenience scenarios:

- **Bid & Proposal Costs**
 - **NOTE:** *Most people (including Government personnel) don't believe that Bid & Proposal costs can be recovered as part of a T4C, and may even go so far as to explicitly tell you they are not allowed, but this is **NOT CORRECT**. Excell has long understood that a specific and clear FAR provision allows for the recovery of Bid & Proposal Costs, to include costs expended before the bid was even entered (i.e., estimating costs). These are perfectly reasonable aspects of a Termination for Convenience Settlement Proposal and Excell has succeeded in recovering them for clients in the past!*

- **Profit**

- Contractors under a Termination for Convenience are absolutely entitled to receive a reasonable profit on whatever work was completed prior to the termination! It's amazing the number of contractors who are unaware of this and assume that a T4C means they won't make any profit on the job at all, but that simply isn't true. T4Cs don't have to be nearly as harmful financially as may be commonly believed!
- **IMPORTANT:** Most contractors think that whatever profit rate was bid at the start of the job is what they are stuck with in the TSP. **THIS IS NOT TRUE.** The maximum profit rate allowed is 15% for a Firm Fixed-Price contract and 10% for a cost-plus type contract. Anything up to these established rates can be fair game in a TSP, and factors for determining a reasonable profit rate on the completed work should be considered! *See section on Risk Adjustments below.*

- **Equipment and Materials Costs Specific to the Contract**

- Many contractors understand that costs for equipment or materials purchased for a specific contract (that cannot be reused on other contracts) are recoverable, but many forget about the costs associated with these items. Things like:
 - Equipment Maintenance costs;
 - Storage costs;
 - delivery fees;
 - handling fees; and
 - Ongoing costs such as lease costs (or lease termination fees) on storage facilities or office spaces.

Even if the items or equipment in question can be sold and are not recoverable, the costs required to **actually complete those sales** ARE recoverable and are very frequently left on the table by contractors in their TSPs.

- **Risk Adjustments on Work Completed**

- If a terminated contract calls for the completion of a complex project, and a certain stage of that project is inherently riskier to your company than another, an adjustment can be made for that factor in your TSP. For example, if your task is to build a bridge and then paint it, but the painting portion of the project is terminated, you may well be entitled to make an adjustment in your TSP as the construction work was inherently much riskier to your company than the comparatively simple painting work.

- **Personnel Reassignment and Down Time Costs**

- Some of the personnel specific to the terminated project likely aren't going to be able to be reassigned to other projects right away, and their down time and reassignment costs are recoverable. Even if personnel aren't performing the tasks they were initially hired to do due to the stoppage of work, you are perfectly within your rights to keep certain staff members on payroll to assist with the formation of the TSP, and then pass those costs on to the Government as part of the TSP. Ultimately, the requirement for whether costs associated with personnel boil down to a "reasonableness" argument, so Excell urges contractors to keep a meticulously record of the time and efforts of such staff, especially if the contractor intends to include these costs in their TSP.

- **Severance Costs**

- In the unfortunate situation where a terminated contract results in you needing to lay off workers (especially those working under an employment agreement), severance costs due to those workers can add up quickly. However, these costs can, in some circumstances, be included in a TSP, especially in today's economy where immediately finding alternative employment may be more difficult than normal.

- **Warranty**

- One final aspect that many contractors forget about in TSPs is their warranty. Excell has seen situations where the Government has attempted to hold a contractor responsible for supporting the warranty on an aspect of a project that was Terminated for Convenience, and thus never even completed by the contractor. For this reason, Excell urges contractors to ensure there is an entry in their TSP releasing them from liability **FROM THE DATE OF THE TERMINATION FORWARD** to uphold warranties on any work they did not actually perform under the contract (i.e, terminated work).

CONCLUSION

It is important to note that a Termination for Convenience is intended to protect the government's interests, and not necessarily a contractor's interests. Contractors should become educated and informed about the different contract termination costs available so that the proper procedures are followed to ensure a reasonable and fair resolution upon a Termination for Convenience proposal.

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!**

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“HERE TODAY FOR YOUR TOMORROW.”**

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