Government Contracts Alert

A Contractor's Guide to Successfully Navigating Non-Payment, Suspensions/Stop-Work Orders, Terminations for Convenience, Tariff-Related Impacts, and Other Issues Arising from Recent Executive Orders and DOGE Initiatives

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Well, it is certainly an interesting time to be a federal government contractor. In the last few weeks, we have seen Executive Orders (EOs) flying fast and furious (including those relating to DEI and contract reviews, which we have previously written about). That has prompted certain agencies to issue class deviations, led other agencies to issue vague and potentially anxiety-inducing memos about re-evaluating a large number of consulting contracts, and generally caused contractors a whole lot of stress and confusion. Overall, these new developments have resulted in a flurry of contract modifications, suspensions, and terminations for convenience (and, in some cases, rounds of retractions, rescissions, and reissuances of same). If you have experienced any of these things, and are confused about what to do next, rest assured that you are not alone. But neither are you without resources. In fact, McCarter & English has compiled below some summary guidance for contractors that can help you navigate these choppy – and somewhat uncharted – waters.

As a threshold matter – and this should go without saying – in these fast-paced times, contractors should be sure to keep up to date on all correspondence from their contracting officers (COs) and other agency points of contact (POCs). Make sure you are regularly checking all emails and alerts – that means several times a day. And of course, contractors should reach out to their legal teams as soon as issues arise that raise questions. In other words: Don't dawdle, even if the agency is telling you to sit tight and wait for further instructions because things might change again soon. In that case, you don't need to overreact, go into panic mode, or get pushy. However, even if you are "in a holding pattern," you still need to analyze where things stand, get a handle on your rights and obligations, and come up with a comprehensive plan to help you navigate whatever comes next. That's where this guidance comes in.

Right now, there are a lot of things-a-changing in the GovCon world, and the number of issues in flux is likely to increase as time goes on. While we cannot say for sure what the future brings, or predict *everything* that contractors may face in the coming months, we discuss below a couple of issues that most contractors are likely to face in the near future. The below should not be interpreted as providing individualized legal advice or forming an attorney-client relationship between author and reader. Nor is it meant to be an exhaustive list of *everything* that could *possibly* occur as a result of the various EOs or Department of Government Efficiency (DOGE) initiatives. Rather it is meant to provide general guidance about some of the most common issues that are likely to arise; you should discuss these matters with your legal team, and develop an individualized strategy on how best to move forward and protect *your* business.

I. SUSPENSIONS OR STOP-WORK ORDERS

In recent weeks, many contractors have had their work suspended, or have received stop-work orders, in connection with certain existing contracts and/or orders with the government. There are several Federal Acquisition Regulation (FAR) clauses that agencies may include in government contracts that give the COs the ability to suspend – or "pause" – work being done under a federal contract. Specifically, FAR 52.242-14, used in fixed-price construction or architect-engineer contracts, allows COs to "order the Contractor…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." Similarly, pursuant to FAR 52.242-15, in contracts for supplies, services, or research and development, "[a] Contracting Officer may, at any time…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." When a prime contractor receives notice that the government has suspended performance or issued a stop-work order, the contractor must consider the following issues, among other things.

A. What Clauses Are in My Contract?

What should your first steps be if you receive a suspension or stop-work order? As a threshold matter, you should check and see that the clause the agency is relying on to suspend your contract or stop work is, in fact, *in* your contract. We have seen numerous examples these past weeks where agencies are issuing stop-work orders, citing as the basis for such action clauses that are not actually included in the contracts they are trying to suspend. (This includes, but is not limited to, COs' attempts to improperly invoke FAR 52.242-15 on commercial item contracts under FAR 12). If that happens to you, at a minimum, it will require a conversation with your CO. (It might even require some legal assistance to push back, as appropriate). So much in the GovCon world is *contractual*; your rights and obligations flow from the terms specific to *your* contract. That has to be the starting point of any discussion relating to suspension, and it is certainly going to be the basis for determining your rights regarding recovery of costs, etc. It is, therefore, imperative to make sure everything is done correctly, which means in full accordance with the clauses in your individual contract.

In summary, don't take the CO's word as gospel, and don't assume they are citing the right clauses. Definitely check your contract! Keep in mind that if you have task order awards under IDIQs, GWACs, or other multiple-award vehicles, you should review not only the order but the underlying contract as well. Same for BPA holders – check your GSA schedule contracts. Clauses might be in there even if they are absent from the BPA or the orders thereunder.

B. Partial or Full Cessation of Work?

If you, as a prime contractor, receive a notice of suspension or a stop-work order, you must comply with the order and stop work! If work is only *partially* suspended, you must stop the work that has been suspended, but must also continue diligently on with the work that was *not* suspended. If the cessation of a portion of the work makes continuing with the other work impossible, you must alert the agency ASAP.

Relatedly, if suspension of some work makes the remaining work more expensive, or causes inefficiencies that will result in delay and/or expense, or will otherwise delay the not-suspended work you are still responsible for doing, etc., you will want to give notice of same to the agency. You will also want to start segregating and tracking costs, so that you can substantiate any claims later on. (More on this below). It is often advisable to create a new cost code(s) for suspension costs.

C. Minimizing Cost and Managing Subcontractors

A big part of your role as a prime, when work has been suspended, is minimizing costs incurred during the suspension period. Primes must "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. This may involve furloughing workers (check with your HR department and outside Labor & Employment counsel on best practices for doing so), buttoning up work, creating certain interim protections, or putting certain preparatory work or recruiting

on hold, etc. You should track costs associated with these efforts as well, as they may be recoverable later (see below).

Primes must also manage their subcontractors. This includes potentially suspending or even terminating for convenience, as appropriate, all subcontractors performing portions of the work that have been suspended. Ideally, suspension is something you and your legal team planned for when drafting your subcontract documents. If so, and if you have a suspension clause in your subcontract, you will likely be able to follow the procedures laid out in that provision to stop work for your subs. If not, your best option might be to terminate the subcontractor for convenience, assuming you have the ability to do so under the subcontract. A prime contractor's options regarding suspension/termination, and what that prime needs to do to legally effectuate such a suspension or termination, will depend on the specific terms included in their individual subcontracts.

To the extent you have options regarding the suspension or termination of your subcontractors (as in, you have both a suspension and T4C clause in your subcontracts), you should consider what makes the most sense for each of your subcontractors in your particular factual circumstances. What constitutes the best option will depend on a number of factors, all of which you should discuss with your legal counsel. Some such factors include whether or not, if the government lifts the suspension, you will be able to resume work without the subcontractor or, if you cannot, how quickly you would need the subcontractor to remobilize or get back on track. (Under both FAR 52.242-14 and FAR 52.242-15, contractors have an obligation to promptly return to work if the suspension is lifted, or if the set period covered by the stop-work order expires). If work resumes, can you issue a new order to the subcontractor under an MSA, for example? Or maybe you can *replace* the subcontractor if work resumes – but how quickly? You might also want to consider what costs the subcontractor might incur in connection with remaining on "standby," and whether, under your subcontract, you would be liable to cover those costs. Overall, primes and subs should also be openly communicating about whether a partial or full suspension causes the subcontractor to incur any damages, and/or what termination costs there may be. That is something the prime will need to think about later, when it seeks payment from the government.

D. Prepare to (Potentially) Ramp Back Up and Resume Performance

As mentioned above, contractors have an obligation to promptly return to work if the suspension is lifted, if the stop-work order is canceled, or if the period set for the stop-work order (usually 90 days) expires. So, while you should take care to minimize costs while "on hold," you must balance that against the fact that you need to remain prepared to return to work within a reasonable time frame if asked to do so. This may involve the consideration of certain HR issues relating to furloughed employees, recruiting, etc. Discuss with your HR team and your Labor and Employment attorneys.

E. Recovering Suspension Costs

Primes are able to seek the additional costs incurred in connection with a suspension through a Request for Equitable Adjustment (REA) or claim. As outlined above, it is important that contractors begin – immediately upon receipt of a suspension or stop-work order – to segregate and carefully track the damages they are incurring as a result of any such order. That may involve new cost codes. Doing so will facilitate quicker recovery. Keep in mind that in certain industries, there may even be different or additional categories of damages available when you're dealing with a suspension (as compared to other types of claims). For example, if there is a government-caused suspension of an uncertain duration on a construction project, the contractor may (assuming some other criteria are met) be entitled to extended home office overhead (aka *Eichleay* damages). Make sure you understand the full set of damages available to you, and that you are doing all you can to maximize your recovery of costs.

F. Timelines

You must remain vigilant about the time limits for these types of claims. While the general statute of limitations for most CDA claims is six years, you definitely can't wait that long in this context. Pursuant to FAR 52.242-14, no claim shall be allowed "unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of the suspension, delay, or interruption, but not later than the date of final payment under the contract." Pursuant to FAR 52.242-15, if a stop-work order is canceled or expires, then the CO shall make an

equitable adjustment if "the Contractor asserts its right to the adjustment within 30 days after the end of the period of work stoppage." If, instead of the stop-work order being canceled or expiring, prompting a return to work, the work covered by the stop-work order is ultimately terminated for convenience, "the Contracting Officer shall allow reasonable costs resulting from the stop-work order in arriving at the termination settlement."

In short, if you are terminated, you should provide notice right away that you intend to seek an equitable adjustment to cover any costs you incur as a result of a suspension or stop-work order. If the suspension or stop-work order is canceled, or the period for the stop-work order expires and you go back to work, you should take the time necessary to gather your costs and calculate the total sum you are seeking, but you should get your claim in ASAP after that. If the work is ultimately terminated, you should roll it into your termination settlement proposal (more on that below).

Overall, the critical tasks will be to determine what types of damages you are and are not entitled to, figure out how best to track and document those damages, and identify what you must submit to the government and when. Your legal team should be able to help you navigate all of these issues.

G. Something for the Subcontractors

Above, we have mostly focused on things from a prime contractor's point of view, albeit keeping in mind that a prime's interactions and communications with subcontractors are important. Let's now briefly look at things from a subcontractor's point of view.

As a subcontractor, you are, unfortunately, pretty beholden to your prime contractor. Indeed, your rights and obligations are going to flow almost exclusively from your subcontract with that prime. Whether or not you can be suspended and/or terminated for convenience, and how much you may be owed, will depend on what clauses have been included in your subcontract. Hopefully you negotiated well when drafting that agreement. For now, make sure you understand the terms included in your subcontract, and what they say about your rights and obligations in the event of the prime's contract being suspended. Moreover, because subcontractors cannot seek recovery of their costs directly from the government, you will need to coordinate with your prime in order to get paid. The key is to ensure you are communicating with your prime as events unfold, and that you develop a cooperative strategy to ensure you can recover any costs you incur as a result of the suspension. It might be wise to proactively reach out to your prime now to discuss what your plan should be if a suspension occurs.

II. NON-PAYMENT OF AMOUNTS DUE AND OWING UNDER "PROPER INVOICES"

We have heard from a number of contractors – even those who have *not* received any stop-work orders, suspension notices, or terminations for convenience – that they have not been paid for work they properly performed. In some cases, contractors have even been expressly advised by agency officials that they will not be paid at all for the foreseeable future. This is true despite the fact that the work being invoiced for was properly performed, there is no allegation of delayed or deficient performance, and the amounts due are undisputedly owing to the contractor. Unfortunately, this seems to be an increasingly common situation, likely (at least partially) due to the *Implementing the President's "Department of Government Efficiency" Cost Efficiency Initiative* Executive Order, which was issued February 26, written about previously here.

As predicted, certain agencies are taking the position, consistent with the EO, that no payments can be made to contractors until the agency sets up and gets running a new "centralized technological system," meant to track and justify payments. In the meantime, contractors have been directed to continue to perform and absorb the costs. In other words, the government's basically directing contractors to "throw it on my tab." Alternately, contractors have been told to "file a claim." If you are facing this situation, consider the following.

First – are you sensing a theme here? – check your contract, and review the clauses relating to payment. Confirm the invoicing requirements, and make sure that your invoices meet all applicable requirements. This will likely be governed by the FAR Part 39, as well as the Prompt Payment Act and its implementing regulations; these laws cumulatively provide guidance on what constitutes a "proper invoice," and require the government to accelerate payments to small businesses. Check your applicable deadlines, make sure you are submitting your invoices in the

correct way and through the correct systems, and familiarize yourself with the provisions relating to payment disputes.

Next, reach out to the agency, nicely, to see if you can determine what is going on. It is possible, even in the current climate, that the delay in payment is nothing more than an administrative error that can be easily resolved. If that is *not* the case, hopefully you can at least get some additional information about the reason the agency is withholding payment. If it is due to the February 26 EO referenced above, perhaps the CO can offer you some insight into the expected timeframe in which the agency expects to complete its "centralized technological system" and resume payments.

Finally, you have the right to submit a formal claim under the CDA. Like in any other CDA claim, you should lay out in detail the relevant facts and law, and demonstrate your entitlement to the monies owed. If there is no dispute as to the fact that the work being invoiced for was successfully completed, and it is simply a matter of non-payment due to EOs or other DOGE initiatives, this should be a comparatively easy lift as compared to other types of claims. Indeed, the government's failure to pay monies that are undisputedly due and owing is generally considered a breach of contract. Still, you will want to make sure you submit all appropriate supporting documentation showing that you are entitled to payment, and the amount of such payment. Don't forget to certify your claim.

The contracting officer should issue its response – called a "Contracting Officer's Final Decision" or "COFD" – in sixty days. (Technically, the government could, rather than issue a COFD within sixty days, state that it needs more time to consider the claim. In such a case, the agency still must issue a response in a "reasonable time." In these extenuating circumstances, and given the relative simplicity of the issues in a claim for non-payment of sums undisputedly due and owing, sixty days should arguably be considered reasonable). Should the COFD deny your claim in whole or in part, or should the agency fail to issue a COFD within a reasonable time, you can appeal that denial to the Civilian Board of Contract Appeals (CBCA)/Armed Services Board of Contract Appeals (ASBCA), as appropriate, or to the U.S. Court of Federal Claims (COFC), and litigate.

III. TERMINATIONS FOR CONVENIENCE

Another thing that everyone is seeing a lot of right now is terminations for convenience (T for C or T4C). That is likely to further increase in coming weeks, as many agencies have been directed to review all existing contracts with an eye towards, among other things, termination.

Pursuant to Far Part 49 (and several different varieties of Termination for Convenience clauses included in different types of government contracts, *see* FAR 52.249-1 through -5; FAR 52.212-4(l)), the government has a right to completely or partially terminate performance of work under a government contract when it is "in the government's interest." Virtually all government contracts contain a Termination for Convenience clause. (Fun fact – even if they *don't*, the clause might be read in anyway, pursuant to something called "the Christian Doctrine"). The key, if you are terminated, is to flow the termination down to your subcontractors ASAP – you don't want to be on the hook for paying them if the government is no longer paying you. Also, start getting your (and your subcontractors') costs together for your Termination Settlement Proposal, which is the process you can use to seek payment from the government for your termination costs. More on these below, but first we should talk about some threshold considerations and questions you should be asking when you first receive notice of termination.

A. Justified Termination?

The first thing you need to ask when receiving a notice of termination is whether the termination was proper. As outlined above, the government can terminate any contract, so long as the agency determines that such termination is "in the government's interest." You might be asking what constitutes "the government's interest" so as to justify such a termination. The answer is that an 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.

It is possible, given the current, chaotic flurry of termination (and recission and re-termination) activity, and the fact that many of these terminations are being made *very* quickly and seemingly without a lot of analysis, together with the fact that many terminations are (from what we have seen) being made solely on the basis of preemptive budget cuts, that not every termination being issued right now is entirely proper. Accordingly, the first thing you will want to do, should you receive a termination notice, is assess whether you have any basis to challenge the termination. If such a challenge succeeds, the case becomes a breach of contract matter; in such a case, you may be able to recover lost profits (in addition to normal termination settlement costs). One potential strategy, if you wish to preserve potential challenges to the termination, is to acknowledge receipt of the termination notice, but to stop short of "accepting" a termination (if requested to do so). Reserve your right to challenge as appropriate.

Termination for convenience challenges have, historically speaking, never been very common. But this will be a space to watch in coming weeks, as it is quite possible that – given the volume of contracts being terminated - some contractors will start to challenge their terminations.

B. Say "No" to the No-Cost Settlement

Lately, contractors have received a fair amount of agency communications attempting to either push inappropriate termination outcomes or impose false deadlines. We do not mean to imply that COs are acting maliciously; it is just as likely that the COs are also very confused by recent events and are unfamiliar with the appropriate processes relating to T4Cs. That may be especially true when one considers that, due to massive federal employee layoffs, there are a lot of inexperienced and overworked COs right now. Whatever the reasons for the COs' actions, now more than ever, it is critical for contractors to know and protect their rights when faced with a termination. In addition to understanding when a termination for convenience may or may not be justified (see above), contractors should know when it is appropriate to enter into a "no-cost settlement" and when they should reject such a determination.

In the last few weeks, we have seen a number of emails advising contractors that they are being terminated, and at the same time declaring that the termination will be a "no-cost settlement," when a no-cost settlement is simply *not* appropriate. A no-cost settlement is – as the name would imply – when the contractor getting terminated gets *nothing*. A less than desirable outcome for most terminated contractors, you would surely agree.

As set forth in FAR 49.109-4, "No-Cost settlement" is only appropriate where:

a. The contractor has not incurred costs for the terminated portion of the contract or

b. The contractor is willing to waive the costs incurred and

c. No amounts are due the Government under the contract.

Presumably, the majority of contractors out there would not accept that they fall into these categories when terminated for convenience.

So, what does that mean for you? It means that if you get correspondence from the agency saying that you are being terminated and that a "no-cost settlement" is the next step, push back! The pre-emptive decision to improperly classify something as a no-cost settlement is likely not enforceable, but it likely would gum up the works on the settlement negotiation process outlined below. At the very least, it would almost certainly delay things. So, if you are faced with this situation, you should advise the government that you do not think that a "no-cost settlement" is appropriate, and be sure to object by the deadline given (if there was one identified).

C. A Prime's Obligations

FAR 49.104 provides a list of prime contractor duties, which a prime must complete after receiving a termination for convenience notice. Specifically, it provides that "[a]fter 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 Termination Contracting Officer (TCO). The notice and clause applicable to convenience terminations generally require that the contractor-

a. Stop work immediately on the terminated portion of the contract and stop placing subcontracts thereunder;

b. Terminate all subcontracts related to the terminated portion of the prime contract;

c. Immediately advise the TCO of any special circumstances precluding the stoppage of work;

d. 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;

e. 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;

f. 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;

g. Settle outstanding liabilities and proposals arising out of termination of subcontracts, obtaining any approvals or ratifications required by the TCO;

h. Promptly submit the contractor's own settlement proposal, supported by appropriate schedules; and

i. Dispose of termination inventory, as directed or authorized by the TCO."

Therefore, some of the major things to consider, similar to suspensions, above, are: (1) making determinations concerning what work must continue versus work that must stop; (2) mitigating damages/taking any necessary protective measures; (3) managing subcontractors; and (4) segregating and tracking termination costs.

1. Partial or Full Termination?

As with suspensions and stop-work orders, terminations can be total (i.e., a cancellation of the entire contract) or partial (removing or de-scoping only certain CLINs, or certain aspects of the work). If your contract is terminated in full, you must stop all work, except for those limited tasks expressly enumerated in FAR 49.104. If the termination is only partial, you must continue to prosecute the work that has not been terminated. To the extent that the termination of part of the work impacts the remaining work, either in terms of duration or price, you should segregate and track those costs for later recovery efforts, outlined below.

2. Protective Measures

This one is pretty self-explanatory, especially given the list above, but by way of summary: You need to take whatever actions necessary to protect the work done on the project so far, and deliver property to the government. This can become especially important in construction projects, where you might need to put interim protection work in place to avoid storm damage, other weather impacts, animal intrusion, etc. If you have questions about this, you should have discussions with your TCO to ensure you are on the same page and taking whatever measures they think are necessary.

3. Terminating Subcontractors

Again, as in the suspension/stop-work order context, interfacing with subcontractors is a critical part of the termination process. When a prime is terminated, it must immediately terminate its subcontractors (at least to the extent those subcontractors are performing portions of the prime contract that has been terminated). A prime's ability to terminate its subs, the manner and timeframe in which the prime must do so, and what costs are owed the subcontractor in the event of a termination, are going to depend on the specific terms included in the applicable subcontracts.

Hopefully, you flowed down the T4C clause in your subcontracts, or at least gave yourself the ability to terminate your subcontractors for convenience if you were terminated by the government. (If not, you might need to get a little creative – your legal team can help). Don't forget to coordinate with your subcontractors about their termination costs. That is something that needs to be incorporated into your Termination Settlement Proposal (see below).

D. Duties of the TCO; Settlement Conference

Pursuant to FAR 49.105, the TCO has certain duties after he or she issues the termination notice. This includes the duty to hold a conference with the contractor, the purpose of which is to develop a definite program for effecting a settlement regarding payment of termination costs to the contractor. Topics that should be discussed at the conference and documented include, pursuant to FAR 49.105(c):

1. General principles relating to the settlement of any settlement proposal, including obligations of the contractor under the termination clause of the contract;
2. Extent of the termination, point at which work is stopped, and status of any plans, drawings, and information that would have been delivered had the contract been completed;
3. Status of any continuing work;
4. Obligation of the contractor to terminate subcontracts and general principles to be followed in settling subcontractor settlement proposals;
5. Names of subcontractors involved and the dates termination notices were issued to them;
6. Contractor personnel handling review and settlement of subcontractor settlement proposals and the methods being used;
7. Arrangements for transfer of title and delivery to the Government of any material required by the Government;
8. General principles and procedures to be followed in the protection, preservation, and disposition of the contractor's and subcontractors' termination inventories, including the preparation of termination inventory schedules;
9. Contractor accounting practices and preparation of SF 1439 (Schedule of Accounting Information (49.602-3));
10. Form in which to submit settlement proposals;
11. Accounting review of settlement proposals;
12. Any requirement for interim financing in the nature of partial payments;
13. Tentative time schedule for negotiation of the settlement, including submission by the contractor and subcontractors of settlement proposals, termination inventory schedules, and accounting information schedules;
14. Actions taken by the contractor to minimize impact upon employees affected adversely by the termination;
15. Obligation of the contractor to furnish accurate, complete, and current cost or pricing data, and to certify to that effect in accordance with 15.403-4(a)(1), to the extent applicable.

Principal subcontractors should be requested to attend the conference, when the TCO judges it appropriate after consulting with the contractor. Be prepared at this conference to ask the appropriate questions, and develop a plan to successfully accomplish the termination and get paid what you think is owed. It is critical to make sure that you and your TCO are on the same page.

FAR 49.105 further requires that the TCO keep the lines of communication with the contractor open in order to, among other things, examine the settlement proposal and promptly negotiate that settlement proposal.

E. Partial Payments?

As discussed in more detail below, contractors are entitled to certain payments from the government in the event of a termination for convenience, once the parties reach an agreement on settlement. However, such payment may not come all that quickly. As noted herein, contractors have a year to submit their Termination Settlement Proposals, and that is only the beginning of negotiations. It might be some time before a contractor actually sees payment. And that is assuming you were able to reach an agreement. Payment will obviously be further delayed or denied if the agency rejects your settlement proposal.

Though the above might seem disheartening, don't fret! In certain cases (i.e., if your contract authorizes it), you may be able to seek partial payment at any time after submission of interim or final settlement proposals. This allows you to seek an advance payment of the money you believe is owed. The procedures outlining this process are set forth at FAR 49.112-1. It is wise to submit such a request for partial payment at the same time as your proposal, using the mandated form SF 1440.

F. Termination Settlement Proposal

1. Generally

Arguably, the most important piece of the termination process is the 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:

> Settlement of terminated cost-reimbursement contracts and fixed-price contracts terminated for convenience may be effected by (a) negotiated agreement, (b) determination by the TCO, (c) costing-out under vouchers using SF 1034, Public Voucher for Purchases and Services Other Than Personal, for cost-reimbursement contracts... or (d) a combination of these methods. When 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.

In other words, unless you want the CO to unilaterally decide (i.e., via a determination) what you are entitled to, you will want to prepare some sort of settlement proposal and then negotiate with the government for payment.

2. What Goes in Your Proposal?

Generally speaking, under the standard non-commercial T4C clauses - FAR 52.249-2 (Fixed-Price) and FAR 52.249-6 (Cost-Reimbursement) – a contractor may recover:

- The contract price for completed supplies or services that have been accepted by the government but not yet paid for;
- Costs incurred in performance of terminated work, including initial costs and preparatory expenses;
- The cost of settling terminated subcontracts;
- Profit on costs incurred (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).

In contrast, consider FAR 52.249-4. This is 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.

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 the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination."

Your Termination Settlement Proposal should be drafted with the above guiding principles in mind. But how do you determine, more specifically, what goes in your proposal? As with many things discussed herein, this is going to be highly dependent on the type of contract you have, and – relatedly – what clauses are in your contract. But let's take a look at the principles outlined in connection with firm-fixed price contracts as a guide. (Note that cost-reimbursable contracts, T&M contracts, and labor-hour contracts may be dealt with somewhat differently. Your legal team can help you navigate the differences).

As outlined in FAR 49.206-1, "the contractor should promptly submit to the TCO a settlement proposal for the amount claimed because of the termination...Termination charges under a single prime contract involving two or more divisions or units of the prime contractor may be consolidated and included in a single settlement proposal." This FAR section provides further guidance to contractors as well: "The settlement proposal must cover all cost elements including settlements with subcontractors and any proposed profit. With the consent of the TCO, proposals may be filed in successive steps covering separate portions of the contractor's costs." As outlined in FAR 49.201(a), the 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." The FAR goes on to explain that "[f]air compensation is a matter of judgment and cannot be measured exactly. In a given case, various methods may be equally appropriate for arriving at fair compensation. The use of business judgment, as distinguished from strict accounting principles, is the heart of a settlement." Critically, the regulations note that:

1. The ***primary*** objective is to ***negotiate a settlement by agreement***. To that end, the regulations allow that the parties may agree upon a total amount to be paid the contractor without agreeing on or segregating the particular elements of costs or profit comprising this amount. In other words, if you can agree to a lump sum, then you might not need to get into the weeds on what specific buckets of cost comprise this lump sum amount.

2. "Cost and accounting data may provide guides, but are not rigid measures, for ascertaining fair compensation." Simply put: In the interest of getting things done, you have a little more wiggle room than you would in other contexts. "In appropriate cases, costs may be estimated, differences compromised, and doubtful questions settled by agreement. Other types of data, criteria, or standards may furnish equally reliable guides to fair compensation. The amount of recordkeeping, reporting, and accounting related to the settlement of terminated contracts should be kept to a minimum compatible with the reasonable protection of the public interest."

The FAR outlines two methods or "bases" that can be used to prepare settlement proposals on firm-fixed price contracts. The first is "Inventory Basis" and the second is "Total Cost Basis." You can find the applicable forms at FAR 49.602-1. "Settlement proposals must be on the forms prescribed in [FAR] 49.602 unless the forms are inadequate for a particular contract." For Inventory Basis, you generally use SF 1435, and for Total Cost Basis, you

generally use SF 1436. For cost reimbursable contracts, you use SF 1437, while SF 1438 should be used to submit proposals for terminations of fixed price contracts that seek less than $10,000. FAR 49.602-1. (Note again that there are unique provisions for terminations for convenience of commercial item contracts under FAR 12. T&M or labor-hour contracts might also involve unique cost/damage analyses).

As explained in FAR 49.206-2(a), under an "Inventory Basis," the contractor may propose "only costs allocable to the terminated portion of the contract, and the settlement proposal must itemize separately" the following items: (i) Metals, raw materials, purchased parts, work in process, finished parts, components, dies, jigs, fixtures, and tooling, at purchase or manufacturing cost; (ii) Charges such as engineering costs, initial costs, and general administrative costs; (iii) Costs of settlements with subcontractors; (iv) Settlement expenses; and (v) Other proper charges. Direct material and direct labor costs, as well as indirect factory expenses are not claimed as lump sums. Rather, they are allocated to categories of termination inventory. FAR 49.206-2(b) explains that "[a]n allowance for profit…or adjustment for loss…must be made to complete the gross settlement proposal." Further information on allowable profit is outlined at FAR 49.202, while further information about "Adjustment for Loss" is found at FAR 49.203. "All unliquidated advance and progress payments and all disposal and other credits known when the proposal is submitted must then be deducted." FAR 49.206(a)(2). FAR 49.206-2(a)(3) enumerates other circumstances in which it is appropriate to use the Inventory Basis, namely: (i) The partial termination of a construction or related professional services contract; (ii) the partial or complete termination of supply orders under any terminated construction contract; or (iii) the complete termination of a unit-price (as distinguished from a lump-sum) professional services contract.

Inventory Basis is preferred in most cases (subject to certain limited exceptions) but the Total Cost Basis can be used when Inventory Basis is not practicable or will unduly delay settlement, if ***approved in advance by the TCO***. FAR 49.206-2(b) lays out some examples of when that may be: (i) If production has not commenced and the accumulated costs represent planning and preproduction or "get ready" expenses; (ii) If, under the contractor's accounting system, unit costs for work in process and finished products cannot readily be established; (iii) If the contract does not specify unit prices; or (iv) If the termination is complete and involves a letter contract. If you wish to use the Total Cost Basis, you should ask for CO approval ASAP.

In general, under a Total Cost Basis proposal, direct material costs, direct labor costs, and indirect factory expenses are not allocated to categories of inventory, but rather claimed as lump sum items. The regulations outline different requirements of the Total Cost Basis for partial versus full terminations:

- "When the total-cost basis is used under a complete termination, the contractor must itemize costs incurred under the contract up to the effective date of termination. The costs of settlements with subcontractors and applicable settlement expenses must also be added. An allowance for profit…or adjustment for loss…must be made. The contract price for all end items delivered or to be delivered and accepted must be deducted. All unliquidated advance and progress payments and disposal and other credits known when the proposal is submitted must also be deducted." FAR 49.206-2(b)(2)

- "When the total-cost basis is used under a partial termination, the settlement proposal shall not be submitted until completion of the continued portion of the contract. The settlement proposal must be prepared as [outlined above for complete terminations], except that all costs incurred to the date of completion of the continued portion of the contract must be included." FAR 49.206-2(b)(3)

- If a construction contract or a lump-sum professional services contract is completely terminated, the contractor shall: (i) Use the total cost basis of settlement; (ii) Omit Line 10 "Deduct-Finished Product Invoiced or to be Invoiced" from Section II of SF 1436 Settlement Proposal (Total Cost Basis); and (iii) Reduce the gross amount of the settlement by the total of all progress and other payments. FAR 49.206-2(c)

Settlement proposals may not be submitted on any basis other than Inventory Basis or Total Cost Basis without the prior approval of the chief of the contracting or contract administration office. FAR 49.206-2(d).

* * * * *

All of the above said, what should go into *your* termination settlement proposal is a highly individualized question that depends on the clauses in your contract, the type of contract you have, the nature and timing of the termination, and the types of costs you are seeking.

G. Subcontractor Considerations

Part of what prime contractors need to analyze when putting together their Termination Settlement Proposal is their subcontractors' costs. As set forth above, in an ideal world, the subcontract agreement executed by a prime and its subcontractors will address terminations for convenience, and what costs may and may not be recovered by the subcontractor in connection with same. Guidance on negotiating with subcontractors, entering into settlement agreements, and incorporating the costs due to subcontractors into a prime's Termination Settlement Proposal are laid out in FAR 49.108 Settlement of subcontract settlement proposals.

Each prime will need to navigate this process on a case-by-case basis, depending on the terms of its subcontracts. Experienced government contract attorneys can help guide you through this "middle man" position to ensure you are not simultaneously fighting a battle on two fronts, or paying your subcontractor when you are no longer getting paid.

H. When to Submit Your Termination Settlement Proposal

The question of timing is another place where there has been, in recent weeks, a lot of misleading communication from agencies. Specifically, contractors are seeing a lot of agency emails with false deadlines. For example, we have seen emails and termination notices telling contractors that they need to submit a preliminary report with all expenses within five days! Or that all termination settlement proposals are due within two weeks, with no further revisions to be permitted after that time. Contrary to what these statements may lead you to believe, you are not legally obligated to put together an entire settlement proposal in two weeks. It is simply not feasible, and it is certainly not what is required under the regulations. That said, if the agency is giving you a deadline, it would be wise to *respond* by that time, if only to outline the reasons why you believe you are entitled to more time pursuant to the applicable regulations. Have a discussion with the TCO.

So what are the appropriate time lines? Contractors must submit their final termination settlement proposal 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, while REAs/claims arising out of *partial* terminations should generally be requested within 90 days from the effective date of the termination. You should, of course, have your legal team specifically analyze your situation, and determine the applicable deadlines to ensure you do not miss anything.

Despite the longer timelines outlined above, given the current climate, and the amount of T4C proposals that every agency is likely to be analyzing in coming months, it may be wise to accelerate your timeline as much as you can. Get your settlement proposal in as soon as practicable, understanding that it will necessarily take some time to gather and calculate all your (and your subcontractors') costs.

I. Settlement Negotiations and Successful Settlement; Payment

After the settlement proposal is finished and submitted, then consideration of the proposal begins. Pursuant to FAR 49.111, each agency is required to establish procedures for the administrative review of proposed termination settlements. Negotiations then follow. As stated above, "[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." Assuming that negotiations are successful, several things then occur.

First "[t]he TCO shall, at the conclusion of negotiations, prepare a settlement negotiation memorandum describing the principal elements of the settlement for inclusion in the termination case file and for use by reviewing authorities." FAR 49.110. 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. FAR 49.109-1. 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. FAR 49.109-2(a). A recommended format for settlement of reservations appears in FAR 49.603-9. FAR 49.109-2(b).

As for payment, it is governed by FAR 49.112-2, which provides that "[a]fter execution of a settlement agreement, the contractor shall submit a voucher or invoice showing the amount agreed upon, less any portion previously paid. The TCO shall attach a copy of the settlement agreement to the voucher or invoice and forward the documents to the disbursing officer for payment." (Though note that, for construction contracts, before forwarding the final payment voucher, the CO must ascertain whether there are any outstanding labor violations. If so, the CO shall determine the amount to be withheld from the final payment).

J. Settlement by Determination and Claims

Discussed above are the procedures used when contractors and agencies are able to successfully negotiate a settlement and enter into an agreement on what the contractor should be paid. But what happens if the parties are unable to reach such an agreement? Remember from above that settlement of terminated cost-reimbursement contracts and fixed-price contracts terminated for convenience may be effected by negotiated agreement, costing out under vouchers, ***or*** by determination by the TCO, the last being what is done when the parties cannot reach an agreement. FAR 49.109-7 outlines what occurs in a "Settlement by determination" situation. It provides, in relevant part:

> 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. Copies of determinations shall receive the same distribution as other contract modifications.
>
> ...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.

After reviewing the information available, the TCO shall determine the amount due and shall transmit a copy of the determination to the contractor. The determination shall specify the amount due the contractor and will be supported by detailed information. The TCO shall explain each major item of disallowance. The TCO need not reconsider any other action relating to the terminated portion of the contract that was ratified or approved by the TCO or another contracting officer.

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. The pendency of an appeal shall not affect

> the authority of the TCO to settle the settlement proposal or any part by negotiation with the contractor at any time before the appeal is decided.

The appeal would then be litigated similarly to any other CDA claim before the applicable Board of Contract Appeals (i.e., The Civilian Board of Contract Appeals, "CBCA," or the Armed Services Board of Contract Appeals, "ASBCA"), or the United States Court of Federal Claims (COFC).

IV. MODIFICATIONS AND OTHER CONTRACT CHANGES

Something that contractors are seeing less of so far (as compared to suspensions and terminations, that is), but that they might see more of as things play out, are contract modifications. Given the legal developments to date, it seems likely that many of these modifications will be deductive, reducing the scope of the work a contractor is supposed to perform under the contract. Or you might see modifications removing certain DEI-related language. But it is possible that, if additional EOs are issued, or other legal developments occur, other, additive modifications might start to become an issue as well. These types of modifications might follow a similar pattern to those that were issued several years ago, when Biden issued his executive orders relating to mandated COVID vaccinations for government contractors.

The critical considerations when it comes to modifications are always: (1) making sure that the contract is adjusted in terms of price and/or duration to the extent needed to offset the change being addressed in the modification; or (2) ensuring that you have not waived any of your rights to seek those associated costs/additional days later. How do you do that? By following the steps below, which you may notice follow a similar conceptual pattern to the analyses outlined above for suspensions, unpaid invoices, and terminations:

- Take a look at the contract clause cited as the basis/justification for the change. Determine whether the clause is in your contract. Also assess whether the requested change is even something in the CO's purview (likely it will be; COs have broad authority to make changes to contracts). Assuming it is, check to see what that clause says about contractors' rights to an equitable adjustment of the contract – in terms of money, time, or both – when such a change is made.
- Determine how much additional cost/additional time may be associated with the change, and whether it is covered in whole or in part in the modification itself. In other words, if you need $500,000 and an additional two months because of the change being made, you will want to see if the modification is, in addition to making the substantive change to scope or terms, making the necessary price and/or duration adjustments. If not, see if you can negotiate for those things to be added. You may or may not be successful. If you are, great. If not, the key is to preserve your claim rights for later, as outlined below.
- To the extent the modification does not add sufficient time and/or money to account for the change being made therein, make sure you do not unwittingly sign away your right to seek that time/money later. Beware language like the below, usually (though not always) found in the "Closing Statement" section:

> It is further understood and agreed that this adjustment constitutes compensation in full on behalf of the Contractor and its Subcontractors and Suppliers for all costs and markups directly or indirectly attributable to the change ordered, for all delays related thereto, for all extended overhead costs, and for the performance of the change within the time frame stated.

If you are asked to sign a modification with language like this when you have not yet been properly compensated, stop! Don't sign your rights away! See if the CO is willing to remove this release language; if not, see if they are willing to edit it. Alternatively, you can see if they will issue the modification unilaterally so that you do not have to sign.

Before we move on from modifications and changes, a note about *constructive* changes: In the paragraphs directly above, we talked about what to do if you get a *written* modification to the contract. But what if you do not receive a *written* modification, but some other sort of written or oral order or directive from the agency, which

requires you to proceed in a way that is different than what you had planned? Depending on what version of the Changes clause you have in your contract, that may or may *not* be permitted. (For example, pursuant to FAR 52.212-4(c), all changes to a commercial items contract must be bilateral and in writing). Where permitted (which again may depend on the version of the Changes clause in your contract), such a directive might be treated as a change to the contract (even if not *called* a change or "modification" by the government). That means time and money. Indeed, contractors can seek equitable adjustments to the contract (time and/or money) in connection with these types of changes – known as constructive changes – provided certain criteria are met. Specifically: (1) the contractor must give appropriate notice; and (2) the contractor must ensure that the direction or instruction to make the change came from someone with authority. Only the CO has the ability to change a contract. So, any change must *come from* a CO (and not from a COR/COTR) or be *ratified* by a CO. If you have questions about the proper notice procedures or how to deal with questions relating to authority, consult a legal professional. Lay the proper groundwork, and you should be able to successfully pursue a claim for the costs incurred with any change.

V. TARIFF-RELATED IMPACTS

Unless you have been living under a rock, you are probably aware that there's been a lot of talk about new tariffs impacting products imported from Mexico, Canada and China. As of the time of writing, an additional steel and aluminum tariff on all countries is scheduled to go into effect on March 12, 2025 (we will see if that gets pushed back). It is almost certain that these tariffs, if they stay in place, will impact contractors. Likely impacts include increased costs of performance, as well as potential supply shortages and significant delays associated with same.

Contractors should review their contracts now to determine whether the documents include any provisions that could assist with these issues. You should be looking for clauses that would allow you to recover unanticipated costs incurred as a result of tariffs, as well as any provisions that would extend the contract's period of performance to account for supply shortage delays, and/or allow you to characterize such delays as "excusable." Sadly, a "constructive change" theory, discussed above, is unlikely to provide a remedy for tariff-related impacts.

A couple clauses to look out for:

EPAs. Contractors with Economic Price Adjustment (EPA) Clauses in their contracts have somewhat of a golden ticket, with some limited caveats. These clauses "provide[ ] for upward and downward revision of the stated contract price upon the occurrence of specified contingencies," and are of three different types:

1. Adjustments based on established prices. These price adjustments are based on increases or decreases from an agreed-upon level in published or otherwise established prices of specific items or the contract end items.

2. Adjustments based on actual costs of labor or material. These price adjustments are based on increases or decreases in specified costs of labor or material that the contractor actually experiences during contract performance.

3. Adjustments based on cost indexes of labor or material. These price adjustments are based on increases or decreases in labor or material cost standards or indexes that are specifically identified in the contract.

FAR 16.203. These clauses – FAR 52.216-2 Economic Price Adjustment-Standard Supplies, FAR 52.216-3 Economic Price Adjustment-Semistandard Supplies, FAR 52.216-4 Economic Price Adjustment-Labor and Material – can provide a mechanism for recovery if tariffs cause a price hike. Be aware, however, that there can be some big limitations in place, as well. For example, reviewing FAR 52.216-4, you will see:

- First, there are strict notice requirements (i.e., 60 days after the increase in "the rate of pay for labor (including fringe benefits)" or the increase "in unit prices for material shown in the Schedule").

- Second, the adjustment shall only apply to supplies or services that are delivered or performed after the adjustment. In other words, no retroactivity. That makes sense, though, because the CO is meant to promptly

negotiate an adjustment upon receipt of the notice of the change from the contractor. It therefore pays to get your notice in ASAP.

- Finally, there is a cap. "The aggregate of the increases in any contract unit price made under this clause shall not exceed 10 percent of the original unit price." (Though DoD contractors should be aware that they may have additional protections under the DFARS).

The biggest downside of the EPA, though, is that not a lot of contracts have it. For most of you, a review of your contact is unlikely to uncover an EPA provision. In the absence of this type of clause, you have to get creative and look for what other contract terms might be of assistance to you.

"Taxes" Clauses

- FAR 52.229-3 Federal, State, and Local Taxes. This clause might offer some relief to certain contractors. Pursuant to this clause, a contract price can be increased to cover an "after-imposed Federal tax", defined as "any new or increased Federal excise tax or duty…that the Contractor is required to pay or bear as a result of the…administrative action tacking effect after the contract date." (In this context, "contract date" means the date set for bid opening or, if this is a negotiated contract or a modification, the effective date of this contract or modification). This includes tariffs imposed after the contract date.

  To avail yourself of the benefits of this clause, you must act promptly to provide notice to your CO, and you will need to "warrant[ ] in writing that no amount for such newly imposed Federal excise tax or duty or rate increase was included in the contract price, as a contingency reserve or otherwise." Beware: Taxes imposed after bid/proposal submission but *before contract award* will not be considered newly imposed, especially in the construction context.

- 52.229-6 Taxes-Foreign Fixed-Price Contracts. For those of you performing services or supply contracts outside the US, you may be able to avail yourself of this clause, which is similar to 52.229-3, but applies in lieu of that clause when the contract involves furnishing supplies or performing services outside the US.

"Excusable Delay" / Default Clauses. These clauses won't compensate you for the increased costs you incur. But you may be able to invoke these clauses to avoid the blame for delays arising from tariff-related supply shortages. At the very least, that will prevent you from being terminated for default as a result of delays, if not get you days (if not dollars) added to your contract. As there are different excusable delay/default clauses for different kinds of contracts, this is another situation in which you need to look at *your* contact to see what clause is applicable to you.

Let's look at FAR 52.249-10(b) (for use in solicitations and contracts for fixed-price construction contracts over the simplified acquisition threshold), for example. It provides that a contractor cannot be terminated for default if "[t]he delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor." That includes, among other things "[a]cts of the Government in either its sovereign or contractual capacity." (Note, however, that a contractor needs to provide notice of a delay within 10 days of the beginning of the delay to take advantage of this safe harbor). Similar language is included in FAR 52.249-9(c) (solicitations and contracts for fixed-price research and development over the simplified acquisition threshold), FAR 52.249-8(c) (solicitations and contracts for fixed-price supply and service over the simplified acquisition threshold); FAR 52.212-4(f) (in solicitations and contracts for commercial products or commercial services); FAR 52.249-14(a) (in cost-reimbursement solicitations and contracts for supplies, services, construction and R&D, T&M contracts, and labor-hour contracts).

* * * * *

Moving forward, contractors should consider what they can do to lessen the impacts of these tariffs, including making changes to supply chains where possible, or decreasing reliance on certain products or materials, if at all feasible. Contractors should also review solicitations for upcoming target contracts very carefully. If you are interested in pursuing an opportunity but the solicitation does not include an EPA, raise the issue with the CO and/or source selection team – see if they will add one. Be aware that if the agency does not agree to add the

clause, you will not be able to invoke it and may be limited in your ability to recover in future. Make sure that all future bids/proposals take into account the new tariffs; do not count on getting modifications or adjustments later. Finally, conduct a detailed review of your subcontracts and think about what adjustments need to be made to protect you in this new environment.

VI. MISCELLANEOUS

In addition to the above, smart contractors should also consider the miscellaneous issues listed below, which may arise from the EOs and DOGE initiatives already in place, or arise due to future EOs or initiatives.

A. Subcontract Review and (if Possible) Proactive Modification

If you are a prime, now would be a good time to review your executed subcontracts to ensure that you have strong termination for convenience and suspension/stop-work order clauses. If not, it might be time to try and modify your subcontracts, or at least to start brainstorming with your legal team about what you might be able to do if you are suspended or terminated.

If you are a subcontractor, you should also be reviewing your subcontract terms – with a particular eye towards anything having to do with Changes, Suspensions, and Terminations – and preparing for what might be coming down the road.

Templates for future subcontracts should also be reviewed and – if necessary – modified, keeping in mind the new world we live in and the increased importance of having suspension and termination clauses that are as tight as can be. Tweak your dispute resolution provisions as needed as well.

B. Issues Relating to Federal Employee Layoffs

1. Impacts on Performance

Given the large number of government employees recently terminated from their jobs, it is entirely possible that agency layoffs could impact your ability to perform a contract. For example, you could arrive on-site at a federal facility only to find that there is no one there to let you in. Or massive layoffs at an agency could result in a logjam of agency work, thus delaying your security badging or the agency's responses to your RFIs, etc. Or a new CO, assigned to your project after your former CO's employment was terminated, could interpret the contract differently and direct you to proceed with performance in a manner or using means you did not plan on. To the extent you are forced to incur costs that you had not anticipated, or suffer delays or disruptions to your performance, you may have a basis for an REA or claim, separate and apart from any suspension or termination issues. Watch out for these things and consult with your legal team if they occur.

2. Ensuring Continuity/Confirming POC

Given that many government employees have been or may soon be terminated, contractors would be wise to be proactive about confirming the continued employment status of current POCs and, if there has been turnover, seeking out new POCs at contracting offices, the SBA, etc. Get phone numbers and emails for higher-ups if necessary. Reach out to see if there are alternate or backup POCs within the contracting office(s) relating to your contract(s). Don't be left without any clue as to whom to speak to about issues that arise on your contracts.

VII. KEY TAKEAWAYS

In conclusion, though we are living through uncertain times, there are FAR provisions and general precepts of government contracts law to help guide us through. Smart contractors will stay on top of new developments, maintain an open dialogue with their legal teams, and keep the following "best practices" in mind:

- Check emails and alerts several times a day.
- Act immediately if you receive a notice of suspension/stop-work order or a notice of termination.
- 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 and improper suggestions regarding "no-cost" settlements.
- If you are a prime, manage your subcontractors (i.e., suspend or terminate your subs) as appropriate, and in accordance with the terms of your subcontract, as soon as you receive any notice of suspension/stop-work order, or 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 suspensions and terminations, and keep an eye on your deadlines to seek suspension or termination costs.
- If you are not getting paid, and there is no relief on the horizon, file a claim.
- If federal employee layoffs are impacting your ability to perform, raise the issue and consider an REA or claim; segregate and track costs and provide appropriate notice.
- Be wary of signing modifications with waiver language.
- Be proactive! Stay informed! The McCarter & English team will continue to post about new legal developments as they occur.
- Seek legal assistance when you need it. You likely need it earlier than you think you do.
- And, last but not least – stay calm, preserve your energy, and act deliberately and with purpose to protect your company and ensure recovery of the monies owed to you. This is going to be a marathon, and not a sprint. But you can get through it!

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