How State and Local Public Agencies May (or May Not) Terminate Construction Contracts

By Aaron P. Silberman

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This article discusses how state and local government agencies—such as state purchasing departments and departments of transportation, counties, cities, and special districts—may, or may not, terminate their construction contracts. As with many issues, the first place to look is the contract itself. State statutes and regulations and local charters, ordinances, and codes may provide additional rights or impose additional restrictions on the ability to terminate. Finally, common law and equity may impact a public agency's ability to terminate.

State and local agency construction contracts typically include termination provisions. They almost always include a provision that permits the agency to terminate the contract for cause (often referred to as a "termination for default"). Many also provide that the agency may terminate without cause (often referred to as a "termination for convenience"). Some also provide for cancellation, which is typically a termination without cause early in the project or for some specific, anticipated possible event (for example, a failure to obtain project funding or contractor bankruptcy).

Public agencies often use, or at least borrow from, the Federal Acquisition Regulation (FAR) standard termination clauses.[1] Most of the law on terminations of public contracts is concerned with the federal government's termination of prime contractors. Where there are no state law decisions that directly involve the termination of contractors by public agencies, state courts will likely find federal decisions persuasive.[2]

Common law and equity will limit the enforceability of some termination provisions. For example, terminations for default are considered forfeitures, to be avoided wherever possible.[3] Overly broad termination for convenience provisions may be considered illusory.[4] And equity will allow rescission under certain circumstances, regardless of what the contract provides.[5]

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Typical Contract Provisions

Terminations for Default

State and local agency construction contracts typically permit the agency to terminate a contract based on the contractor's default,[6] and many also provide for termination based on the occurrence of specified contingencies, such as contractor bankruptcy or insolvency.[7]

A typical default termination clause will provide that the agency may terminate on a specified number of days' written notice if the contractor (1) repeatedly refuses or fails to supply sufficient skilled workers or materials; (2) fails to pay its subcontractors; (3) violates applicable laws; or (4) substantially breaches the contract documents, including failing to meet the schedule or comply with specifications.[8] The agency typically may also exclude the contractor from the site; take possession of all materials, equipment, tools, and equipment and machinery owned by the contractor; accept assignment of any subcontracts that it desires to keep;[9] and finish the work by whatever reasonable method it deems expedient.[10]

When a contract is terminated for default, the agency may be entitled to recover from the contractor a variety of damages resulting from the contractor's failure to perform its contractual obligations. These include excess reprocurement costs, delay damages, and unliquidated progress payments, among others.[11] Moreover, the contractor may also incur poor performance evaluations and negative responsibility determinations that may affect the contractor's ability to obtain additional work in the future, not to mention litigation costs in defending against the government's decision to terminate.

The agency may withhold sufficient amounts to protect itself from loss due to its costs to complete performance. If the government's cost to complete the procurement is less than the outstanding contract balance with the terminated contractor, then the contractor will be entitled to payment of the remaining amount; if the costs of finishing the work exceed the unpaid balance, then the contractor must pay the difference to the agency.[12]

Terminations for Convenience

Many state and local agency contracts also permit public agencies to terminate a contract for convenience.[13] Where a contract so provides, the public agency typically must provide specified written notice of the termination for convenience to the contractor.[14] If it does, the contractor has several important obligations. The most important among these obligations are to stop work and notify all

subcontractors that the agency has terminated the prime contract and to instruct the subcontractors to stop work, protect and preserve work-in-progress, terminate existing lower-tier subcontracts and supply orders, and not enter into any new subcontracts or orders for the project.[15]

The contractor, under a typical provision, will be entitled to some form of recovery if the agency terminates the prime contract. The contract will typically provide a deadline for the terminated contractor to submit claims for reimbursement in accordance with the termination provisions. Among the costs the contractor typically may recover are its pre-termination performance costs and settlement expenses, which typically will include post-termination costs incurred in terminating and settling its subcontracts.[16]

Public Agency's Right to Terminate the Contractor

Terminations for Default

Typical default termination language will allow the public agency to terminate based on a material breach by the contractor and a failure to cure that breach within a specified time period after notice is given by the public agency. Some state and local agency contracts also allow termination for specific breaches, such as failures to acquire required insurance or bonds and contractor bankruptcy.

Material Breach Requirement

A material breach is generally required before the agency may terminate a contract for default.[17] The types of material breaches that may warrant a default termination are sometimes, but not always, set forth in the default clause. While some courts will not permit a default termination for any reason that is not specified in the contract clause,[18] the more common approach is to allow default termination for any material breach.[19] The clause may, for example, include as material breaches defective or nonconforming work, failure to pay subcontractors or suppliers, or violation of applicable law. Additional material breaches that commonly result in default terminations include anticipatory repudiation[20] and abandonment of the contract.[21] State courts may consider the following five factors to determine whether a breach is material: (1) the amount of the benefit lost to the injured party, (2) the adequacy of compensation to the injured party, (3) the amount of forfeiture by the breaching party, (4) the likelihood that the breaching party will cure, and (5) the breaching party's good faith.[22]

Notice and Opportunity to Cure Requirement

In many situations, as a condition to a default termination, the agency must provide the contractor with a cure notice. State courts will typically require strict compliance with such notice requirements.[23] Failure to provide notice and a cure period may itself be a material breach by the agency.[24] Where the agency provides the notice, and the contractor takes sufficient, timely action to cure, the agency may not terminate for default.[25]

Challenges to Default Termination: Standard to Justify; Default as Forfeiture

A default involves very serious consequences for a contractor. For example, a default may exclude the contractor from the competition for the reprocurement contract, and terminations for default on prior similar contracts may be considered in assessing past performance or responsibility on future procurements. Therefore, state courts should adhere to the principle, oft stated in federal contract termination decisions, that a default termination is a drastic sanction akin to a forfeiture, which imposes on a prime contractor strict accountability for its actions. Due to the serious implications of a default termination, the agency in most instances has the burden of sustaining its contention that the prime contractor was materially out of compliance with the contract requirements. There are exceptions to this general policy, such as the prime contractor's burden of showing that its untimely performance was attributable to excusable delay. State courts will typically place the burden of proof on the party alleging a breach, which would typically be the defaulted contractor seeking recompense for its termination.[26] Only if a public agency counterclaims would it then bear the burden of proving that the contractor was at fault.[27] However, the general concept of a termination for default as a forfeiture is an important foundation in examining the rights of the public agency and the contractor with respect to termination for default.

Bases for Default

Under typical clauses, state and local agencies will have the right to terminate for default on the following bases:

Failure to Meet Schedule Deadline. For federal contracts, if the government can show that the contractor failed to deliver or to perform services in the time specified, then it may terminate without issuing a ten-day cure notice or giving a contractor the opportunity to cure under the Default clause.[28] Other contracts often contain similar provisions.[29]

Failure to Meet Specifications. For federal contracts, absent unusual facts and circumstances, the government is entitled to insist on strict compliance with all contract provisions.[30] Such provisions are less common, but not unheard of, in nonfederal government contracts.[31]

Failure to Make Progress. A contractor's failure to make progress is a separate basis for default and may occur when the contractor fails to progress satisfactorily toward the completion of performance, despite the fact that the final performance date has not yet arrived.[32] Cases involving failure to make progress generally fall into two categories: (1) the contractor is so far behind schedule that timely completion is unlikely or (2) there is a failure to make progress because of defective work.[33] When addressing an allegation of failure to make progress, the question has traditionally been whether or not the contractor's performance has progressed in such a way as to permit the contractor to meet the end-item delivery date. In this

circumstance, the government has the burden of demonstrating that the contractor had no reasonable likelihood of completing the work by the contract date. Typically, a cure notice is required before termination is allowed.

Failure to Meet Other Contract Requirements. Under federal law, in addition to providing for default for failure to make progress or failure to meet specifications, the default clause provides the government with the right to terminate the contract in whole or in part for the failure to perform any other provision of the contract that is not cured after due notice.[34] As with a termination for failure to make progress, a cure notice is required for a default termination based on failure to perform other provisions of the contract.[35] Such a provision is less common in nonfederal contracts. Some courts have held, however, that even in the absence of such a provision, a default termination may be justified where the contractor's breach is sufficiently material.[36]

Anticipatory Breach. A termination for anticipatory breach or repudiation of the contract has traditionally been found to exist in two situations: (1) where it is evident from the circumstances that the contractor is unable to perform although willing to do so or (2) where a contractor makes a positive, definite, unconditional, and unequivocal statement, before contract performance is due, that it will not perform in accordance with the contract's terms.[37]

Abandonment. Abandonment occurs when the contractor simply performs no further work on the contract but does not state its reasons for doing so.[38] In cases of true abandonment, a default termination may be valid even without a cure notice. Whether there has been an abandonment of performance depends upon the totality of the contractor's conduct.

Contractor Defenses; Excusable Delay

When there is a default termination, the contractor may be able to assert the defense of "excusable delay." A delay is typically excusable where it is caused either by the agency or its agents or by forces not within either the agency's or the contractor's control, for example, force majeure.

A delay is generally not excusable where it is caused by one of the contractor's subcontractors or suppliers. This is so because the prime contractor is generally responsible to the agency for the conduct of its subcontractors and suppliers.[39] As a consequence, the agency may choose to terminate a prime contractor for default even where the basis for the termination lies solely with a subcontractor or supplier. *Hutton Construction Co. v. City of Coffeyville*, while not a termination case, is instructive.[40] There, the plaintiff contractor sued the defendant city under Kansas law to obtain the unpaid amount of a contract to construct a power line and a fiber-optic line. After a jury trial, the district court ordered the city to pay the contractor $24,659.47—the retainage of $110,159.47 minus $85,500 in liquidated damages to which the city was entitled. On appeal, the contractor unsuccessfully challenged the district court's rejection of the contractor's contention that it should have been excused for all delays caused by its suppliers or subcontractors, at least when those delays arose without its fault and were beyond its control. The court ruled that the contractor was responsible to the city for its supplier's delays when those delays were not themselves excused by a force majeure.[41] These same principles would apply in a termination for default based on a prime contractor's failure to deliver on schedule or failure to make progress—i.e., that the prime's delays were caused by one of its subcontractors or suppliers would not render its termination improper.

This rule was applied to a state agency default termination in *Excell Construction, Inc. v. Michigan State University Board of Trustees*.[42] In that case, the defendant university awarded the plaintiff general contractor a construction contract for defendant's Swine Teaching and Research Center. After the university terminated the contractor for failure to meet the contract schedule, the contractor sued for breach of contract, claiming the termination was improper. The trial court granted the university summary judgment, finding that the contract was terminated because of undisputed delays that were the result of the contractor's failure to coordinate and adequately manage its subcontractors. The appellate court affirmed.

An issue that sometimes arises is whether an agency, where it designates a particular subcontractor or supplier as a sole source, necessarily warrants the performance by that subcontractor, such that the failure of that subcontractor to perform will not serve as a ground for terminating the prime contractor. State courts have generally declined to shift responsibility for subcontractor performance from the prime contractor to the agency simply because the latter directed use of that particular subcontractor.[43] For example, in *Barham Construction, Inc. v. City of Riverbank*, Barham, a general contractor, sued the city to recover the balance due on a contract for the construction of a skate park. The city had withheld certain amounts from its payments to Barham as liquidated damages for delays in completion of the project. After trial, judgment was entered in favor of Barham on its complaint against the city. The appellate court reversed and remanded that judgment, in part because it disagreed with the trial court's conclusion that the city was responsible for delays caused by a bathroom supplier that it specified in the contract.[44] This rule, applied to a default termination, would mean that, where a sole-source subcontractor or supplier causes the prime contractor's default, the agency may terminate for default under a typical termination clause, even though the agency specified that sole-source subcontractor or supplier.

Contractor Defenses; Waiver of Schedule Deadline

Another defense to a default termination is that the public agency elected to waive the delivery date, permitting a contractor to continue with performance despite the fact

that the contractor will not be able to deliver on time. If subsequently terminated for default, the contractor may then raise such a waiver as a defense if it can demonstrate that it relied on the agency's election and actually continued to perform. Once waived, the right of the agency to terminate for default can only be revived by establishing a new delivery schedule.[45]

For example, in *State of California v. Lockheed Martin IMS*, the court rejected the state's contention that "the referee erred in finding the cure notice waived past [delays]" because "the cure notice did not include an express waiver as required by the terms of the deadlines contract." Instead, the court agreed with the referee's adoption of Lockheed's contention that "the plain language of the cure notice constitutes a waiver of past delays."[46] It found that, despite the absence of the term "waive" in the state's cure notice, the notice indicated the state's clear intent to waive past deadlines because it promised that the state would proceed with the contract if Lockheed "cured the correctable deficiencies within the specified time and provided adequate assurances of its future ability to perform." Because a past deadline is a past event that cannot be corrected and the state did not reserve the right to terminate the contract for past delays, the cure notice was "a conditional waiver that clearly expressed the State's intention to go forward with the contract and forgive past deadlines if [Lockheed] met the specified conditions." Lockheed was entitled to rely, and did rely, on the state's promise to proceed, and "the State waived any breaches by [Lockheed] involving previously missed deadlines."[47]

Contractor Defenses; Impossibility

Where the contract specifications are impossible to perform, delay caused by that impossibility will be excused, and the contractor even has a right to stop work. Default termination by the agency under these circumstances would be improper and a breach of contract. That said, impossibility is an affirmative defense and is very difficult for a contractor to prove. For a contractor to prove impossibility, so that its failure to perform under the contract is excused, it must prove that the industry as a whole would find the specifications impossible to meet.[48]

When a contractor points out a specification deficiency, the agency has the obligation to give the contractor proper direction and correct any deficiencies, rather than terminate the contract. If a contractor discovers a defective specification, it may not suspend work unless and until it promptly gives notice of the perceived defect to the agency. Suspending work without providing this notice may justify a default termination, even where the contractor can show the suspension was caused by a defect in the agency's specification.

Contractor Defenses; Substantial Completion

Contractors may also avoid default when they have substantially completed the required work.[49] To determine whether substantial completion has been reached, a court will examine both (1) the quantity of work left to be done and (2) the extent to which the "unfinished" project is capable of serving its intended use.

In order to rely on a substantial completion defense, a contractor must first show that the work performed is near total completion. Although no fixed percentages can be relied on with confidence, substantial completion will not be found where large portions of work remain unfinished. In addition, even where a high percentage of the work has been accomplished, substantial completion will not be found if a project cannot be put to its intended use.

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For example, in *Norberto & Sons, Inc. v. County of Nassau*, a general contractor had been awarded a contract by the county government to renovate and construct a public swimming pool. The general contractor hired a subcontractor to perform some work. Under the subcontract, the subcontractor was to furnish all material, labor, equipment, plant, and services to construct new pools and renovate existing pools at a facility. By letter, the general contractor declared the subcontractor in default of the contract. As a result, the subcontractor filed an action to recover the balance it alleged it was due under the subcontract. The court found that the subcontractor had substantially performed its obligations under the subcontract, and, as such, the general contractor improperly declared the subcontractor in default and terminated the subcontractor from the job. An engineer from the county testified that, at the time the subcontractor was declared in default, 95 percent of the work required under the subcontract had been completed. Because the general contractor breached the subcontract, it was not entitled to liquidated damages.[50]

Once found, substantial completion does not operate to discharge all subsequent obligations of the contractor. If the contractor is ordered to complete or correct work that is practical to perform, and if it fails to do so, the agency may terminate for default, assess costs of completion, or reduce the contract price through equitable adjustment.

Terminations for Convenience

Many state and local agency construction contracts also allow the public agency to terminate for convenience.

These provisions will generally be enforced.[51] Where such clauses are not included, the courts generally will not imply a convenience termination right.[52] Convenience termination provisions are more variable than those for default and often depend on the agency and type of project.

Some challenges of convenience terminations have succeeded under state law, even where a bad faith standard is applied.

Limitations on Ability to Terminate for Convenience

Most convenience termination clauses give public agencies extremely broad rights to terminate.[53] But even under the broadest of provisions, there are limitations on the agency's ability to terminate without cause. Most jurisdictions prohibit convenience terminations made in bad faith or clear abuse of discretion.[54] This limitation is very narrow and difficult to prove, such that contractor challenges of convenience terminations are rarely successful. For example, in *Vila & Son Landscaping Corp. v. Posen Construction, Inc.*, the court held that a contractor may terminate a subcontract for convenience in order to enter into another subcontract with a different subcontractor at a lower price, finding that such a termination does not constitute bad faith. The court rejected the subcontractor's argument that interpreting the prime's termination rights so broadly would render the subcontract illusory, holding that the prime provided valid consideration because it was bound by the termination for convenience provision's written notice requirement.[55]

In *Handi-Van, Inc. v. Broward County*, a Florida court of appeal noted that a public entity's discretion to terminate for convenience, where its contract so allows, is even broader where the contract's convenience termination clause was not required by law.[56] This case, decided under Florida law, provides a good discussion of the history of convenience terminations and federal decisions on improper terminations from *Colonial Metals Co. v. United States*,[57] to *Torncello v. United States*,[58] to *Krygoski Construction Co., Inc. v. United States.*[59] In *Handi-Van*, the court affirmed summary judgment for the county in the contractors' challenge of the terminations for convenience of their paratransit services contracts.[60] The court stated that federal case law was inapposite because, unlike federal procurement contracts in which the FAR requires inclusion of a termination for convenience clause, county rules did not require such a clause in the contracts at issue.[61] As such, the parties were free to negotiate whether to include a termination for convenience clause, and, having agreed to one, it was not for the court to undo the bargain struck. The court also held that the termination for convenience clause was not illusory because it contained a notice requirement.[62] Finally, even if federal law were applied, the termination passed muster: changed circumstances are not required (and in any event were present), and there was no evidence of bad faith, which the court equated to intent to injure the terminated contractors.[63]

Some challenges of convenience terminations have succeeded under state law, even where a bad faith standard is applied. For example, in *Questar Builders, Inc. v. CB Flooring, LLC*, a general contractor terminated its carpeting installer for convenience before it started work at the project based on changes to the interior design plans and the subcontractor's proposed change order increasing the contract price by an amount the prime considered excessive. The prime terminated and obtained the work from a substitute subcontractor at a lower price. The terminated subcontractor sued for wrongful termination, prevailed at trial, and was awarded its expectation damages. On appeal, the appellate court held that an implied obligation of good faith and fair dealing limits a terminating party's discretion to terminate for convenience and affirmed the trial court's finding that the prime breached this obligation.[64]

Other courts have been more restrictive regarding the ability to terminate for convenience, requiring a change in circumstances to justify termination.[65] For example, in *Ram Engineering & Construction, Inc. v. University of Louisville*, a protest had challenged award to Ram of the contract for site preparation for construction of a football stadium. The university and the protester entered into a stipulated dismissal of the protest that called for the project to be rebid, and Ram's contract was terminated for convenience. On rebid, Ram again won and then sued for the difference between its original price and its revised lower price in the resolicitation. The Kentucky Supreme Court held that summary judgment for the university was improper. Since a contract issued under the Kentucky Model Procurement Code was subject to the obligation of both parties to perform the contract in good faith, a convenience termination could only be justified by a change in circumstances and that the stipulated dismissal did not qualify as such a change.[66]

Terminations for Convenience by Operation of Law

In addition to terminations for convenience following formal written notice, a convenience termination may arise by operation of law where a court converts an erroneous default termination. State and local agency construction contracts sometimes expressly provide that, where the agency improperly terminates a contractor for default, that termination will be converted to one for convenience.[67] *R&J Construction Corp. v. E.W. Howell Co., Inc.*, although it involved termination of a subcontract,

is illustrative. In that case, the terminated subcontract provided that, if the prime "wrongfully" terminated for default, its liability to the subcontractor would be the same as it would be had the prime terminated for convenience.[68] The court enforced that provision.[69]

Some courts have implied a termination conversion provision in state and local agency construction contracts.[70] Others have done so for subcontracts based on an express provision to that effect in the prime contract and on the prime's ability to terminate for convenience. In *Rogerson Aircraft Corp. v. Fairchild Industries, Inc.*, however, the court held that, because the default termination clause contained in a subcontract did not provide for the automatic conversion of an improper default termination to one for convenience, the subcontract's convenience termination clause did not apply, and, as a result, a subcontractor was entitled to breach of contract damages for an improper termination for default.[71]

Termination Procedures

While some state and local agency construction contracts provide procedures for how and when the prime contractor may terminate for convenience, they do not typically provide the same level of detail as do federal procurement contracts. Most require the public agency to give some kind of notice to the contractor. If they follow the federal government model, they will require the notice to state whether any portion of the contract is to be continued, provide the effective date of the termination, and instruct the contractor to (1) stop all work, (2) terminate subcontractors, and (3) place no further orders except those necessary to perform any unterminated portion of the contract.[72]

Contractor Recovery from the Public Agency

Once the agency has effectively noticed the termination for convenience of the contract, the parties must determine the recovery to which the contractor is entitled, if any. If the contractor has not incurred costs pertaining to the terminated portion of the contract or agrees to waive its costs, and if no costs are due the agency under the contract, then the parties may execute a no-cost settlement agreement.

More commonly, a termination for convenience will entitle the contractor to a monetary recovery. The typical procedure for achieving this recovery is that the contractor will prepare and submit a termination settlement proposal to the public agency, and the parties will then attempt to negotiate a settlement. If successful, the parties will enter into a settlement agreement and close out the contract. If not, the agency will pay the contractor what the agency determines to be due under the contract convenience termination provision, if anything, and the contractor will either accept that determination and payment or sue for breach of the contract.

Most state and local agency construction contract clauses for termination for convenience provide that, in the event of such a termination, the contractor is entitled to the following: (1) payment at the contract price for completed or accepted work as of the termination; (2) costs incurred for work-in-progress at termination, plus a reasonable profit (or loss) on that work; and (3) settlement expenses.[73] They typically preclude recovery of anticipated profits on the unexecuted, i.e., terminated, work.[74] Some clauses provide for different or more limited contractor recovery.[75]

The most complicated element of a contractor's recovery, and often the most significant, is its costs incurred for work-in-progress at termination, plus a reasonable profit (or loss) on that work. The costs, under certain circumstances, may include performance costs incurred prior to the notice to proceed or even the effective date of the contract.[76] All credits to the public agency, such as pretermination progress payments and disposal credits, must be deducted.[77] The agency also may be able to deduct costs it has incurred due to breaches by the contractor.

The contractor also may incur post-termination costs to which the contractor necessarily committed itself but that, due to the termination, it is prevented from absorbing through payments under the contract. Examples include (1) costs continuing after termination, (2) loss of useful value of special equipment, and (3) rental cost under unexpired leases. Each of these costs arises out of commitments necessary to perform the contract. These costs generally will be recoverable under most convenience termination clauses.

An express or implied term of the contract convenience termination provision is that the contractor has a duty to mitigate its costs.[78] This requires the contractor to act quickly and diligently to stop work, cancel orders, and terminate its subcontracts and equipment leases. It also requires the contractor to dispose of its "termination inventory," such as unused materials and equipment and work-in-progress, so as to minimize the costs it passes on to the public agency as part of its termination claim. If the contractor fails to meet any of these obligations, the agency will be entitled to reduce its settlement payment by deducting the claimed costs that it can prove the contractor would not have incurred had it done so.

Some state and local agency contract clauses will cap or otherwise limit the contractor's recovery for a convenience termination. For example, many contracts, including those adopting federal requirements, do not allow the contractor's termination recovery to exceed the total contract value or to include consequential damages.[79] Such provisions are generally enforced, unless they are not sufficiently specific.[80]

Some courts have refused to apply to subcontracts the recovery limitations in the prime contract based on general flow-down provisions; rather, they will only do so where the subcontract specifically incorporates those limitations. For example, in *Encon Utah, LLC v. Fluor Ames Kraemer, LLC*, a subcontract incorporated prime contract terms "as applicable to the Scope-of-Work" of the subcontractor.

The prime terminated the subcontractor for convenience and sought to limit the subcontractor's recovery to "the value of work performed" as provided in the prime contract terms. The court rejected the prime's argument, finding that the prime contract termination clause was not applicable to the subcontractor's scope of work and holding that the subcontractor's recovery would be determined by the convenience termination clause in the subcontract. That clause did not limit recovery to the value of work performed; rather, it allowed the subcontractor to recover "the actual costs of all such Work satisfactorily executed to the date of termination, plus an allowance for reasonable overhead and profit on such costs incurred prior to termination (but not to exceed a pro rata portion of such Contract Price for such Work based on the percentage of Work properly completed to the date of termination), together with reasonable costs." The court interpreted this to apply the pro-rata limitation only to overhead and profit and not to direct costs incurred.[81]

Most state and local agency contract termination for convenience provisions entitle the terminated contractor to recover its reasonable settlement expenses. These may include the following: (1) accounting, legal, clerical, and similar costs reasonably necessary for preparation and presentation of settlement claims and the termination and settlement of subcontracts; (2) reasonable costs for the storage, transportation, protection, and disposition of termination inventory; and (3) indirect costs related to salary and wages incurred as settlement expenses.

Finally, the prime must take reasonable steps to ensure that its termination claim is true and correct before submitting it to the agency. In many states, if the contractor includes amounts in its termination settlement proposal to which it is not entitled, it may be liable under false claims laws.[82]

Conclusion

As with any state and local agency contracting issue, the law of terminations will vary by jurisdiction, locality, and even agency. State and local public contracts almost always contain default termination provisions and are much more commonly including convenience termination provisions as well. Typical contract clauses vary somewhat for terminations for default, much more so for terminations for convenience. In all cases, counsel should look both to the contract itself and to applicable law, regulation, and agency policy. Often, counsel will find little or no law in the applicable jurisdiction and so should look to law on analogous subjects (such as material breach, forfeiture, and equity) and terminations law from other jurisdictions, including federal common law.

Despite the variation, several common themes exist. As with default terminations of federal government contracts, state and local public contracts typically require agencies to provide pre-termination notices, with opportunities to cure, for most types of default, and the burden on the agency to justify any default termination is high. Where it validly terminates, the agency will be entitled to recover its cost of cover (i.e., its excess re-procurement costs). For convenience terminations, typical provisions give the agency extremely broad discretion to terminate, and the burden on the contractor to overturn a termination is extremely high. Contractor recovery usually, but not always, consists of payment at the contract price for completed work, pre-termination costs plus a reasonable profit (or less any loss), and post-termination costs to close out the contract (and subcontracts) and settle the termination; the contractor rarely gets to recover its anticipated profit on the terminated work.

Endnotes

1. FAR 52.249-1 through 52.249-12 (48 C.F.R. pt. 52).

2. *See, e.g.*, TRG Constr., Inc. v. Dist. of Columbia Water & Sewer Auth., 70 A.3d 1164, 1167 (D.C. Ct. App. 2013); Linan-Faye Constr. Co., Inc. v. Hous. Auth. of City of Camden, 49 F.3d 915 (3d Cir. 1995); Pac. Architects Collaborative v. State of California, 100 Cal. App. 3d 110, 125 (1979) ("We are strongly persuaded by decisions relating to federal procurement bidding.").

3. Lisbon Contractors, Inc. v. United States, 828 F.2d 759, 765 (Fed. Cir. 1987); B.V. Constr., Inc., ASBCA Nos. 47766 et al., 2004-1 B.C.A. (CCH) ¶ 32,604, at 161,350. The scope of this rule is being tested in a pending appeal in California. Cal. Dep't of Water Res. v. Whitaker Contractors, Inc., Cal. Ct. App. No. C069248, 3d App. Dist. (filed Sept. 16, 2011).

4. Questar Builders, Inc. v. CB Flooring, LLC, 978 A.2d 651 (Md. 2009); distinguished by SAK & Assocs., Inc. v. Ferguson Constr., Inc., 189 Wn. App. 405, 413–14 (2015).

5. *See, e.g.*, Tolboe Constr. Co. v. Staker Paving & Constr. Co., 682 P.2d 843, 847 (Utah 1984); Lakeside Pump & Equip., Inc. v. Austin Constr. Co., 576 P.2d 392, 396–97 (Wash. 1978).

6. *See, e.g.*, California, General Provisions—Information Technology, Form GSPD-401IT, ¶ 23 [hereinafter Cal. GPIT], *available at* http://tinyurl.com/l32thk6; Me. Dep't of Transp., Standard Specifications for Highways and Bridges, General Conditions, §§ 112.1.1, 112.1.2, 12.2.1 (Jan. 2001) [hereinafter MDOT Standard Specifications]; State of Maine, Standard General Conditions and Contract Work on State Projects, art. 22 (Nov. 22, 1993) [hereinafter Me. Standard Gen. Conditions]; *see also* ABA 2000 Model Procurement Code for State and Local Governments §§ 5-401(3)(c), 6-101(3)(c) [hereinafter ABA 2000 MPC].

7. *See, e.g.*, MDOT Standard Specifications, *supra* note 6, § 112.1.1; Me. Standard Gen. Conditions, *supra* note 6, art. 22.

8. *See, e.g.*, Cal. GPIT, *supra* note 6, ¶ 23(a), (b); MDOT Standard Specifications, *supra* note 6, §§ 112.1.1, 112.1.2, 12.2.1; Me. Standard Gen. Conditions, *supra* note 6, art. 22.

9. *See, e.g.*, Bolt Elec., Inc. v. City of New York, 53 F.3d 465 (2d Cir. 1995).

10. *See, e.g.*, Cal. GPIT, *supra* note 6, ¶ 23(d); MDOT Standard Specifications, *supra* note 6, §§ 112.1.2, 112.2.1; Me. Standard Gen. Conditions, *supra* note 6, art. 22.

11. *See, e.g.*, Cal. GPIT, *supra* note 6, ¶ 23(c); MDOT Standard Specifications, *supra* note 6, § 112.2.1; Me. Standard Gen. Conditions, *supra* note 6, art. 22.

12. *See, e.g.*, Cal. GPIT, *supra* note 6, ¶ 23(e).

13. *See, e.g.*, *id.* ¶ 22; MDOT Standard Specifications, *supra* note 6, § 112.2.2; *see also* ABA 2000 MPC, *supra* note 6, §§ 5-401(3)(d), 6-101(3)(d).

14. *See, e.g.,* Cal. GPIT, *supra* note 6, ¶ 22(a); MDOT Standard Specifications, *supra* note 6, § 112.2.2.

15. *See, e.g.*, Cal. GPIT, *supra* note 6, ¶ 22(b).

16. *See, e.g.*, *id.* ¶ 22(c), (d); MDOT Standard Specifications,

(Continued on page 41)

the amount of subcontractor costs sought and to assess whether, based on the information then in possession of the contractor, the claim "accurately reflects the contract adjustment for which the contractor believes the government is liable." The court held that the certification at issue was deficient because the prime failed to include any representation to the effect that it had no reason to believe that subcontractor's figures were not correct or that there was a "good ground" for the subcontractor's claim. The court stated, "To the contrary, [the prime] could not have made such a representation because it had not yet examined [the subcontractor's] proposal and without such an examination, [the prime] could not yet have determined whether its claim for reimbursement 'accurately reflects [subcontractor's costs] for which [the prime] believes the government is liable.'"

71. Gulf Grp. Gen. Enters. Co. W.L.L. v. United States, 114 Fed. Cl. 258, 316 (2013).

72. 25 F.3d at 1010–11 (even though the prime contractor believed the subcontractor's $1.9 million claim was worth only $44,000, the contractor certified the claim in good faith, in part because the CDA obligated the contractor to certify the claim under threat of suit for damages from the subcontractor).

73. *Id*.

74. *Id*.

75. 31 U.S.C. §§ 3729–33.

76. *Id*.

77. 31 U.S.C. § 3729(a)(1)(A)–(B).

78. *See* United States *ex rel*. Conner v. Salina Reg'l Health Ctr., Inc., 543 F.3d 1211, 1217 (10th Cir. 2008).

79. 31 U.S.C. § 3729(b); *see, e.g.*, United States *ex rel*. Wilson v. Kellogg Brown & Root, Inc., 525 F.3d 370, 376 (4th Cir. 2008); United States *ex rel*. Harrison v. Westinghouse Savannah River Co., 352 F.3d 908, 913, 917–18 (4th Cir. 2008).

80. United States v. McCarty Corporation et al., No. 5:13-cv-00409 (E.D.N.C. dismissed June 6, 2013).

81. 31 U.S.C. § 3729(a)(1)(A)–(B). *See* Tanner v. United States, 483 U.S. 107, 129 (1987) (noting prior cases in which the Court "recognized that the fact that a false claim passes through the hands of a third party on its way from the claimant to the United States does not release the claimant from culpability under the Act"); United States v. Bornstein, 423 U.S. 303, 309 (1976) (noting that the FCA "gives the United States a cause of action against a subcontractor who causes a prime contractor to submit a false claim to the Government").

82. *Tanner*, 483 U.S. at 130.

Terminations

(Continued from page 22)

supra note 6, § 112.2.2.

17. *See, e.g.*, Cal. GPIT, *supra* note 6, ¶ 23(b) ("The State's right to terminate this Contract under sub-section a) above, may be exercised if the failure constitutes a *material breach* of this Contract. . . . ") (emphasis added).

18. *See, e.g.*, Cnty. of La Paz v. Yakima Compost Co., Inc., 233 P.3d 1169, 1180–81 (Ariz. Ct. App. 2010).

19. *See, e.g.*, Pettinelli Elec. Co., Inc. v. Bd. of Educ. of City of New York, 391 N.Y.S.2d 118, *order aff'd*, 401 N.Y.S.2d 1011 (1977).

20. *See, e.g.,* Mometal Structures, Inc. v. T.A. Ahern Contractors Corp., 2013 WL 764717 (E.D.N.Y. Feb. 28, 2013) (applying New York law).

21. *See, e.g.*, BloomSouth Flooring Corp. v. Boys' & Girls' Club of Taunton, Inc., 800 N.E.2d 1038 (Mass. 2003).

22. *See, e.g.*, L.L. Lewis Constr., L.L.C. v. Adrian, 142 S.W.3d 255, 260 (Mo. Ct. App. 2004).

23. *See, e.g.*, Allstate Contractors, Inc. v. Marriott Corp., 652 N.E.2d 1113, 1119 (Ill. App. Ct. 1st Dist. 1995).

24. McClain v. Kimbrough Constr. Co., Inc., 806 S.W.2d 194, 198–99 (Tenn. Ct. App. 1990).

25. Cnty. of La Paz v. Yakima Compost Co., Inc., 233 P.3d 1169, 1179–81 (Ariz. Ct. App. 2010).

26. *See, e.g.*, Collins/Snoops Assocs., Inc. v. CJF, LLC, 988 A.2d 49, 57–58 (Md. App. 2010).

27. *Id.*

28. FAR 52.249-8(a)(1)(i).

29. *See, e.g.*, Excell Constr., Inc. v. Mich. State Univ. Bd. of Trs., 2003 Mich. App. LEXIS 59 (Mich. Ct. App. Jan. 14, 2003).

30. FAR 52.249-8(a)(1)(i); Dimarco Corp., ASBCA No. 29870, 87-1 B.C.A. (CCH) ¶ 19,456; R.B. Wright Constr. Co. v. United States, 919 F.2d 1569 (Fed. Cir. 1990), *aff'g* R.B. Wright Constr. Co., ASBCA No. 31967 et al., 90-1 B.C.A. (CCH) ¶ 22,364.

31. *See, e.g.,* Cal. GPIT, *supra* note 6.

32. FAR 52.249-8(a)(1)(ii).

33. Hannon Elec. Co. v. United States, 31 Fed. Cl. 135, 143 (1994); Cal. Dep't of Water Res. v. Whitaker Contractors, Inc., Cal. Ct. App. No. C069248, 3d App. Dist. (filed Sept. 16, 2011).

34. FAR 52.249-8(a)(1)(iii).

35. Paine, ASBCA No. 41273, 95-2 B.C.A. (CCH) ¶ 27,896.

36. Pettinelli Elec. Co., Inc. v. Bd. of Educ. of City of New York, 391 N.Y.S.2d 118, *order aff'd*, 401 N.Y.S.2d 1011 (1977).

37. Mometal Structures, Inc. v. T.A. Ahern Contractors Corp., 2013 WL 764717 (E.D.N.Y. Feb. 28, 2013).

38. *See, e.g.*, BloomSouth Flooring Corp. v. Boys' & Girls' Club of Taunton, Inc., 800 N.E.2d 1038 (Mass. 2003).

39. *See, e.g.*, Cont'l Mach. Tool Co., Inc. v. Aircraft Welding & Mfg. Co., Inc., 1996 Conn. Super. LEXIS 2015, at *9–10 (Conn. Super. Ct. July 24, 1996); Hutton Contracting Co., Inc. v. City of Coffeyville, 487 F.3d 772, 779 (10th Cir. 2007).

40. 487 F.3d 772.

41. *Id.*

42. 2003 Mich. App. LEXIS 59 (Mich. Ct. App. Jan. 14, 2003).

43. *See, e.g.,* Barham Constr., Inc. v. City of Riverbank, 2011 Cal. App. Unpub. LEXIS 5959, at *26–28, *35–39 (Aug. 8, 2011); *see also* Collins/Snoops Assocs., Inc. v. CJF, LLC, 988 A.2d 49, 51 (Md. App. 2010) (county terminated prime contractor even after replacing defaulted subcontractor).

44. *Barham Constr., Inc.*, 2011 Cal. App. Unpub. LEXIS 5959, at *26–28, *35–39.

45. State of Cal. v. Lockheed Martin IMS, 2002 Cal. App. Unpub. LEXIS 4548, at *46–56 (Jan. 25, 2002).

46. *Id.*

47. *Id.* at *50–53.

48. Evan Johnson & Sons Constr., Inc. v. State, 877 So. 2d 360, 366–67 (Miss. 2004).

49. Norberto & Sons, Inc. v. Cnty. of Nassau, 16 A.D.3d 642, 643 (N.Y. App. Div. 2005).

50. *Id.*

51. *See, e.g.*, Jeffrey B. Peterson & Assocs. v. Dayton Metro. Hous. Auth., 2000 WL 1006562 (Ohio App. 2 Dist. July 21, 2000) (citing Refreshment Serv. Co., Inc. v. City of Cleveland, 63 Ohio St. 2d 89 (1980)); York Eng'g Co., Inc. v. City of Montgomery, 374 So. 2d 884 (Ala. 1979).

52. *See, e.g.*, Baker v. State, 78 N.Y.S. 922 (3d Dep't 1902).

53. *See, e.g.*, G & R Elec. Contractors, Inc. v. State, 496 N.Y.S.2d 898, 900, 902 (Ct. Cl. 1985); Subsurface Techs., Inc., MSBCA No. 2801 (Apr. 2013), *available at* http://www.msbca.state.md.us/2013.html; *compare* La. Civ. Code Ann. art. 2765 (2011) (gives owner absolute right to terminate, even without cause, but then requires it to pay the contractor its costs incurred as of the termination, plus any damages caused).

54. *See, e.g.*, Questar Builders, Inc. v. CG Flooring, LLC, 978 A.2d 651 (Md. 2009); Capital Safety, Inc. v. State Div. of Bldgs. & Const., 848 A.2d 863 (N.J. Super. A.D. 2004); Ram Eng'g & Const.,

Inc. v. Univ. of Louisville, 127 S.W.3d 579 (Ky. 2003); Harris Corp. v. Giesting & Assocs., Inc., 297 F.3d 1270, 1272–73 (11th Cir. 2002) (applying Florida law); *Jeffrey B. Peterson*, 2000 WL 1006562; A.J. Temple Marble & Tile, Inc. v. Long Island R.R., 659 N.Y.S.2d 412 (1997); Linan-Faye Constr. Co., Inc. v. Hous. Auth. of City of Camden, 49 F.3d 915 (3d Cir. 1995); EDO Corp. v. Beech Aircraft Corp., 911 F.2d 1447 (10th Cir. 1990) (applying Kansas law).

55. 99 So. 3d 563 (Fla. Dist. Ct. App. 2d Dist. 2012).

56. 116 So. 3d 530 (Fla. Dist. Ct. App. 4th Dist. 2013).

57. 494 F.2d 1355 (Ct. Cl. 1974) (termination to get better price is not improper, even where government may have known about the availability of the lower price when it made the award).

58. 681 F.2d 756 (Ct. Cl. 1982) (termination, even when not in bad faith, is improper absent changed circumstances since award).

59. 94 F.3d 1537, 1543–44 (Fed. Cir. 1996) (limiting *Torncello*'s "changed circumstances" requirement to cases in which the government knew at award that it had no intention of performing the contract).

60. 116 So. 3d at 535–38.

61. *Id.* at 539.

62. *Id.*

63. *Id.* at 540–41.

64. Questar Builders, Inc. v. CB Flooring, LLC, 978 A.2d 651 (Md. 2009).

65. Ram Eng'g & Constr., Inc. v. Univ. of Louisville, 127 S.W.3d 579 (Ky. 2003); Linan-Faye Constr. Co., Inc. v. Hous. Auth. of City of Camden, 49 F.3d 915 (3d Cir. 1995). *See also* Smart, Inc. v. Virgin Islands Hous. Auth., 320 F. Supp. 2d 332 (D.V.I. 2004) (constructive termination for convenience limited to changed circumstances).

66. *Ram Eng'g & Constr., Inc.*, 127 S.W.3d 579.

67. *See, e.g.,* Jeffrey B. Peterson & Assocs. v. Dayton Metro. Hous. Auth., 2000 WL 1006562 (Ohio App. 2 Dist. July 21, 2000).

68. 239 N.Y.L.J. 123 (Sup. Ct. 2008).

69. *Id.*

70. *Linan-Faye Constr. Co.*, 49 F.3d 915.

71. 632 F. Supp. 1494 (C.D. Cal. 1986) (applying California law); *see also* Westinghouse Elec. Corp. v. Garrett Corp., 437 F. Supp. 1301 (D. Md. 1977); Coleman Eng'g Co. v. N. Am. Aviation, Inc., 65 Cal. 2d 396 (1966); MLK, Inc. v. Univ. of Kansas, 940 P.2d 1158 (Kan. App. 1997).

72. FAR 49.102.

73. *See, e.g.*, CAL. GPIT, *supra* note 6, ¶ 22(c); *compare* FAR 52.249-2(g); *see also* TRG Constr., Inc. v. Dist. of Columbia Water & Sewer Auth., 70 A.3d 1164, 1166–67 (D.C. Ct. App. 2013); Clingerman, MSBCA No. 2002, 5 MSBCA ¶ 431 (1998); G & R Elec. Contractors, Inc. v. State, 496 N.Y.S.2d 898, 900 (Ct. Cl. 1985).

74. *See, e.g.*, *G & R Elec.*, 496 N.Y.S.2d at 900; Affirmative Pipe Cleaning, Inc./Edenwald Contracting Co., Inc. v. City of New York, 553 N.Y.S.2d 324 (1st Dep't 1990); Subsurface Techs., Inc., MSBCA No. 2801 (Apr. 2013), *available at* http://www.msbca.state.md.us/2013.html (citing Delle Data Sys., Inc., MSBCA No. 2146, 5 MSBCA ¶ 493 (2001)).

75. *See, e.g.*, *Affirmative Pipe Cleaning*, 553 N.Y.S.2d 324 (based on percent complete on unit-priced contract); Encon Utah, LLC v. Fluor Ames Kraemer, LLC, 210 P.3d 263, 268 (Utah Sup. Ct. 2009) (prime contract limited contractor's recovery to "the value of work performed").

76. Linan-Faye Constr. Co., Inc. v. Hous. Auth. of City of Camden, 49 F.3d 915 (3d Cir. 1995).

77. *See, e.g.*, M&M Hunting Preserve, MSBCA No. 1279 (Mar. 30, 1987).

78. *See, e.g.*, *G & R Elec.*, 496 N.Y.S.2d at 900, 902.

79. *See, e.g.*, CAL. GPIT, *supra* note 6, ¶ 22(e) ("in no event will total payments exceed the amount payable to the Contractor if the Contract had been fully performed"); *M&M Hunting Preserve*, MSBCA No. 1279; *compare* FAR 49.202(a), 49.207; Okaw Indus., Inc., ASBCA Nos. 17863, 17864, 75-1 B.C.A. (CCH) ¶ 11,321, *reconsideration denied*, 75-2 B.C.A. (CCH) ¶ 11,571.

80. Dep't of Transp. v. Arapahoe Constr., Inc., 357 S.E.2d 593 (Ga. 1987).

81. Encon Utah, LLC v. Fluor Ames Kraemer, LLC, 210 P.3d 263, 268–69 (Utah Sup. Ct. 2009).

82. For a link to 29 states' false claims laws, go to FALSE CLAIMS ACT RESOURCE CENTER, http://tinyurl.com/lzrdhke.

COURTROOM CONTRACTING

(Continued from page 27)

as well as advanced disapproval will be insufficient to disallow the costs"); Thermalon Indus., Ltd. v. United States, 51 Fed. Cl. 464, 472 (2002) (government not obligated "to present evidence attacking an item if [the contractor] did not prove *prima facie* that it was properly included").

12. 51 Fed. Cl. 116, 125 (2001); *see also* Clark Constr. Grp., Inc., GAOCAB No. 2003-1 (Nov. 23, 2004) ("A presumption has been found that a contractor's proved or actual costs in implementing a change are reasonable, such that the government 'must carry the very heavy burden' of showing that the proved or actual costs were of such a nature that they should not have been expended or that the contractors' costs were more than were justified in the particular circumstance.").

13. 64 Fed. Cl. 229, 246 (2005).

14. *Id.*; *see also* DFARS 252.243-7001, *codified at* 48 C.F.R. § 252.243-7001 (2015) (incorporating FAR 31.201).

15. Kellogg Brown & Root Servs., Inc. v. United States, 107 Fed. Cl. 16, 39 (Fed. Cl. 2012), *aff'd*, 742 F.3d 967 (Fed. Cir. 2014).

16. Ace Constructors, Inc. v. United States, 70 Fed. Cl. 253, 276 (2006), *aff'd*, 499 F.3d 1357 (Fed. Cir. 2007) (labor costs demonstrated by certified payrolls, equipment costs by examining rental invoices, equipment operating costs by reference to standard handbooks for equipment operating rates, and material and subcontractor costs demonstrated by examining invoices); *Clark Constr. Grp., Inc.*, GAOCAB No. 2003-1 (time sheets and invoices for the claimed material and equipment costs and impact-related labor); Doninger Metal Prods., Corp. v. United States, 50 Fed. Cl. 110, 125 (Fed. Cl. 2001) (cost demonstrated using contractor summaries, time sheets, vendors' invoices, freight records, and other related source documents).

17. *Ace Constructors*, 70 Fed. Cl. At 276; *see also* Delco Elecs. Corp. v. United States, 17 Cl. Ct. 302, 321 (1989), *aff'd*, 909 F.2d 1495 (Fed. Cir. 1990) ("The preferred method is through the submission of actual cost data.").

18. 74 Fed. Cl. 75, 104 (Fed. Cl. 2006).

19. *Id.*

20. *Id.*; *see also Delco Elecs. Corp.*, 17 Cl. Ct. at 321 ("The preference for actual cost data is reflected in the regulations, which require that contractors submit cost and pricing data that are 'accurate, complete and current.'"), citing to DAR § 3-807.3(a), 32 C.F.R. § 3-807.3(a).

21. *See Travelers Cas. & Sur. of Am.*, 74 Fed. Cl. at 104 (finding estimates of costs may be used where actual cost data are not available); *but see Clark Constr. Grp. Inc.*, GAOCAB No. 2003-1 (contractor's estimated costs denied where contractor could have tracked actual costs, and provided no evidence as to why it did not).

22. FAR § 31.201-3(b).

23. *Delco Elecs. Corp.*, 17 Cl. Ct. at 321.

24. Kellogg Brown & Root Servs., Inc. v. United States, 103 Fed. Cl. 714 (2012), *aff'd in part, rev'd in part*, 728 F.3d 1348 (Fed. Cir. 2013), *opinion corrected on denial of reh'g*, 563 F. App'x 769 (Fed. Cir. 2014), *and cert. denied*, 135 S. Ct. 167 (2014) (*KBR I*).