

Claims Webinar Series:

CONTRACT TERMINATIONS

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PRESENTED BY

Pilieromazza Government Contracts Group

Jon Williams, Partner

jwilliams@pilieromazza.com

(202) 857-1000



Michelle Litteken, Associate

mlitteken@pilieromazza.com

(202) 857-1000





ABOUT PILIEROMAZZA

PilieroMazza PLLC is a full-service law firm located in Washington, D.C. We are most well known as a government contracting firm and for 25 years we have helped our clients navigate the complexities of doing business with the federal government. We also provide a full range of legal services including advice on corporate, labor and employment, SBA procurement programs, and litigation matters. Our clients value the diverse array of legal guidance they receive from us and our responsiveness as we guide their growth and secure their success.

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PM Legal Minute – our blog, written by all of PilieroMazza’s attorneys, provides trending insight to small and mid-sized businesses.

Legal Advisor Newsletter – our quarterly publication which addresses current issues that are of concern to federal government contractors and commercial businesses nationwide. The Legal Advisor articles focus on recent legal trends, court decisions, legislative and regulatory rule-making, as well as other newsworthy events.

Weekly Update – an email sent every Friday that provides an up-to-the-minute recap of legislative and regulatory issues affecting small businesses.

Webinars on YouTube – all of our past webinars can be found on the PilieroMazza YouTube channel.

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OVERVIEW

- ❖ Termination for Convenience (“T4C”)
- ❖ Termination for Default (“T4D”)
- ❖ T4C vs. T4D at a glance
- ❖ Brief overview of termination appeals
- ❖ Q & A



TERMINATION FOR CONVENIENCE



T4C BASICS

- ❖ A T4C allows the government to cancel a contract (in whole or in part) when the contracting officer (“CO”) determines a termination is in the government’s interest
- ❖ A T4C provision is required for most contracts with the federal government
- ❖ Prime contractors are encouraged to include a T4C provision in most subcontracts
- ❖ In most cases, the government will pay only for the cost of work actually done, plus a reasonable profit
 - In a no-cost termination, the government does not pay the contractor anything



T4C IN THE FAR

- ❖ **52.249-1, Fixed-Price (Short Form):**
 - “The Contracting Officer, by written notice, may terminate this contract, in whole or in part, when it is in the Government’s interest. If this contract is terminated, the rights, duties, and obligations of the parties, including compensation to the Contractor, shall be in accordance with part 49 of the Federal Acquisition Regulation in effect on the date of this contract.”
- ❖ **52.249-2, Fixed-price (Long Form)**
- ❖ **52.249-6, Cost-Reimbursement**
- ❖ **52.249-4, Services**
- ❖ **52.249-7, Architect-Engineer**
- ❖ **52.249-9, Research & Development**



THE GOVERNMENT'S ABILITY TO T4C

- ❖ “In the Government’s interest”
 - Broad discretion to COs
 - Often used when agency’s needs or the scope of work have changed
- ❖ There are limits
 - Cannot T4C to get a better price
 - Cannot T4C in bad faith, e.g. with intent to injure the contractor
 - Abuse of discretion
- ❖ A wrongful T4C is treated as a breach and the contractor can recover anticipated profits



THE T4C PROCESS

- ❖ Government first sends notice of termination
- ❖ Written termination notice should state:
 - That the contract is being terminated for the convenience of the government
 - The effective date of the termination
 - The extent of the termination
 - Any special instructions
 - The steps to take to minimize the impact on personnel



THE T4C PROCESS

- ❖ Contractor's immediate actions
 - Stop work on terminated portions of contract
 - Terminate all subcontracts
 - Alert the CO if unable to cease work

- ❖ Longer-term steps
 - Notify the government in writing of any legal proceedings related to subcontracts or other commitments
 - Settle outstanding liabilities related to the contract
 - Prepare settlement proposal
 - Settle with subcontractors
 - Keep lines of communication open with the government



THE T4C PROCESS

- ❖ **Submit a settlement proposal to the government**
 - Due no later than one year after contract termination
 - Provide as much support as possible
- ❖ **Negotiate?**
 - Be flexible
 - Reach out to allies within the agency
- ❖ **Execute a Settlement Agreement**
 - Sometimes documented as a modification



SUBCONTRACTOR CONSIDERATIONS

- ❖ For prime contractors:
 - Flow down T4C provisions in subcontracts
 - The FAR does not protect a prime if it omits a T4C provision
 - Terminate subcontracts immediately when you receive the T4C notice
 - Request settlement proposals from subcontractors



SUBCONTRACTOR CONSIDERATIONS

- ❖ For subcontractors:
 - Flow down T4C provisions to lower tier subcontractors
 - Cease work immediately upon receiving the T4C notice
 - Terminate lower tier subcontractors immediately
 - Track and document costs



SETTLEMENT PROPOSAL – FIXED PRICE

- ❖ Inventory basis
 - Preferred method
 - Itemize costs separately (e.g. labor, materials, etc.)
 - Use Standard Form 1435
- ❖ Total cost basis
 - Use when inventory basis is not practicable or will unduly delay settlement
 - CO must approve in advance
 - Use Standard Form 1436
- ❖ Actual costs incurred
- ❖ Set-off for government's costs



SETTLEMENT PROPOSAL – COST-REIMBURSEMENT

- ❖ Voucher method
 - Use Standard Form 1034 for the 6 months following termination
 - Once all costs are vouchered, a settlement proposal may be submitted
 - Use Standard Form 1437 for the proposal
- ❖ Actual costs incurred
- ❖ Award fee
- ❖ Set-off for government's costs



ALLOWABLE COSTS

❖ “Fair Compensation”

- Allowable costs incurred during contract performance
- Reasonable profit on work performed
- Reasonable settlement expenses (including attorney’s fees)
- Certain continuing/post termination costs
- Fixed-price contracts are effectively treated as cost-reimbursement contracts

❖ Cannot Recover:

- Anticipated profits
- Common items (reasonably usable on other work)
- Post-termination overhead



T4C BEST PRACTICES

- ❖ Engage counsel early
- ❖ Keep records
 - Time spent preparing the settlement proposal
 - Time negotiating with subcontractors
 - Costs incurred because of the termination
 - Costs incurred performing pre-termination
- ❖ Communicate
 - Inform subcontractors and suppliers immediately
 - Alert the government to any issues or ongoing expenses
- ❖ Mitigate damages



TERMINATION FOR DEFAULT



WHAT IS A T4D?

- ❖ Defined in the FAR as “the exercise of the Government’s contractual right to completely or partially terminate a contract because of the contractor’s actual or anticipated failure to perform its contractual obligations”
- ❖ An extreme remedy that should be used only when it is in the Government’s best interests
- ❖ A stain on your record as a contractor
- ❖ To be avoided at all costs!



WHAT CAN LEAD TO A T4D?

- ❖ Failure to perform or deliver on time
 - No notice or opportunity to cure is required
- ❖ Failure to make progress, endangering contract performance
 - Should first be given 10-day cure period, but not required for construction contracts or if there is not enough time to cure
 - May be liable for subcontractor's failure unless beyond your control and you had no alternative
- ❖ Failure to perform any other provision of the contract
 - Includes incorporated FAR clauses, such as Service Contract Act and Davis-Bacon Act requirements



WHAT CAN LEAD TO A T4D?

- ❖ Contractor's anticipatory breach
 - Can arise if you tell the government you cannot or will not perform
 - Be careful in making threats about walking off a project – could result in a T4D against you
- ❖ Other factors that can contribute to a T4D
 - Poor communication and responsiveness
 - Deteriorating relationships with key stakeholders
 - Inadequate response to a cure or show cause notice



WHAT DOES A T4D MEAN?

- ❖ Government can complete work and charge you for it
 - Excess costs of re-procurement
 - Administrative costs
 - Liquidated damages
 - Other potential damages
- ❖ Black mark on your performance record
 - T4D must be reported in CPARS/PPIRS



TIPS TO AVOID OR MITIGATE A T4D

- ❖ **Knock your response to the cure or show cause notice out of the park**
 - **Make sure you respond on time**
 - **Address all issues raised by the government**
 - **Demonstrate why T4D is not in the Government's best interest**
 - **Provide a corrective action plan, with measurable milestones and assurance of performance**
 - **Push back where necessary, explaining excusable delays or other issues outside your control impacting the project**
 - **But also accept responsibility**
 - **Focus on path forward, mutually-beneficial approach to accomplish the mission**



TIPS TO AVOID OR MITIGATE A T4D

- ❖ Government can withdraw or modify termination notice
- ❖ Government can convert T4D to T4C
 - This can be negotiated with the CO
 - Or submitted as a formal claim litigated under the Contract Disputes Act
- ❖ Therefore, offer alternatives to T4D
 - Finish out current contract period, no further options
 - Partial termination/de-scope contract, complete the rest
 - Demonstrate how you are not in default
 - Justify failure to perform as excusable or caused by circumstances beyond your control



TIPS TO AVOID OR MITIGATE A T4D

- ❖ On construction contracts, promptly notify Government of delays
 - Written notice must be provided within 10 days from the beginning of any delay unless extended by CO
- ❖ Examples of potentially excusable delays:
 - Default of a subcontractor beyond your control
 - Act of another contractor
 - Government's change in scope of contract
 - Defective specifications
 - Payment delays



TIPS TO AVOID OR MITIGATE A T4D

- ❖ **Did the Government properly notify you?**
 - Opportunity to cure
 - Notification that T4D was imminent
 - Details of acts or omissions constituting default
 - Reference to relevant contract terms purportedly violated
 - Designation of final decision and information regarding your appeal rights/deadlines



T4D ISSUES FOR SMALL BUSINESSES

- ❖ Government should follow additional steps before issuing T4D against a small business:
 - The CO must immediately provide a copy of any cure notice or show cause notice to the contracting office's small business specialist and the nearest SBA regional office
 - The CO should consult with the small business specialist before proceeding with a T4D
- ❖ Contact your OSDBU and SBA representatives for assistance
- ❖ Use small business procedures and your small business status to your advantage in negotiations



T4D ISSUES FOR SMALL BUSINESSES

- ❖ Although not typical, T4D is possible as a result of an adverse SBA protest ruling
- ❖ Potential pushback if this happens:
 - SBA rules do not require termination for cause when a protest is sustained
 - Agencies can mitigate need to terminate after SBA protest by issuing notice of proposed award before actual award
 - SBA's protest ruling does not necessarily mean firm did not have good faith basis to believe it was eligible at the time it submitted its proposal
- ❖ No-cost termination may be best solution



T4C vs. T4D

❖ Causes

- T4C: No cause required but generally a change in the government's needs
- T4D: Failure to perform or cure defect/breach of contract

❖ Costs

- T4C: Can usually recover costs incurred and reasonable profit, with set off for government's costs
- T4D: May face various costs and damages owed to government

❖ Effect on past performance

- T4C: Should not have adverse effect, but...
- T4D: Black mark in your CPARS/PPIRS



APPEALING A TERMINATION

- ❖ Watch out for waiver language before you sign a modification or other document!
- ❖ When & where to appeal
 - Appeal may be filed based on the CO's final decision, or the CO's failure to make a decision within 60 days (i.e., deemed denial)
 - Can appeal based on issuance of T4D rather than T4C
 - Choice of forum: COFC, Boards of Contract Appeal
- ❖ For more on appeals, please refer to our recent webinar: [Requests for Equitable Adjustments and Claims](#)



RECENT TERMINATION DECISIONS

- ❖ **Environmental Safety Consultants, Inc., ASBCA No. 58343 (March 2, 2015)**
 - Environmental Safety Consultants, Inc. (“ESCI”) had a contract to remove and install new fuel storage tanks.
 - The contract was T4D’ed. ESCI appealed the T4D, and it was converted to a T4C. ESCI submitted its settlement proposal to the CO, and the CO refused to negotiate a settlement or issue a final decision.
 - The ASBCA denied the appeal because ESCI failed to support its claimed costs. For example, it submitted gross payroll records to support its direct labor costs and did not provide a general corporate ledger to support its claimed G&A expenses. For claimed expenses related to vendors and subcontractors, ESCI did not provide invoices.
 - Notably, the ASBCA gave ESCI the option to amend its settlement proposal, but the company still did not include the required support.



RECENT TERMINATION DECISIONS

❖ Xerox Corp., CBCA No. 3964 (July 30, 2015)

- Xerox had a schedule contract to lease copiers and other equipment to the government. Equipment was leased using delivery orders.
- Under the contract, Xerox would receive early termination charges if an agency decided to terminate a delivery order for reasons other than the lack of (1) “a bona fide need for the equipment or functionally similar equipment;” or (2) appropriated funds sufficient to make the lease payments. The contract also had the standard FAR provision for commercial items (52.212-4).
- The Navy terminated a delivery order early and refused to pay the early termination charges. Xerox submitted a certified claim, and the CO failed to issue a decision.
- The CBCA granted Xerox’s appeal and ordered the Navy to pay the charges plus interest.



RECENT TERMINATION DECISIONS

- ❖ **CP of Bozeman, Inc., ASBCA No. 58491 (July 8, 2015)**
 - CP of Bozeman had contract to operate two concessions on an Air Force base. The contract gave the concessionaire the right to terminate the contract with one day notice. The contract also had standard T4C and T4 D provisions.
 - CP of Bozeman was not making money, closed one of the concessions, and began to remove the inventory. The CO objected and warned CP of Bozeman that it would be in default.
 - When CP of Bozeman declined to reopen, the CO issued a T4D notice that did not include an appeals rights notice.
 - CP of Bozeman submitted a claim for losses, which was denied. At the ASBCA, CP of Bozeman sought its losses and to convert the T4D to a T4C.
 - The ASBCA converted the T4D to a T4C because the contract allowed the contractor to unilaterally terminate the contract.



Any Questions?

Thank you for joining us today.

If you would like to speak with Jon or Michelle about contract terminations, please contact them at:

Jon Williams

jwilliams@pilieromazza.com

(202) 857-1000

Michelle Litteken

mlitteken@pilieromazza.com

(202) 857-1000