



A Contractor's Guide to Surviving 2025:

How to Handle Terminations for Convenience,
Suspensions/Stop-Work Orders, Unpaid Invoices,
Claims and More!



AGENDA

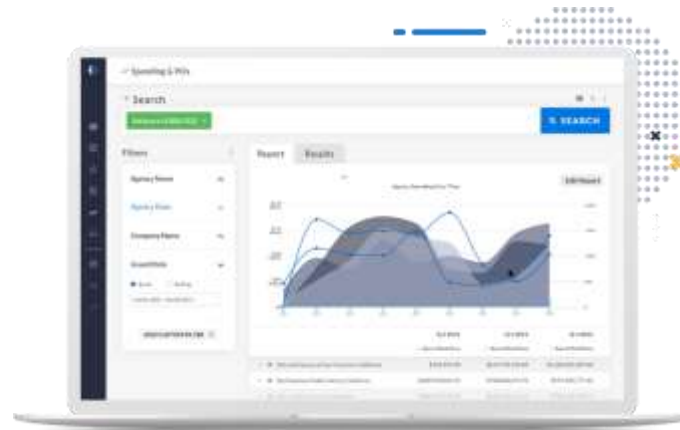
- Introduction
- Presentation
- Q&A

Note: Presentation will be sent to all attendees and will be posted on GovSpend's website



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Meet the Presenter

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Unpaid Invoices

*aka Non-Payment of Amounts Due and Owing
Under “Proper Invoices”*

Unpaid Invoices

- Federal Employee Layoffs → Agencies Understaffed → Delays
- Funding impacts
- Widespread and significant uncertainty; increased scrutiny

February 26, 2025 Executive Order “IMPLEMENTING THE PRESIDENT’S “DEPARTMENT OF GOVERNMENT EFFICIENCY” COST EFFICIENCY INITIATIVE”

- “All Covered Contracts and Grants”
- Among other things...“Centralized Technological System” to record payment with brief written justification for same (with mechanism to pause any payment without justification)

Unpaid Invoices

- Check your contract and review clauses relating to payment. Confirm invoicing requirements and make sure your invoices meet all applicable requirements (See FAR Part 32 as well as Prompt Payment Act and implementing regulations).
- Reach out to the CO to see what is going on. Get more information, a sense of timing?
- CDA Claim → COFD . . . Claims Litigation
 - CDA and Prompt Payment Interest

Terminations for Convenience

T4C

- What Even Is It?
 - When Does it Happen? (How often?)
 - Myth Busting?
-
- Why is it happening so much now?

T4Cs - FAR Clauses

- Part 49 - Termination of Contracts
- Different Varieties of Termination for Convenience
 - FAR 52.249-1 Termination for Convenience of the Government (Fixed-Price) (Short Form).
 - FAR 52.249-2 Termination for Convenience of the Government (Fixed-Price).
 - FAR 52.249-3 Termination for Convenience of the Government (Dismantling, Demolition, or Removal of Improvements).
 - FAR 52.249-4 Termination for Convenience of the Government (Services) (Short Form).
 - FAR 52.249-5 Termination for Convenience of the Government (Educational and Other Nonprofit Institutions).
 - FAR 52.249-6 Termination (Cost-Reimbursement).
 - FAR 52.249-7 Termination (Fixed-Price Architect-Engineer)
 - FAR 52.212-4(I) Contract Terms and Conditions—Commercial Products & Services
- The *Christian* Doctrine

T4C Notice

Termination Notice **Must** Include (FAR 49.102):

- That the contract is being terminated for the convenience of the Government under the contract clause authorizing the termination;
- The effective date of termination;
- The extent of termination (full or partial);
- Any special instructions; and
- The steps the contractor should take to minimize the impact on personnel if the termination, together with all other outstanding terminations, will result in a significant reduction in the contractor's work force (see paragraph (g) of the notice in 49.601-2). If the termination notice is by telegram, include these "steps" in the confirming letter or modification.

Notice Can Also Include:

- More detail on Termination Inventory
- More info on notifying subs (dates, etc.)
- When work should be stopped (if not immediately)
- Settlement Forms

Can be Amended/Rescinded:

- Correct nonsubstantive mistakes in the notice;
- Add supplemental data or instructions; or
- Rescind the notice if it is determined that items terminated had been completed or shipped before the contractor's receipt of the notice.

A Couple of Threshold Considerations

- **A Justified Termination?**

- Agency's discretion is very broad, but it is not entirely unfettered.
- While courts have generally deferred to agencies' judgment in these matters, there are certain limited situations where courts have found that an agency's termination of a contract for convenience was improper. For the most part, these involve cases where the government was found to have acted arbitrarily or capriciously or in bad faith, or had terminated a contractor in an effort to extricate itself from a bad deal or in an attempt to cover up/fix a procurement mistake made by the agency.

- **Is Reinstatement Possible?**

- FAR 49.102(d) provides that the contracting office (with the consent of the contractor) may reinstate a terminated portion of a contract in whole or part if it has been determined that: (1) circumstances clearly indicate a requirement for the terminated items; and (2) reinstatement is advantageous to the Government. There is very little case law on this section (d), though what is out there confirms that the agency is given enormous amounts of discretion as to when utilization of this mechanism is appropriate.

- Comparatively rare but will we see these types of challenges increase in frequency?

No-Cost Settlements?

- As set forth in FAR 49.109-4, “No-Cost settlement” is only appropriate where:
 - The contractor has not incurred costs for the terminated portion of the contract or
 - The contractor is willing to waive the costs incurred and
 - No amounts are due the Government under the contract.

FAR 49.104 - Duties of prime contractor after receipt of notice of termination

After receipt of the notice of termination, the contractor shall comply with the notice and the termination clause of the contract, except as otherwise directed by the TCO. The notice and clause applicable to convenience terminations generally require that the contractor-

- Stop work immediately on the terminated portion of the contract and stop placing subcontracts thereunder;
- Terminate all subcontracts related to the terminated portion of the prime contract;
- Immediately advise the TCO of any special circumstances precluding the stoppage of work;
- Perform the continued portion of the contract and submit promptly any request for an equitable adjustment of price for the continued portion, supported by evidence of any increase in the cost, if the termination is partial;

FAR 49.104 - Duties of prime contractor after receipt of notice of termination (cont.)

(cont.)

- Take necessary or directed action to protect and preserve property in the contractor's possession in which the Government has or may acquire an interest and, as directed by the TCO, deliver the property to the Government;
- Promptly notify the TCO in writing of any legal proceedings growing out of any subcontract or other commitment related to the terminated portion of the contract;
- Settle outstanding liabilities and proposals arising out of termination of subcontracts, obtaining any approvals or ratifications required by the TCO;
- Promptly submit the contractor's own settlement proposal, supported by appropriate schedules; and
- Dispose of termination inventory, as directed or authorized by the TCO.

FAR 49.104 - Duties of prime contractor after receipt of notice of termination - Takeaways

Key Takeaways

- Clarify Scope
- Avoidance/Mitigation of Costs
- Subcontractors
- Protect Project/Inventory
- Dispose of Inventory (Plan with TCO)

- Segregate and Track Costs – New Cost Codes, etc.
- Work Diligently to get TSP Together

FAR 49.105 - Duties of termination contracting officer after issuance of notice of termination

- Direct the action required of prime contractor
- Examine TSP and settlement proposals of sub-contractors where appropriate
- Promptly negotiate settlement and enter into settlement agreement/settle settlement proposal by determination if unable to complete settlement
- May request assistance from specially qualified personnel (including to deal with termination inventory)
- Hold a conference with the contractor to develop a definite program for effecting the settlement (when appropriate, in consultation with prime, subs should be asked to attend)

Termination Settlement Proposal and Settlement Methods

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

Termination Settlement Proposal

- The overarching principle here is that of “fair compensation.” The idea that the contractor should be made whole, and fairly compensated for the work performed and preparations made to perform.
- That said, what goes into a TSP, or how a contractor ultimately settles and for what costs, is a highly individualized analysis.

TSP – FAR 52.249-2 Termination for Convenience of the Government (Fixed-Price)

Contractor may recover:

- The contract price for completed supplies or services accepted by the Government not previously paid for, adjusted for any saving of freight and other charges;
- 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 based on the above);
- The cost of settling and paying termination settlement proposals under terminated subcontracts;
- Fair and reasonable profit on costs incurred in connection with completed supplies or services (unless determined that contractor would have sustained a loss on the contract);
- The reasonable costs of settlement of the work terminated (including (1) internal and external accounting, legal, clerical and other costs involved with preparation of the Termination Settlement Proposal, (2) costs associated with termination of settlement proposals (excluding amounts of such settlements themselves), and (3) storage, transportation and other costs associated with the preservation, protection or disposition of the termination inventory).

The cost principles and procedures of FAR part 31 shall govern all costs claimed, agreed to, or determined under this clause.

TSP – FAR 52.249-2 Termination for Convenience of the Government (Fixed-Price)

Limitations:

- Exclusive of settlement costs, recovery is capped at total contract price, reduced by (1) the amount of payments previously made and (2) the contract price of work not terminated.
 - Total contract price must account for pending REAs
- No anticipatory profits or consequential damages
- If 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.

■

TSP – FAR 52.249-6 Termination (Cost-Reimbursement)

Contractor may recover:

- All costs reimbursable under the contract, not previously paid, for the performance of this contract before the effective date of the termination, and those costs that may continue for a reasonable time with the approval of or as directed by the Contracting Officer; however, the Contractor shall discontinue those costs as rapidly as practicable;
- The cost of settling and paying termination settlement proposals under terminated subcontracts;
- The reasonable costs of settlement of the work terminated (including (1) internal and external accounting, legal, clerical and other costs involved with preparation of the Termination Settlement Proposal and supporting data, (2) costs associated with termination of settlement proposals (excluding amounts of such settlements themselves), and (3) storage, transportation and other costs associated with the preservation, protection or disposition of the termination inventory);
- A portion of the fee payable under the contract – specifically, a percentage of the fee equal to the percentage of completion of work contemplated under the contract, but excluding subcontract effort included in subcontractors' termination proposals, less previous payments for fee.

The cost principles and procedures of FAR part 31 shall govern all costs claimed, agreed to, or determined under this clause.

TSP – FAR 52.249-2 and FAR 52.249-6

In arriving at the amount due the Contractor, the TCO shall deduct:

- All unliquidated advance or other payments to the Contractor under the terminated portion of this contract;
- Any claim which the Government has against the Contractor under this contract; and
- The agreed price for, or the proceeds of sale of, materials, supplies, or other things acquired by the Contractor or sold under the provisions of this clause and not recovered by or credited to the Government.

TSP – FAR 52.249-4 Termination for Convenience of the Government (Services) (Short Form)

- A special “Short Form” clause, which is designed to be used for service contracts when “[t]he Contracting Officer determines that because of the kind of services required, the successful offeror will not incur substantial charges in preparation for and in carrying out the contract, and would, if terminated for the convenience of the Government, limit termination settlement charges to services rendered before the date of termination”
- If this clause is in your contract, recovery is limited to payment for services rendered before the effective date of the termination only

TSP – FAR 52.212-4(I) Contract Terms and Conditions—Commercial Products & Services

- Commercial product or service contracts containing FAR 52.212-4 are also different
- For contracts containing this clause, contractors are entitled to recover:
 - A percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus
 - Reasonable charges (which the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system) that have resulted from the termination

Subcontractor Settlements

- [FAR 49.108 Settlement of subcontract settlement proposals.](#)
 - 49.108-1 Subcontractor's rights.
 - 49.108-2 Prime contractor's rights and obligations.
 - 49.108-3 Settlement procedure.
 - 49.108-4 Authorization for subcontract settlements without approval or ratification.
 - 49.108-5 Recognition of judgments and arbitration awards.
 - 49.108-6 Delay in settling subcontractor settlement proposals.
 - 49.108-7 Government assistance in settling subcontracts.
 - 49.108-8 Assignment of rights under subcontracts.

TSP Timing

- Contractors must submit their final TSP to the Contracting Officer (in the form and with the certification prescribed by the Contracting Officer) “promptly, but no later than 1 year from the effective date of termination”
- Moreover, generally speaking (though cases can vary, and cases should be analyzed individually), contractors have 120 days to submit complete termination inventory schedules
- REAs/claims arising out of partial terminations should generally be asserted within 90 days from the effective date of the termination

Settlement ... or Lack Thereof

- Pursuant to FAR 49.111, each agency is required to establish procedures for the administrative review of proposed termination settlements. Negotiations then follow.
- Pursuant to the regulations, “[w]hen possible, the TCO should negotiate a fair and prompt settlement with the contractor. The TCO shall settle a settlement proposal by determination only when it cannot be settled by agreement.”
 - Clear preference for agreement/negotiation as compared to unilateral determination from Agency
 - So participate and make your voice heard!

Settlement ... or Lack Thereof

- Once a termination settlement has been negotiated and all required reviews have been obtained, the contractor and the TCO shall execute a settlement agreement on SF 30. The settlement shall cover:
 - (a) Any setoffs that the Government has against the contractor that may be applied against the terminated contract; and
 - (b) All settlement proposals of subcontractors, except proposals that are specifically excepted from the agreement and reserved for separate settlement.
- In addition, The TCO shall:
 - (1) Reserve in the settlement agreement any rights or demands of the parties that are excepted from the settlement;
 - (2) Ensure that the wording of the reservation does not create any rights for the parties beyond those in existence before execution of the settlement agreement;
 - (3) Mark each applicable settlement agreement with "This settlement agreement contains a reservation" and retain the contract file until the reservation is removed;
 - (4) Ensure that sufficient funds are retained to cover complete settlement of the reserved items; and
 - (5) At the appropriate time, prepare a separate settlement of reserved items and include it in a separate settlement agreement

Settlement ... or Lack Thereof

- If the contractor and TCO cannot agree on a termination settlement, or if a settlement proposal is not submitted within the period required by the termination clause, the TCO shall issue a determination of the amount due consistent with the termination clause, including any cost principles incorporated by reference.
- The TCO shall comply with 49.109-1 through 49.109-6 in making a settlement by determination and with 49.203 in making an adjustment for loss, if any.
- Before issuing a determination of the amount due the contractor, the TCO shall give the contractor at least 15 days notice by certified mail (return receipt requested) to submit written evidence, so as to reach the TCO on or before a stated date, substantiating the amount previously proposed.
 - The contractor then has the burden of establishing, “by proof satisfactory to the TCO,” the amount proposed.

Settlement ... or Lack Thereof

- A contractor who accepts the determination should, consistent with FAR 49.112-2(b)(1), submit a voucher or invoice showing the amount determined due, less any portion previously paid.
- But to the extent that a contractor disagrees with the determination of the TCO, it has remedies, so long as it timely submitted its Termination Settlement Proposal.
 - Specifically, pursuant to FAR 49.109-7(f), The contractor may appeal, under the Disputes clause, any settlement by determination, except when the contractor has failed to submit the settlement proposal within the time provided in the contract and failed to request an extension of time.

T4C Takeaways!

- Check emails and alerts several times a day and act immediately if you receive a notice of termination.
- Assess whether you have any argument for reinstatement.
- Double check that agency actions are proper and consistent with law. Raise the issue when agencies cite the wrong contract clauses. Push back on unjustified terminations, improper suggestions regarding “no-cost” settlement, and false deadlines that are inconsistent with the regulations.
- If you are a prime, manage your subcontractors as appropriate, and in accordance with the terms of your subcontract, as soon as you receive any notice of termination.
- If you are a subcontractor, work cooperatively with your prime to make sure you can recover costs incurred.
- Track, segregate, and document all costs associated with terminations, and keep an eye on your deadlines to recover costs.
- Be proactive! Stay informed! Seek legal assistance when you need it. You likely need it earlier than you think you do.

Stop-Work Orders and Suspensions

FAR 42.1305 - Contract clauses

Stop-Work Orders / Suspensions

- FAR 52.242-14, Suspension of Work (In solicitations and contracts when a fixed-price construction or architect-engineer contract is contemplated.)
- FAR 52.242-15 Stop-Work Order (In solicitations and contracts for supplies, services, or research and development)

FAR 52.242-15 - Stop-Work Order

- The Contracting Officer may, at any time, by written order to the Contractor, require the Contractor to stop all, or any part, of the work called for by this contract for a period of 90 days after the order is delivered to the Contractor, and for any further period to which the parties may agree. The order shall be specifically identified as a stop-work order issued under this clause.
- Upon receipt of the order, the Contractor shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage.

FAR 52.242-15 - Stop-Work Order

- Within a period of 90 days after a stop-work is delivered to the Contractor, or within any extension of that period to which the parties shall have agreed, the Contracting Officer shall either-
 - Cancel the stop-work order; or
 - Terminate the work covered by the order as provided in the Default, or the Termination for Convenience of the Government, clause of this contract.

FAR 52.242-15 - Stop-Work Order

- If canceled or 90 days (or other period of order) expires → Contractor to resume work. CO to make equitable adjustment, modify contract if:
 - Stop-Work order increases time/cost properly allocable to performance of contract; and
 - Contractor asserts right to adjustment within 30 days of end of period of work stoppage

FAR 52.242-15 - Stop-Work Order

- If T4C → CO shall allow reasonable costs resulting from the stop-work order in arriving at termination settlement.
- If T4D → CO shall allow, by equitable adjustment or otherwise, reasonable costs resulting from stop-work order

52.242-14 - Suspension of Work

- The Contracting Officer may order the Contractor, in writing, to suspend, delay, or interrupt all or any part of the work of this contract for the period of time that the Contracting Officer determines appropriate for the convenience of the Government.
- Unreasonable Period of Time? → Adjustment (UHOH *Eichleay*? excluding profit)

Best Practices / What to Do Upon Receipt of Suspension Notice or Stop-Work Order

- What Clauses are in MY Contract?
- Partial or Full Cessation? For How Long?
- Minimizing Cost and Managing Subcontractors (Lessons for Subcontracting?)
- Prepare to (Potentially) Ramp Back Up and Resume Performance
- Recovering Suspension Costs
- Timelines
- If You Are a Sub...

Contract Modifications, Changes and Claims

Contract Modifications, Changes and Claims

- A number of circumstances that could lead to modifications...
 - Key Strategies:
 - Make sure the modification is properly increasing price/adjusting duration
 - Beware waiver/release language!
- How claims might arise in the current climate...
- A note about Constructive Changes and Authority

Tariff Impacts

Questions?

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