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Legal Sidebar

Legal Mechanisms for Dealing with Changed Circumstances in Federal Contracting

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The federal government enters into hundreds of billions of dollars in contracts for the acquisition of goods and services every year. The complexity of these acquisitions run the gamut, ranging from the development of propulsion systems to support missions to Mars to the provision of housekeeping services and standard office supplies. Evolving national interests and unforeseen events such as natural disasters, acts of God, acts of war, cyberattacks, and changing executive priorities brought on by new presidential administrations can substantively alter federal acquisition priorities. For example, the COVID-19 pandemic and related mandates and recommendations (i.e., to practice social distancing, work from home, shelter in place, and self-quarantine) impacted government contracts by disrupting supply chains and business operations. These disruptions made it difficult or impossible for some contractors to perform government procurement contracts as originally contemplated and prompted the issuance of guidance on how contracting officers should manage contracts in light of the pandemic. Another example occurred when President Biden, in the first month of taking office, announced a change in policies regarding the security of the southern border of the United States. The policy change manifested in an initial pause and then a termination of some border wall construction contracts. Similarly, the decision to withdraw American troops and contractors from Afghanistan also likely prompted modified procurement priorities to address, for instance, a reduced need for or redeployment of contracted security services, food, and other services and supplies.

Federal procurement law is designed to provide agencies with the flexibility necessary to adapt to these and the innumerable other issues that might arise during the procurement contract lifecycle and impact federal acquisition priorities. Federal law often requires the incorporation in federal procurement contracts several standard clauses that provide legal mechanisms through which the government and contractors can adapt to changed circumstances and the government's evolving needs. This Legal Sidebar analyzes a selection of these clauses, specifically the Changes, Stop-Work Order, Excusable Delay, and Termination for Convenience clauses, and provides a few examples of how each could be applied in practice. Although these clauses can be used to address countless situations, the examples that follow involve three issues the government is currently addressing: border wall construction, the COVID-19 pandemic, and U.S. withdrawal from Afghanistan.

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Changes Clauses

Federal procurement contracts generally must include some variation of a Changes clause. These clauses authorize federal contracting officers to make unilateral changes "within the general scope of the contract" to address the government's changed needs. Federal law does not expressly define the phrase "within the general scope of the contract." Courts and contract boards of appeals generally have found that the phrase applies where the government requested changed work is not "so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for" and is similar enough to what was originally contracted that it could "hav[e] been fairly and reasonably within the contemplation of the parties when the contract was entered into." Each Changes clause specifies categories of changes that can be made, which can include "the method or manner of performance of work," the time or place of performance or delivery, the "[m]ethod of shipment or packing," and contract specifications. When warranted, the parties can negotiate an "equitable adjustment" to account for any reasonable increases or decreases in costs associated with the change. Like other situations in which a federal agency and contractor cannot settle an issue that arises within the context of contract administration, the federal Contracts Dispute Act and any applicable Disputes clause contained in the contract generally govern situations in which the parties cannot agree on an equitable adjustment.

For example, in response to the decision to withdraw troops from Afghanistan, the U.S. Marine Corps might have invoked applicable changes clauses to have contractors move or dispose of U.S. government equipment in contractor control or to shift contractor personnel who had been supporting military operations in Afghanistan to other work assignments.

Stop-Work Order Clauses

Stop-Work Order clauses authorize the suspension or delay of performance on a specific contract and are required in many non-construction contracts. (Fixed-price construction contracts generally must include a similar Suspension of Work clause.) Stop Work Order clauses permit agency personnel to require a 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 Stop-Work Order clauses are triggered, contractors generally have a right to an equitable adjustment of the contract to receive reasonable costs associated with halting and restarting the contract. When implementing stop-work orders, contractors also are generally required to "take all reasonable steps to minimize the incurrence of costs" to the government, which could force contractors to reassign employees to other projects, place employees on unpaid leave, or terminate employees, at least temporarily.

For instance, the United States Army Corps of Engineers, in response to President Biden's January 2021 proclamation ordering a "pause work on each construction project on the southern border wall," utilized Stop-Work Order clauses to halt performance of various contracts associated with the construction of barriers along the southern border while agencies assessed barrier construction plans in accordance with the President's directives.

Similarly, in response to the decision to suspend operations of the U.S. Embassy in Kabul after the withdrawal of troops from Afghanistan, the State Department might have issued stop work orders on contracts to provide support services to embassy personnel while the agency determines diplomatic operations moving forward and to provide time for assessing whether contract changes or terminations are in the government's best interest.

Excusable Delays Clauses

Federal law requires that many federal contracts include an Excusable Delay clause. These provisions provide contractors protections from default liability for delays triggered by "causes beyond the control

and without the fault or negligence of the Contractor." Triggering events can include "acts of God or of the public enemy," "unusually severe weather," "epidemics," "quarantine restrictions," and "acts of the Government in either its sovereign or contractual capacity." This clause potentially could authorize contractors who cannot perform work on time because of covered events more time to complete performance without suffering contractual consequences (such as payment of liquidated damages). The clause only offers schedule relief (i.e., more time to perform). It does not authorize cost relief.

In its guidance on contract management during the COVID-19 pandemic, for example, the Office of Management and Budget noted that excusable delay clauses could be used to provide flexibilities to contractors whose performance timelines slipped because employees were required to comply with pandemic-related quarantines.

It also is possible that the decrease in safety and security following the U.S military withdrawal from Afghanistan and the fall of the Afghan military and elected government to the Taliban could qualify as "acts of . . . the public enemy" or "acts of the Government in [] its sovereign . . . capacity" that would justify excusable delays in contract performance.

Termination for Convenience Clauses

Termination for convenience refers to the exercise of the government's right to require contractors to halt performance of all or part of the work stipulated by a contract before the contract's expiration "when it is in the Government's interest." Contracting officers have wide latitude to terminate a contract for the government's convenience.

The government's right to terminate contracts for convenience developed from Civil War-related statutes designed to allow the government to avoid unnecessary expenditures after cessation of hostilities. Although these wartime statutes and relevant contracts did not expressly authorize the government's right to terminate contracts, courts nonetheless concluded that agency termination actions were legally permitted and implicitly part of the contracts. Eventually, federal procurement regulations were put in place that generally require federal agencies to include express termination clauses in procurement contracts. A commonly required Termination for Convenience clause states:

> 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 Government shall be liable only for payment under the payment provisions of this contract for services rendered before the effective date of termination.

When a contracting officer notifies a contractor of a termination, the contractor must, among other things, immediately stop performing the terminated portion of the contract or inform the contracting officer of activities that cannot be immediately halted, and terminate any subcontracts related to the terminated work.

While exercising the right to terminate a contract for convenience allows the government to reduce waste associated with the purchase of supplies or services it no longer needs, its use generally does not absolve the government of all liabilities under the terminated contract. The government typically is liable to the contractor for costs, including reasonable profits, for the portion of the contract already performed, certain costs incurred in anticipation of performance, and costs associated with terminating the contract. The government's liability for terminating for convenience, however, is more limited than what would be applicable for breach of contract, as it generally does not cover anticipatory profits, costs of work not yet performed, or consequential damages.

Federal agencies have utilized the termination for convenience clauses to terminate several contracts for the construction of barriers along the southern border after President Biden's January 2021 proclamation ordered a pause in construction while relevant agencies "develop a plan for the redirection of funds

concerning the southern border wall, . . . includ[ing] consideration of terminating or repurposing contracts with private contractors engaged in wall construction."

The withdrawal of troops and suspension of embassy operations in Afghanistan also likely prompted contract terminations for supplies and services that the U.S. government no longer needed.

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