

4-15-1980

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Recommended Citation

Lawrence Lerner *Tying Together Termination For Convenience In Government Contracts*, 7 Pepp. L. Rev. Iss. 3 (1980)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol7/iss3/7>

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Tying Together Termination For Convenience In Government Contracts

Cases and legal theories surrounding convenience terminations are found throughout numerous publications. This comment pulls together and organizes this information into major areas of application and limitations that have arisen as a result of case law and Congressional action. The author concludes that existing limitations on the use of a convenience termination are not sufficient to prevent abuse by the government. Thus, it is up to Congress to implement a more equitable test for determining the proper applicability of convenience terminations if abuse by the government is to be avoided.

I. INTRODUCTION

After a contract has been signed or even after it has been partially executed, the government may terminate it, in whole or in part, with almost uncontrolled discretion. This sovereign right derives from the termination for convenience¹ of the government clause, which is included, expressly or "by operation of law," in all government contracts over \$10,000.00.² Such a right is contrary to common law principles governing breach of contract. The contractor can lose anticipatory unearned profits, as well as being subjected to disruption and material harm to his expected financial return, revenue, material, equipment, and manpower planning. A substantial amount of research has discussed the actual use of the T/C clause and many authorities have suggested limitations on the government's power to terminate a contract. The objective of this commentary is to tie together the legal theories surrounding a convenience termination and to review some of the existing and proposed limitations on the government's right as suggested in the literature.³

1. Hereinafter referred to as T/C.

2. The Termination for Convenience of the Government Clause provides: "The performance of work under this contract may be terminated by the Government in accordance with this clause in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interest of the Government. . . ." 41 C.F.R. § 1-8.701, ASPR §§ 8-701(a) and 7-103.21(a) (1979); 32 C.F.R. § 7.103-21(b), F.P.R. 1-8.201, ASPR § 7-103.21(c) (1966), 32 C.F.R. §§ 7.103-21(c), 8.701(a) (1970). See also NASA-PR 8.701(a) for NASA Contracts.

3. W. KEYES, GOVERNMENT CONTRACTS IN A NUTSHELL (1979); R. NASH & J. CIBINIC, FEDERAL PROCUREMENT LAW (2d ed. 1969); J. WHELAN & R. PASLEY, CASES

Initially, a brief review of the historical background of the convenience termination right will delineate the process by which the T/C clause became included "by operation of law" in government contracts. Some significant examples of the government's application of the T/C clause will be offered in circumstances characterized as: partial T/C, constructive T/C, wrongful default termination, contracts illegally awarded, loss contracts, and buying elsewhere at a cheaper price. The commentary will then briefly address the contractor's remedies in a convenience termination focusing on the relinquishment of anticipatory profits. This will be followed by a review of some of the current and proposed limitations upon the government's use of the T/C clause. Likewise, the issue of the validity of the government's use of the termination and a number of attempted arguments upon the limitation of the government's right will be discussed. The bad faith limitation approaches will be analyzed in turn. Finally, the abuse of discretion tort approach, the multiple convenience terminations approach, and the first to file approach will be analyzed in terms of limiting the government's use of the T/C clause.

II. HISTORICAL DEVELOPMENT OF CONVENIENCE TERMINATIONS

A. Pre-World War I

Administrative requirements that contracts contain a provision allowing the government to terminate for its own convenience can be traced back quite far.⁴ In 1875, in *United States v. Corliss Steam-Engine Co.*,⁵ the Supreme Court held that the capacity to

AND MATERIALS ON FEDERAL GOVERNMENT CONTRACTS (1975); Dickson, *The Effect of Government Breach of Contract Prior to Termination for Convenience or Default*, 11 NAT'L CONT. MGT. J. 125 (1977-78); Dohnis & Forman, *Historical Significance of Termination of Contracts for the Convenience of the Government*, 14 FED. G.J. 191 (1954); Hardee, *Termination of Military Contracts*, 32 TEX. L. REV. 172 (1953); Mitchell & Tracy, *Terminations of Government Contracts: Recent Developments*, 14 WM. & MARY L. REV. 817 (1973); Perlman & Goodrich, *Termination for Convenience Settlements - The Government's Limited Payment for Cancellation of Contracts*, 10 PUB. CONT. L.J. 1 (1978); vom Baur, *Fifty Years of Government Contract Law*, 29 FED. B.J. 305 (1970); Whelan & Pearson, *Underlying Values in Government Contracts*, 10 J. PUB. L. 298 (1961). See also A. JOSEPH, *TERMINATIONS OF GOVERNMENT CONTRACTS* (1978); W. PETTIT, *Terminations: Default and Convenience*, in CONCENTRATED COURSE IN GOVERNMENT CONTRACTS (1979); W. PETTIT, *Terminations for Convenience and Default and Government Specifications*, in MASTER'S INSTITUTE (1972); L. VICTORINO, *More Contract Clauses*, in FUNDAMENTALS OF GOVERNMENT CONTRACTING (1979); L. VICTORINO, *Terminations*, in PROCUREMENT FOR LAWYERS (1979).

4. For an early requirement of this type, see *United States v. Speed*, 75 U.S. (8 Wall.) 77 (1868). The contract in this case was not binding on the United States because it did not contain a "for termination" clause.

5. 91 U.S. 321 (1875). "With the improvements constantly made in ship-building and steam-machinery and in arms, some parts originally contracted for may have to be abandoned, and other parts substituted." *Id.* at 323.

contract necessarily included the capacity to administer contracts and also the capacity to breach them, when to do so would serve the public interest. And in the case of *Cramp v. United States*,⁶ the Court applied the common law principle that contracting parties may agree in advance to be bound by specific conditions in government contracts. From these two cases came the government's right to terminate a contract for its convenience, with limited remedies existing for the contractor.

B. World War I

The predominant need to terminate for the convenience of the government arose during the early part of this century. The entire country was mobilized and heavily involved in the procurement of necessities for World War I. It was soon recognized that technological and political developments could quickly make the subject matter of existing contracts obsolete. As a result, there came a need to terminate contracts at the will of the government.⁷ In addition, the government was faced with potential stockpiles of weapons and substantial contractual obligations to buy more.⁸ In order to solve these problems, and avoid government waste, Congress included a clause in the Urgent Deficiency Appropriation Act of 1917⁹ which gave the President the power to "modify, suspend, cancel or requisition any existing or future contracts for the building, production, or purchase of ships or material."¹⁰

Under the Act the contract may be terminated by the government whenever the President determines such termination to be in the best interests of the government.

C. World War II

Similar problems faced government procurement officials during World War II. The Contract Settlement Act of 1944¹¹ became

6. 216 U.S. 494 (1910).

7. vom Baur, *Fifty Years of Government Contract Law*, 29 FED. B.J. 305, 313 (1970).

8. *Id.*

9. Urgent Deficiency Appropriation Act of 1917, § 2, ch.29, 40 Stat. 182 (1917).

10. *Id.* See *Ohio Savings Bank & Trust Co. v. Willys Corp.*, 16 F.2d 859 (3d Cir. 1929), which briefly discusses procedures in force in the War Department during 1918. Discussed in part in the opinion is War Department Supply Circular No. 111 of 1918 dealing with the subject of termination for convenience and clauses to be used for that purpose.

11. The Contract Settlement Act, § 1, ch. 358, 58 Stat. 649 (1944). Current ver-

effective in July of 1944. It expressly established uniform T/C procedures and assured speedy and equitable final settlement of claims under terminated war contracts.¹² Termination procedures remain basically the same today.¹³

III. THE RIGHT TO TERMINATE FOR CONVENIENCE WHERE NOT EXPRESSLY INCLUDED IN THE CONTRACT

The government, at its convenience, can terminate a contract for the purchase of supplies when it believes the contract is not in its best interest, whether or not the contract contains an express termination clause.¹⁴ This power evolves from the government's inherent sovereign authority.¹⁵ In *United States v. Corliss Steam-Engine Co.*,¹⁶ the Supreme Court held that the executive Department need not have specific statutory authority to include an express T/C clause in a government contract.¹⁷

With regard to lost profits, the Court in *Russell Motor Car Co. v. United States*¹⁸ held that any contract entered into after enactment of the Urgent Deficiency Appropriation Act of 1917, "was entered into with the prospect of its cancellation in view," and therefore loss of profits was "within the contemplation of the parties."¹⁹

In *G.L. Christian & Assoc. v. United States*,²⁰ the court held that a clause providing for termination for the government's convenience was to be read into the contract and therefore was included *by operation of law* because "Congress would be loath to sanction a large contract which did not provide for power to terminate."²¹ Today under the "Christian Doctrine," a T/C clause

sion at 41 U.S.C. §§ 101-25 (1976). This statute relates only to terminated war contracts and therefore has no effect upon contracts not relating to World War II.

12. *Id.*

13. See Contract Settlement Act, 41 U.S.C. §§ 101-25 (1976).

14. 29 Comp. Gen. 36 (1949).

15. *United States v. Corliss Steam Engine Co.*, 91 U.S. 321, (1875).

16. *Id.*

17. Dohnis & Forman, *Historical Significance of Termination of Contracts for the Convenience of the Government*, 14 FED. B.J. 191 (1954); Hardee, *Termination of Military Contracts*, 32 TEX. L. REV. 172 (1953).

18. 261 U.S. 514 (1923).

19. *Id.* at 524.

20. 312 F.2d 418 (Ct. Cl. 1963), *cert. denied*, 375 U.S. 954 (1963), *aff'd on rehearing*, 320 F.2d 345 (1964). See also *Esquire, Inc. v. B.A. Ringer*, 591 F.2d 796 (D.C. Cir. 1978).

21. *G.L. Christian & Assoc. v. United States*, 312 F.2d at 426. The contract failed to include a T/C clause. As a result when the contract was terminated the contractor sought to recover anticipated profits. It was held that the provision is required by the ASPR, and therefore had the force and effect of law. Therefore, the court incorporated as a matter of law the ASPR termination for convenience of the government articles into the contract. See also *Chamberlain Mfg., ASBCA 18103*, 74-1 BCA ¶10368 (1974). The court stated that it would incorporate a termi-

must be considered included in the contract even though it may have been inadvertently omitted.²² T/C clauses are now routinely contained in most government contracts,²³ thus, the omission of a T/C clause, even if deliberate, does not preclude its incorporation through application of the "Christian Doctrine".

IV. SOME EXAMPLES OF THE GOVERNMENT'S APPLICATION OF THE TERMINATION FOR CONVENIENCE CLAUSE

A T/C can come about by written notice from the contracting officer²⁴ or by operation of law. Convenience terminations have been used in a wide variety of situations, including: to avoid a conflict with the Comptroller General,²⁵ to avoid a dispute with Congress,²⁶ to employ a rival contractor with better production facilities,²⁷ to halt work that was proving to be too difficult or expensive because of defective government specifications,²⁸ to cease construction of an Anti-Ballistic Missile base,²⁹ and to discontinue contracts when the South Vietnamese government had collapsed.³⁰

The characteristic case for a convenience termination is ably

nation for convenience clause unless extraordinary circumstances were present. No such circumstances were found in the case.

22. *Steinthal & Co., Inc. v. Seamans*, 455 F.2d 1289, 1304 (D.C. Cir. 1971).

23. F.P.R. 1-8.7 now makes the use of a termination clause mandatory for the agencies subject to the Federal Procurement Regulations. See F.P.R. 1-8.700-2.

24. Where the convenience termination is a result of a written notification, it is provided by way of a summary telegram. See 41 C.F.R. § 1-8.802.1, ASPR § 8-801.1 (1979) for approved telegraphic notice forms. The telegram is then followed by a letter more completely describing the actions to be taken 41 C.F.R. § 1-8.801.2, ASPR § 8-8.801.2 (1979).

25. *Warren Bros. Roads Co. v. United States*, 355 F.2d 612 (Ct. Cl. 1965); *Coastal Cargo Co. v. United States*, 351 F.2d 1004 (Ct. Cl. 1965); *Brown & Son Elec. Co. v. United States*, 325 F.2d 446 (Ct. Cl. 1963); *John Reiner & Co. v. United States*, 325 F.2d 438 (Ct. Cl. 1963), *cert. denied*, 377 U.S. 931 (1964).

26. *Schlesinger v. United States*, 390 F.2d 702 (Ct. Cl. 1968).

27. *Nesbitt v. United States*, 345 F.2d 583 (Ct. Cl. 1965).

28. *Nolan Bros., Inc. v. United States*, 405 F.2d 1250 (Ct. Cl. 1969).

29. An interesting example of the necessity for the power to terminate for convenience occurred in conjunction with the Strategic Arms Limitation Talks (SALT). As a result of those negotiations a multi-million dollar Anti-Ballistic Missile base under construction had to be immediately discontinued under the terms of the diplomatic agreements reached. The T/C clause provided the Government with the ability to discontinue the project in an orderly, timely, and effective manner. A. JOSEPH, *TERMINATIONS OF GOVERNMENT CONTRACT* (1978).

30. *Han Yang Construction Co., Ltd.*, 79-2 BCA § 13,951, Gov't. CONT. REP. (CCH) § 89,189 (1979). See also *Computer Sciences Corp.*, ASBCA § 22,758, 79-2 BCA § 14,022 (1979).

described in *Nolan Brothers, Inc. v. United States*,³¹ where the court stated:

Among the host of variable and unspecified situations calling for closing of the work under a still-existing contract [citation omitted] it is entirely reasonable to include a post-contract recognition that the job is impossible or too difficult to perform or too costly for the Government if pushed through to its conclusion.³²

A. Partial Termination For Convenience

There are two primary situations in which a partial convenience termination may be utilized, as expressed within the meaning of the clause itself.³³ The first is where it is used to cover a deletion of a portion of the contract. A partial T/C may also be used where the contracting officer and the contractor had initially proceeded to negotiate a price reduction under the "changes clause" where the government desired to delete an item of the contract.³⁴

B. Constructive Termination For Convenience

The termination for convenience, while generally for the government's benefit, does not always leave the contractor without protection. A "constructive termination for convenience" may occur where the government, operating under a "requirements contract,"³⁵ avoids giving the contractor further orders.³⁶ This is considered a constructive termination for convenience "by operation of law" because the contracting officer *could have* terminated

31. *Nolan Bros., Inc. v. United States*, 405 F.2d 1250, 1253 (Ct. Cl. 1969).

32. *Id.*

33. See note 2, *supra*.

34. In *Frederick Constr. Co. v. United States*, ASBCA 12,108, 12,241, 68-1 BCA ¶6832 (1968), the Board held that "where the government wishes to reduce the number of units of supplies to be furnished, eliminate an item of work, or otherwise reduce the quantity of work to be performed, it proceeds properly to this end under the convenience termination article." See *Dairy Sales Corp. v. United States*, 593 F.2d 1002 (Ct. Cl. 1979), where the court stated "[A]fter the contract was entered into with plaintiff an error in computing shipping costs was discovered with respect to one of the items, which, when corrected, showed the award of that item actually should have gone to [another contractor]." The government subsequently terminated for the convenience of the government most of the item in the initial contract and awarded that portion to the other contractor. See also *Kisco Co., Inc. v. United States*, Gov't. CONT. REP. (CCH) § 83,432 (1979).

35. In a "requirements contract," the government agrees to order from the contractor *all* of its requirements for the agreed upon contract period. In this type of situation, once the government's requirements are met, the contract can be cancelled. See *Kalvar Corp., Inc. v. United States*, 543 F.2d 1298 (Ct. Cl. 1976); *Wheeler Brothers, Inc.*, ASBCA 2465, 79-1 BCA § 13,642 (1979). The failure of the government to order its requirements for automotive parts from a contractor under an automotive parts requirements contract constituted a constructive partial termination of the requirements contract which entitled the contractor to an equitable adjustment under the T/C clause.

36. *Nesbitt v. United States*, 345 F.2d 583 (Ct. Cl. 1965), *cert. denied*, 383 U.S. 926 (1966). See also *Soledad Enterprises*, ASBCA 20,376, 77-2 BCA ¶12,552 (1977).

for the convenience of the government.³⁷ Thus, the T/C clause may be used to grant relief to contractors, based upon the government's inaction with these contracts.³⁸

A constructive T/C can also occur in a case where the contracting officer directs work on the contract to cease and subsequently fails to direct the contractor to resume work.³⁹ Further, a constructive termination may be applied in situations when the government attempts to repudiate a contractual relationship in which a contractor has been induced to rely, to his detriment, on the government's former position. An "equitable estoppel"⁴⁰ may

37. In *Nesbitt* the court decided that since the government had also reserved the right to terminate plaintiff's performance, either wholly or partially, the contracting officer could still have satisfied his desire to place some orders elsewhere by invoking the right of partial termination, "from time to time" if necessary, under the convenience-termination article. 345 F.2d at 585.

38. In *Integrity Management Int'l, Inc.*, ASBCA 18,789, 75-1 BCA ¶11,235 (1975), it was held that the government has the obligation to use due care and take into account all reasonable available relevant information in establishing the estimates upon which the bids are to be based. Since the government did not use reasonable due care in calculating the estimates, the contractor would be entitled to relief based upon a constructive partial termination for convenience. See also *Pied Piper Ice Cream, Inc.*, ASBCA 20,605, 76-2 BCA ¶12,148 (1976); *Gover Contracting Corp.*, GSBCEA 4115, 75-2 BCA ¶11,550 (1975). In *Henry Angelo & Sons, Inc.*, ASBCA 15,082, 72-1 BCA ¶9356 (1972), the Board held that, where the government had partially terminated a printing contract on a military base due to lack of funds, the government had constructively partially terminated the contract for convenience. See also *Inland Container v. United States*, 512 F.2d 1073 (Ct. Cl. 1975); *Charles Bainbridge, Inc.*, ASBCA 19,949, 75-2 BCA 11,414 (1975). But see *Maxson Electronics Corp.*, ASBCA 12,983, 72-2 BCA ¶9543 (1972).

39. In *Harbridge House Inc.*, PSBCA 264, 77-2 BCA ¶17,653 (1977), the court stated:

A contractor [was] entitled to termination costs on an implied in fact contract for professional services because the contracting officer's directions that work on the contract was to cease due to internal disagreements concerning the type of program to be developed, and the absence of subsequent directions to resume work, constituted a constructive termination for convenience, even though the procedure for termination was not precisely followed.

Cf. *Commercial Cable Co. v. United States*, 397 F.2d 816 (Ct. Cl. 1968). (A corporation agreed pursuant to a contract to construct a trans-Atlantic cable. The court ruled that the corporation could not recover for a breach of contract because of its failure to show that the breach was caused by a failure of the United States to render assistance as required by the contract).

40. The following four elements must be present in order to establish an estoppel:

- 1) The party to be estopped must know the facts;
- 2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended;
- 3) the latter must be ignorant of the true facts, and;
- 4) he must rely on the former's conduct to his injury.

Emeco Indus., Inc. v. United States, 485 F.2d 652, 657 (Ct. Cl. 1973).

arise to prevent the government from denying the existence of the contract.⁴¹

The termination clause may be used to deny the government the right to allow a contractual relationship to end through the mere failure to exercise an option.⁴² In the case of *Manloading & Management Associates, Inc. v. United States*,⁴³ the contract contained an option provision allowing for termination in the event that funds were not appropriated for the project. The contracting officer, at the pre-bid conference, stated that any prospective bidder should be assured that funds are available. Subsequently the contract was terminated because of the erroneous bid protests of another contractor, after the plaintiff relied on it to his detriment.⁴⁴

C. Wrongful Default Termination

The T/C clause may be used in cases of *wrongful* termination by the contracting officer.⁴⁵ The most common example is the sit-

41. *Emeco Indus., Inc. v. United States*, 485 F.2d 652 (Ct. Cl. 1973).

42. *Manloading & Management Assoc., Inc. v. United States*, 461 F.2d 1299 (Ct. Cl. 1972).

43. *Id.* See also *Stevens Mfg. Co. v. United States*, 8 F. Supp. 720 (Ct. Cl. 1934) where the court held that the party against whom an equitable estoppel is set up acquiesced in the transaction in such a manner as to change the relationship of the parties and make its repudiation of the proceedings contrary to equity and good conscience.

44. In these factual situations the government is prevented from repudiating a contractual arrangement because by its action, it acquiesced in a situation in such a manner as to induce a contractor to detrimentally change his position.

45. In the case of *G.C. Casebolt Co. v. United States*, 421 F.2d 712 (Ct. Cl. 1970), the court said:

The rule we have followed is that, where the contract embodies a convenience-termination provision as this one would, a Government directive to end performance of the work will not be considered a breach but rather a convenience termination — if it could lawfully come under that clause — even though the contracting officer *wrongly* calls it a cancellation, mistakenly deems the contract illegal, or erroneously thinks that he can terminate the work on some other ground The principle underlying these decisions is that a party to a contract may justify an asserted termination, rescission, or repudiation, of a contract [which turns out not to be well grounded] by proving that there was, at the time, and adequate cause, although it did not become known to him until later.

See *Schlesinger v. United States*, 390 F.2d 702 (Ct. Cl. 1968); *Coastal Cargo Co. v. United States*, 351 F.2d 1004 (Ct. Cl. 1965); *Nesbitt v. United States*, 345 F.2d 583 (Ct. Cl. 1965), *cert. denied*, 383 U.S. 926 (Ct. Cl. 1966); *Warren Bros. Roads Co. v. United States*, 355 F.2d 612 (Ct. Cl. 1965); *Brown & Son Elev. Co. v. United States*, 325 F.2d 446 (Ct. Cl. 1963); *John Reiner & Co. v. United States*, 325 F.2d 438 (Ct. Cl. 1963), *cert. denied*, 377 U.S. 931 (1964). See also *Switlik Parachute Co., Inc. v. United States*, 573 F.2d 1228 (1978). However, the dissenting opinion in *Switlik* stated that the contractor had a right to an *informed* and *deliberate* exercise of discretion by the government officials involved (in deciding whether to terminate). There was no evidence that the Government officials ever exercised their discretion or even realized they had any. The "*haste*" to terminate the contractor for default was "*indecent*" under the circumstances of the case. The speed reflects a

uation of a termination for default, where the default determination was found to have been improper. In such situations, the government's act will be treated as a convenience termination.⁴⁶

D. Contracts Illegally Awarded

A T/C may be applied in such cases where a contract has been "illegally"⁴⁷ awarded in a manner that is not "plainly or palpably illegal."⁴⁸ The doctrine of palpable illegality is seriously criticized by Professor Keyes:

Except to the extent that the government benefits from the past performance, this practice appears to be questionable because the statutes and regulations authorized thereunder make no such distinction between a

clear intent to terminate before the contractor knew it was imminent and could urge anything in its own behalf. The court concluded that the default termination should be converted into a termination for the government's convenience. 573 F.2d at 1236-37 (dissenting opinion); *Nolan Brothers, Inc. v. United States*, 405 F.2d 1250 (Ct. Cl. 1969); *College Point Boat Corp. v. United States*, 267 U.S. 12 (1925).

46. ASPR 7-103.11(e) provides that, following a termination for default, if it is determined that the contractor was not in default, the rights of the parties will be determined as though the termination had been pursuant to the termination for the convenience of the government clause. [I]f the contract does not contain a clause providing for termination for convenience . . . the contract shall be equitably adjusted." See also: *Albano Cleaners, Inc. v. United States*, 455 F.2d 556 (Ct. Cl. 1972); *National Investigation Bureau, Inc., Dot Cab 78-24*, 79-1 BCA § 13,782 (1979). An interesting question has been raised by Professors Whelan and Pasley:

[I]f the Contractor is clearly in delinquency and the Government entitled to issue a termination for default . . . , must the Contracting Officer do so in circumstances where a reasonable man (or a reasonable Comptroller General) would think that this course was in the 'public interest' [or might] the Contracting Officer instead decide to issue a 'Termination for Convenience' notice?

J. WHELAN AND R. PASLEY, CASES AND MATERIALS ON FEDERAL GOVERNMENT CONTRACTS 826 n.2 (1975).

47. An "illegal" award results only if it was made contrary to statutory or regulatory requirements. W. KEYES, GOVERNMENT CONTRACTS IN A NUTSHELL 55 (1979).

48. Cancellation for illegality and termination for convenience has been discussed by the Comptroller General as follows:

We are in agreement with the position of the Court of Claims that 'the binding stamp of nullity' should be imposed only when the illegality of an award is 'plain'. In determining whether an award is plainly or palpably illegal, we believe that if the award was made contrary to statutory or regulatory requirements because of some action or statement by the contractor or if the contractor was on direct notice that the procedures being followed were violative of such requirements than *the award may be cancelled without liability to the government except to the extent recovery may be had on the basis of quantum meruit*. On the other hand, if the contractor did not contribute to the mistake resulting in the award and was not on direct notice before award that the procedures being followed were wrong, the award should not be considered plainly or palpably illegal, and the contract may only be terminated for the convenience of the government.

'plain illegality' and other illegalities. Absent a statute or regulation, the judiciary and the Comptroller General are legislating with respect to the disposition of taxpayer funds for purposes not envisioned by the elected representatives of the taxpayer.⁴⁹

E. Loss Contracts

The question of using the T/C clause to relieve the contractor from a "loss contract"⁵⁰ arises when the contractor seeks a "no cost" convenience termination because the projected cost to complete the contract greatly exceeds the contract price. For example, unanticipated double digit inflation has seriously affected estimated labor and material budgets. In a number of cases, the GAO has questioned as to whether the T/C clause should be exercised where the *entire* purpose is to relieve the contractor from a loss contract.⁵¹ However, terminations for the convenience of the government are proper to cancel a loss contract if the contractor's future performance is essential to the national defense.⁵² Terminations on this basis are in the best interest of the government. Where the T/C is *both* beneficial to the contractor and in the best interests of the government, the convenience termination is generally approved.⁵³

E. Buying Elsewhere At A Lower Price

In 1963, the Comptroller General was presented with the circumstances of terminating a contract to take advantage of a lower bid from another contractor.⁵⁴ The Comptroller General directed

49. W. KEYES, GOVERNMENT CONTRACTS IN A NUTSHELL, 56-57 (1979).

50. *Id.* at 57.

51. A loss contract is one requiring performance according to terms which would operate to deprive the contractor of any profit from the job and would probably impose a substantial loss. *In re Veterans Administration* the Comptroller General stated that:

A termination of convenience clause is designed for the Government's benefit and not as a means of relieving contractors from the burdens of contract performance. It appears to us, however, that the primary reason for terminating these contracts is to relieve certain contractors from the increased costs of contract performance . . . we do not recommend in favor of terminating these contracts.

GOV'T. CONT. REP. (CCH) § 81,806 (1974). See also *In re R.H. Pines Corp.*, 54 Comp. Gen. 527 (1974).

52. See *Amron Corp.*, ACAB 1155; *Kellet Corp.*, ACAB 1164; *Libby Welding Co.*, ACAB 1163.

53. See *Scope Electronics, Inc.*, ASBCA 20,359, 77-1 BCA ¶12,404 (1977) (the requirements of the contract were not possible of performance). See also *Caskel Forge, Inc.*, ASBCA 7638, 62 BCA ¶5318; *Arnold H. Leibowitz*, GSBGA CCR-1, 76-2 BCA ¶11,930 (1976).

54. Comp. Gen. B-152,486 (1963) (unpublished opinion).

Therefore, the remaining portion of the contract was cancelled by the Department of the Air Force for the convenience of the Government, and it appears that such action will result in substantial savings to the Government. As it is not apparent from the record that the administrative action

the contracting officer to terminate the award after finding that three lower bids had not been properly evaluated from a technical standpoint. In 1974, the Court of Claims, in *Colonial Metals Co. v. United States*,⁵⁵ approved the exercise of the T/C clause to terminate a contract to enable the government to buy elsewhere at a cheaper price. The far-reaching impact of the *Colonial Metals* decision is of major concern today to contractors dealing with the federal government.⁵⁶ By permitting the government's action, the

was capricious, we will not attempt to substitute our judgment for that of the contracting agency nor do we perceive any basis upon which we could object to cancellation for the convenience of the Government when a lower price is obtainable for a usable product.

55. 494 F.2d 1355 (Ct. Cl. 1974).

In synopsis, *Colonial* held that the government may terminate a contract for convenience to attain a lower price for the same goods, even where the availability of the lower price was known or should have been known to the government at the time of initial award.

In *Colonial* the contractor was awarded a contract to furnish copper to the Navy. Immediately after award he ordered the copper from his supplier to fulfill the basic contract. Less than one month later the government terminated the contract, using the termination for convenience clause in the contract. The government then repurchased the material from another contractor at approximately thirty percent below the originally contracted price.

Immediately upon termination, plaintiff cancelled its order with his supplier, simultaneously replaced the order for contractor's own account, and thereafter sold the copper for more than it had paid but less than the price in the original contract with the Navy. In a termination cost proceeding the Board of Contract Appeals allowed neither profit on the contract with the government nor loss on the contract with the supplier.

Colonial asserted that the convenience-termination was an act of bad faith because the government acted in order to obtain elsewhere a better price known at the time of the award to be available. Citing *Christian*, the court reasoned that the T/C clause is designed to provide a mechanism whereby the Government may end its obligation on a contract. The court said, "the determination of the interest and convenience of the Government is by the contract's clause left to the discretion of the contracting officer." *Id.* at 1360-61.

The court reaffirmed that the contracting officer has the fullest discretion to end the work in the interest of the government. The conclusion reached was that the common theme of all these terminations was the obtaining of monetary benefit or other benefit to the government. The court freely extended this conclusion and held that a termination to buy elsewhere at a cheaper price is essentially such a termination. The government's saving of almost "one quarter of a million dollars" cannot be questioned as being anything but in the best interests of the government. *Id.* at 1361.

The lower ASBCA decision can be found at *Colonial Metals Co.*, ASBCA 15,860, 76-1 BCA ¶9328 (1972). See also 494 F.2d at 1360.

56. The following cases have cited *Colonial* as precedent: *Kalvar Corp. Inc. v. United States*, 543 F.2d 1298 (Ct. Cl. 1976); *Dr. Javad Hedayaty*, ASBCA 22,276 78-1 BCA ¶13,151 (1978); *MSG Assoc., Inc.*, ASBCA 21,753, 77-2 BCA ¶12,613 (1977); *Electrical Testing Labs, Inc.*, HUD BCA 76-15, 77-1 BCA ¶12,466 (1977); *Corparra Motor Serv. Inc.*, GSBCEA 4376, 75-2 BCA ¶11,518 (1975); *Dairy Sales Corp.*, ASBCA 20,193,

court has impliedly given its approval to other government terminations for convenience where the government successfully obtains a cheaper price from other outside sources.

The General Services Administration, in a 1978 order by the GSA administrator, said that:

If GSA cannot save the taxpayer money in the procurement of items, we should not be offering them (to federal agencies) at all. Therefore, I have directed that any item or class of items obtainable from retail outlets at a cost lower than that available under GSA's Federal Supply System multiple-award schedules will be discontinued.⁵⁷

Apparently the GSA intends to halt supply contracts where cheaper prices exist outside of the contract. Thus the basis of terminations for the convenience of the government, as developed in *Colonial Metals*, is being enforced today to the fullest extent possible.

V. CONTRACTOR'S REMEDIES IN A TERMINATION FOR CONVENIENCE

In exchange for the privilege of being able to terminate a contract at will, the government agrees to reimburse the contractor for all reasonable costs of the work performed, the cost of settlement, plus a profit on the portion of the job completed before termination.⁵⁸ Under a common law breach of contract, the contractor is entitled to the above plus anticipatory profits.

Originally, under the Urgent Deficiency Appropriation Act of 1917, the contractor was to be entitled to "just compensation" as determined by the President.⁵⁹ Subsequently, the United States Supreme Court in *Russell Motor Car Co. v. United States*,⁶⁰ held that "just compensation" did not include anticipated profits because termination for the convenience of the government did not constitute a breach of contract. The contractor will be allowed profit on preparations made and work done on the contract, and any reasonable method may be used to arrive at a fair profit, but the recovery of anticipatory profits and consequential damages are clearly prohibited by the regulation.⁶¹

The court held, in *John Reiner & Co. v. United States*,⁶² that failure to follow the requirements of the termination procedures does not convert a termination into a common-law breach of contract

75-2 BCA ¶11,613; *United States Optics Corp.*, ASBCA 18,972, 75-2 BCA ¶11,603 (1975).

57. FED. CONT. REP. (BNA) 746 (1978).

58. ASPR 8-701.

59. See note 9 *infra*.

60. 261 U.S. 514, 523-24 (1923).

61. *General Builders Supply Co., Inc. v. United States*, 409 F.2d 246 (Ct. Cl. 1969).

62. 325 F.2d 438, 444 (Ct. Cl. 1963), *cert. denied*, 377 U.S. 931 (1964).

nor subject the United States to liability for unearned anticipated profits.⁶³ In *Manloading & Management Associates*, the court concluded that:

Although the plaintiff is entitled to recover, it is clear that it may not recover lost profits or consequential damages. The subject contract contained the standard 'Termination for Convenience' clause. Therefore the plaintiff is entitled to recover only in accordance with the 'Termination for Convenience' clause, and not as if a common law breach of contract had occurred.⁶⁴

Frequently, *Colonial Metals* is cited for the court's holding that "the contract clause on convenience-termination provides that anticipatory profits shall not be allowed in the settlement of termination costs."⁶⁵

Thus, on a termination for the convenience of the government, plaintiff would be entitled, in general, to the unreimbursed costs of performance but would have no claim to anticipated but unearned profits.⁶⁶ The right to recover for anticipated profits arises only if the termination of the contract by the government constitutes a breach. If the government has reserved the right to terminate a contract for its convenience and then exercises the right, there is no breach, and normally there would be no recovery for the profits that would have been made if the government

63. *Id.* at 444.

64. 461 F.2d at 1303.

65. 494 F.2d at 1362. *See also* ASPR 8-303(a) (1970).

Interestingly in *Colonial* the plaintiff ingeniously alleged that the profits were not anticipatory, but rather fixed and certain, because it had a contract with the government to sell at a fixed price and a contract with supplier to buy at a fixed price. The court simply said that, "the profit was 'anticipatory' because it was unearned, unrealized, and contingent upon the completion of the transaction." 494 F.2d at 1362.

66. *G.L. Christian and Assoc. v. United States*, 312 F.2d 418 (Ct. Cl. 1963), *cert. denied*, 375 U.S. 954 (1964); *Nolan Bros, Inc. v. United States*, 405 F.2d 1250 (Ct. Cl. 1969); *J.W. Bateson Co. v. United States*, 308 F.2d 510 (5th Cir. 1962). In a more recent case.

A construction contractor who was ordered to perform 'changed work' which was later cancelled was not entitled to receive profit on the work not performed because the Changes and Termination for Convenience clauses prohibit recovery of anticipatory profits. The change in work consisted of the installation of additional water lines on the construction site. Before the contractor could order materials and commence performance, the work was cancelled. The Changes and Termination for Convenience clauses in the contract authorized the deletion of the work and disallowed recovery of profit on work not performed. However, the contractor was entitled to recover "estimating costs" for bid and proposal expenses on the changed work and obtaining a railroad right of way for the additional water lines.

Molony & Rubien Construction Co., ASBCA 22,276, 78-1 BCA ¶13,000.

had not exercised its reserved right.⁶⁷ Today, the fully developed policy, as initiated in the Urgent Deficiency Appropriation Act of 1917, clearly shifts the uncertainty of procurement costs to the contractor.⁶⁸

By the incorporation of a T/C provision, the government contractor relinquishes, whenever the termination provisions of the contract become operative, the "anticipated but unearned profits" portion of the common-law formula for damages in a breach of contract action. Only profits from work actually performed prior to termination may be included as damages.⁶⁹

VI. LIMITATIONS UPON THE GOVERNMENT'S USE OF THE TERMINATION FOR CONVENIENCE CLAUSE

In recent years, the validity of the government's use of the T/C clause⁷⁰ with federal government contracts in excess of \$10,000 has been a recurring issue before the United States Court of Claims⁷¹ and the Government Agency Board of Contract Appeals, as well as the subject of a number of legal articles.⁷² The limita-

67. 312 F.2d at 423. See also, *DeLaval Steam-Turbine Co. v. United States*, 284 U.S. 61 (1931); *College Point Boat Corp. v. United States*, 267 U.S. 12 (1925); *Davis Sewing Machine Co. of Delaware v. United States*, 60 Ct. Cl. 201, 217 (1925), *aff'd mem.* 273 U.S. 324 (1927).

68. See generally, vom Baur, *Fifty Years of Government Contract Law*, 29 FED. B. J. 305,353 (1970).

69. See *Nolan Bros., Inc. v. United States*, 405 F.2d 1250 (Ct. Cl. 1969); *Mitchell & Tracy, Terminations of Government Contracts: Recent Developments*, 14 WM. & MARY L. REV. 817, 864 (1973). But see, *North Star Aviation Corp. v. United States*, 458 F.2d 64 (1972), a case which occurred after *Christian*, but in an interesting manner deviated from the common anticipatory profits prohibition and allowed the recovery of anticipatory profits by relying solely upon the contract provision. The contract did not contain a termination for convenience clause. The court determined that the breach constituted common law breach of contract and they thus allowed recovery based on anticipatory profits. See also, *Mitchell & Tracy, Terminations of Government Contracts: Recent Developments*, 14 Wm. & Mary L. Rev. 817, 864 (1973).

70. See note 2 *supra*.

71. See, e.g., *Kalvar Corp. v. United States*, 543 F.2d 1298 (Ct. Cl. 1976); *Emeco Industries Inc. v. United States*, 485 F.2d 652 (Ct. Cl. 1973); *Manloading & Management Assoc., Inc. v. United States*, 461 F.2d 1299 (Ct. Cl. 1972); *G.C. Casebolt Co. v. United States*, 421 F.2d 710 (Ct. Cl. 1970); *Nolan Bros., Inc. v. United States*, 405 F.2d 1250 (Ct. Cl. 1969); *Schlesinger v. United States*, 390 F.2d 702 (Ct. Cl. 1968); *Nesbitt v. United States*, 345 F.2d 583 (Ct. Cl. 1965), *cert. denied*, 383 U.S. 926 (1966); *Coastal Cargo Co. v. United States*, 351 F.2d 1004 (Ct. Cl. 1965); *Brown & Son Elev. Co. v. United States*, 325 F.2d 446 (Ct. Cl. 1965); *John Reiner & Co. v. United States*, 325 F.2d 438 (Ct. Cl. 1963) *cert. denied*, 377 U.S. 931 (1964); *Warren Bros. Roads Co. v. United States*, 355 F.2d 612 (Ct. Cl. 1965); *G.L. Christian and Assoc. v. United States*, 312 F.2d 418 (Ct. Cl. 1963); *Librach & Cutler v. United States*, 147 Ct. Cl. 605 (1959); *Line Constr. Co. v. United States*, 109 Ct. Cl. 154 (1947); *Davis Sewing Mach. Co. v. United States*, 60 Ct. Cl. 201 (1925), *aff'd*, 273 U.S. 324 (1927).

72. See, e.g. Beauregard, *Termination for Convenience as Breach of a Government Contract*, 7 B.C. INDUST. AND COMM. L. REV. 259 (1966); Brous, *Termination for Convenience: A Remedy for the Erroneous Award*, 5 PUB. CON. L.J. 221 (1972);

tions on this right to terminate are not set forth in either the T/C clause or in the procurement regulations.

VII. BEST INTEREST OF THE GOVERNMENT

It is possible that a contractor would not be bound by the government's action if the interpretation of the clause somehow limited the scope of the right. However, the language of the current T/C clause,⁷³ in federal government contracts in excess of \$10,000, is extremely broad, permitting termination when in "*the best interest of the government*." This language is ambiguous and is not defined in the government clause or in procurement regulations,⁷⁴ nor has litigation clarified the intent of the clause.⁷⁵ For example, in *John Reiner* the court held that:

Such termination is authorized whenever the contracting officer shall determine that it is in the best interest of the Government. The broad reach of that phrase comprehends termination in a host of variable and unspecified situations calling (in the contracting officer's view) for the ending of the agreement. . . . Under such an all-inclusive clause, the Government has the right to terminate at will.⁷⁶

Apparently any savings at all, monetary, tangible, or intangible, constitutes sufficient grounds for a convenience termination.⁷⁷

The contracting officer cannot issue a T/C if not in the "best interest of the government." When a contract is to be partially terminated, the government can issue either a T/C or a deductive

Dyert, *Implied Warranties in Government Contracts*, 53 MIL. L. REV. 39 (1971); Grossbaum, *Procedural Fairness in Public Contracts: The Procurement Regulations*, 57 VA. L. REV. 171 (1971); Mitchell & Tracy, *Terminations of Government Contracts: Recent Developments*, 14 WM. & MARY L. REV. 817 (1973); Perlman & Goodrich, *Termination for Convenience Settlements - the Government's Limited Payment for Cancellation of Contracts*, 10 PUB. CONT. L.J. 1 (1978); Comment, *A Question of Interest: The Government Contractor v. the United States*, 23 A.U.L. REV. 443 (1973); vom Baur, *Fifty Years of Government Contract Law*, 29 FED. B.J. 305 (1970); Whelan & Pearson, *Underlying Values in Government Contracts*, 10 J. PUB. L. 298 (1961).

73. See note 1 *supra*.

74. R. NASH & I. CIBINIC, *FEDERAL PROCUREMENT LAW* (2d ed 1969).

75. *Id.*

76. *Id.* at 442. See also *Davis Sewing Machine Co. v. United States*, 60 Ct. Cl. 201, 217 (1925), *aff'd mem.*, 273 U.S. 324 (1927); *Librach v. United States*, 147 Ct. Cl. 605, 611 (1959); *Okinawa Climate Control Corp., ASBCA 19,753, 77-2 BCA ¶12,669* (1977).

77. In *Commercial Cable Co. v. United States*, 397 F.2d 816 (Ct. Cl. 1968) plaintiff alleged that the government breached by failing to terminate the contract for the convenience of the government where the contractor had requested that it do so. The court concluded that the contracting officer had decided not to terminate and that his decision was conclusive, regardless of bad faith or clear abuse of discretion. See also *Steinthal & Co., Inc. v. Seamans*, 455 F.2d 1289 (Ct. Cl. 1971).

change order. A partial termination order will allow costs incurred plus a profit on those costs and will eliminate payment of anticipatory profits to the contractor. If a change order is issued, the contract will be reduced by "pricing out" the estimated cost of the work and allowing an estimated profit.⁷⁸ In *J.W. Bateson Co. v. United States*,⁷⁹ the Court held that the basis for determining whether the deletion was properly a T/C rather than a change is whether the modification has a "major" or "minor" impact on the work.⁸⁰ In *Bateson*, an order by the contracting officer to a construction contractor to use the government's material instead of a subcontractor's material was held to be a partial termination and not a change. *A change would have entitled the contractor to greater compensation.*⁸¹

VIII. ATTEMPTED LIMITATIONS OF THE GOVERNMENT'S RIGHT

A. Adhesion Contract Argument

The government contract is an example of that type of agreement known as a "contract of adhesion."⁸² Its boiler-plate provisions are the result of long experience in the making, administration, and termination of contracts.⁸³ With the classic adhesion contract, one party, at its leisure, drawing from expert legal advice, drafts a form contract complete with waivers of rights and privileges and exculpatory clauses; a court could not

78. R. NASH & I. CIBINIC, *FEDERAL PROCUREMENT LAW*, 764 n.3 (1969). See, e.g., *Celesco Indus., Inc.*, ASBCA 22,251 79-1 BCA ¶13,604 (1979); *Kakos Nursery, Inc.*, ASBCA 10,989, 66-2 BCA ¶15733 (1966); *Algernon Blair, Inc.*, ASBCA 10,738, 65-2 BCA ¶5127 (1965); *Gregory & Reilly Assoc., Inc.*, FAACAP 65-30, 65-2 BCA ¶4918 (1965).

79. 308 F.2d 510 (5th Cir. 1962).

80. *Id.* at 513.

It is obvious that there can be no hard and fast line between a 'termination' and a 'change' in the sense of these contracts. By a shift of circumstances, the two words may be made to verge on each other, or, on the other hand, may be made to stand far apart. Anybody would readily agree that when a contract for 430 buildings is cut down to 81 buildings, there has been a partial termination, and there would be the same unanimity in saying that the use of a shingle roof in place of a composition roof on a house would be a change rather than a termination, yet if a contractor for a dwelling and basement has the basement eliminated, there would be borderline picture, and that fairly could be called a change as readily as a partial termination. The long and short of it is that the proper yardstick in judging between a change and a termination in projects of this magnitude would best be found by thinking in terms of major and minor variations in the plans. *Id.* at 514.

81. See *Principles and Procedures for Terminations*, 2 GOV'T. CONT. REP. (CCH) ¶12,075.60 (1962). See also *Sutton Constr. Co.*, ASBCA 8405, 63 BCA ¶3762 (1963); *Seaboard Surety Co.*, ASBCA 6716, 62 BCA ¶3407 (1962).

82. See W. KEYES, *ENCYCLOPEDIA OF PROCUREMENT LAW* (1975).

83. Whelan & Pearson, *Underlying Values in Government Contracts*, 10 J. PUB. L. 298, 331 (1961).

treat this as an agreement negotiated and hammered out at arm's length by equals. A contracting party must voluntarily, knowingly, and intelligently waive its rights and do so with full awareness of the legal consequences. The T/C clause may be disregarded if it is the result of overreaching or of unfair use of unequal bargaining power.⁸⁴ An educated contractor familiar with the procedures of the federal government, should know of the government's right to terminate a contract in order to conserve limited government funds. However, the likelihood that the contractor did not realize that the government might terminate at any time for convenience and for reasons outside the contract, must be considered.⁸⁵

B. Illusory Contract Argument

It does not seem legally valid to say that the mere presence of a T/C clause in a contract makes the contract void for want of a binding obligation on the part of the government. One might argue that contractual promises which are entirely illusory are not consideration and cannot serve as the basis for a contract.⁸⁶ Although this argument appears sound, the T/C clause in itself contains sufficient promissory consideration to overcome such challenge. The contract is binding and not illusory, because the many other promises by the government to the contractor incorporated within the clause itself amount to a sufficient consideration.⁸⁷

C. Procedural Due Process Argument

Although ingenious, the attempt to limit the government's use of the T/C clause as a denial of procedural due process⁸⁸ has been unsuccessful. The procedural due process requirement is

84. Following the so called "blue-pencil" rule wherein the court may strike words from a contract.

85. See *Dairy Sales Corp. v. United States*, 593 F.2d 1002 (Ct. Cl. 1979).

86. An "illusory" contract does not obligate the promisor and may allow him to excuse himself entirely from his promise. "[I]n any case where a promise in terms or in effect provides that the promisor has a right to choose one of two alternatives, and by choosing one will escape without suffering a detriment or giving the other party a benefit, the promise is insufficient consideration." 1 S. WILLISTON, *WILLISTON ON CONTRACTS*, 400 (3d ed. 1957).

87. W. KEYES, *GOVERNMENT CONTRACTS IN A NUTSHELL*, 281 (1979).

88. U.S. CONST., amend. V (1971). "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

satisfied by a mere hearing such as the *post termination* appeal to the Board of Contract Appeals. In a recent case,⁸⁹ involving the termination for convenience of a contract to supply medical services, the contractor contended that the termination was improper because it was the product of bad faith and advance notice of the reasons supporting the termination were not received.⁹⁰ The termination was based on personal as well as professional differences between the doctor providing the services and the hospital commander. The Board concluded that, "[T]he termination of a contract which has given rise to personal and professional differences between a contractor and government officials, for whatever reasons, lies within the field of discretion afforded by the Clause. (Advance notice of the Government's intention and an opportunity to oppose termination not required)."⁹¹

IX. LIMITATION OF THE GOVERNMENT'S RIGHT

A. *Bad Faith Approach*

Apparently the only limitation on the government's discretion in a T/C action is by a clear showing that the termination was in bad faith.⁹² In both *Librach & Cutler v. United States*,⁹³ and *Jacobs v. United States*,⁹⁴ the contractor's allegation of bad faith termination was not shown. In *Librach*, the Army Quartermaster General had *erroneously* directed the contract to be terminated and after discovering his mistake, directed that the terminated supplies be repurchased, but shifted the work to another contractor.

In the subsequent case of *John Reiner* the court stated that "*in the absence of bad faith or clear abuse of discretion the con-*

89. Dr. Javad Hedayaty, ASBCA 22,276, 78-1 BCA ¶13,151 (1978).

90. *Id.* at 64,277.

The Board also found that the government by its termination action, was not commenting upon the appellant's professional performance, since the termination was not for default. The Board citing *Colonial Metals* went on to state that:

Absent either bad faith or some other wrongful or illegal conduct, the Government alone is the judge of its best interest in terminating a contract for convenience pursuant to the discretionary power reserved by the clause to the contracting officer. Abuse of this plenary discretion is cognizable only as a breach of contract action, a legal remedy beyond the administrative jurisdiction of this Board.

91. *Id.*

92. *Jacobs v. United States*, 239 F.2d 459 (4th Cir. 1956), *cert. denied*, 353 U.S. 904 (1957); *National Factors, Inc. v. United States*, 210 Ct. Cl. 218 (1976); *Librach & Cutler v. United States*, 147 Ct. Cl. 605 (1959).

93. 147 Ct. Cl. 605 (1959).

94. 239 F.2d 459 (4th Cir. 1956).

tracting officer's election to terminate is conclusive."⁹⁵ In *Colonial Metals* the court held that:

[I]n the absence of some proof of malice or conspiracy against the plaintiff . . . [or in the absence of] bad faith or *some other wrong to the plaintiff or illegal conduct* . . . , the Government alone is the judge of its best interest in terminating a contract for convenience, pursuant to the discretionary power reserved by the clause to the Government's contracting officer.⁹⁶

Impliedly, the courts have recognized that under appropriate circumstances an action could be brought for a bad faith termination.

Practically speaking, the burden of proof required to establish bad faith is great. The Board reinterpreted "bad faith" in *Kalvar Corp. v. United States*.⁹⁷ This case involved a primary source of supply contract where the contractor asserted a claim of bad faith and abuse of discretion. The court stated that *when considering "allegations of bad faith, the necessary irrefragable proof had been equated with evidence of some specific intent to injure the plaintiff" and "compared bad faith to actions which are motivated alone by malice."*⁹⁸ The court went on to cite *Colonial Metals* and affirmed that "[t]he mere fact that a contracting officer awards a contract to another company after terminating the plaintiff's contract is insufficient to show bad faith."⁹⁹ The Court of Claims apparently assumes that public officials act "conscientiously in the discharge of their duties."¹⁰⁰

In *James E. McFadden v. United States*,¹⁰¹ the contractor ar-

95. 325 F.2d at 444. See also *Line Constr. Co. v. United States*, 109 Ct. Cl. 154, 187 (1947).

96. 494 F.2d at 1361.

97. 543 F.2d 1298 (Ct. Cl. 1976). Plaintiff was to supply the General Services Administration with a specific type film. The GSA determined, on the basis of information supplied by Kalvar and Xidex (Xidex had been a primary source supplier to GSA in the year preceding Kalvar's contract) regarding their own films, that the films requested were beyond the scope of Kalvar's primary source contract and entered into an additional contract with Xidex. *Id.* at 1301 n. 1. See also *Librach & Cutler v. United States*, 147 Ct. Cl. 605 (1959); *Levering & Carrigues Co. v. United States*, 71 Ct. Cl. 739 (1931); J. McBRIDE & I. WACHTEL, *GOVERNMENT CONTRACTS*, ¶5.60 (1965).

98. 543 F.2d at 1302. "Irrefragable" is defined as impossible to deny or refute.

99. *Id.* (emphasis added).

100. "[I]n the absence of clear evidence to the contrary, it must be presumed that the public officials involved in the termination of the plaintiff's contract were acting conscientiously in the discharge of their duties when the contract was terminated for the purported convenience of the Government." *Librach & Cutler v. United States*, 147 Ct. Cl. 605, 612 (1959).

101. *James E. McFadden*, GOV'T CONT. REP. (CCH) §81,819 (1977).

gued that the contracting officer's termination action¹⁰² was taken in bad faith, basing this argument on the meanings of the terms "good faith" and "commercial reasonableness" in commercial transactions between private parties. The court again restricted its interpretation of "bad faith" and held, "that neither the contracting officer nor his superiors acted in bad faith, as that phrase had been defined in connection with the termination actions of Government officials."¹⁰³ The court stated that, "*the term bad faith had been equated with a specific intent to injure and must be shown with well-nigh irrefragable proof*"¹⁰⁴ (emphasis added). The court briefly reviewed the factual holding of *Colonial Metals* and analogized that, "[t]he motivation of the contracting officer's superiors in the instant case was identical (*i.e.*, a desire to obtain a lower price)."¹⁰⁵ The result of these cases is that no court has yet found "bad faith" in a convenience termination case.¹⁰⁶

Yet another "bad faith" approach was attempted in *Legislative Resources, Inc.*,¹⁰⁷ brought before the BCA in 1976. This appeal to the BCA was based upon the allegation that the T/C was racially motivated and therefore in bad faith. The Board held that it did not have jurisdiction to consider claims of bias or prejudice.¹⁰⁸ In June of 1977, in *MSG Associates, Inc.*, the ASBCA stated that it lacked authority to review an allegation of bad faith termination.¹⁰⁹ In citing *Colonial Metals* the Board decided that:

By the express terms of the contract the Government is given the absolute and unconditional right to terminate the contract for its convenience. The determination of the interest and inconvenience of the Government is, by the pertinent contract clause, left exclusively to the discretion of the Government and its motives in exercising this absolute contract right are immaterial to our decision.¹¹⁰

102. "On the same day that the contractor received written notice that it has been awarded a post office rehabilitation contract, the contracting officer was instructed by his superiors to reject all bids as unreasonably priced. Since the contract had already been awarded, the contracting officer ultimately terminated it for the Government's convenience." 20 G.C. ¶49 (1978).

103. James E. McFadden, Gov'T CONT. REP. (CCH) §81,819 (1977).

104. *Id.*

105. *Id.*

106. *Kalvar Corp., Inc. v. United States*, 543 F.2d 1298, 1301 (Ct. Cl. 1976). For a very recent opinion from the GAO, *see Bradford Nat'l Corp.*, Comp. Gen. D-19479 (1980).

107. DCAB OMBE-16-74, 76-2 BCA ¶11,951 (1976).

108. *Id.* at 57,281. *See also* *Midwest Telecommunications Corp.*, ASBCA 21,541, 77-2 BCA ¶12,581 (1977) (dealing with jurisdiction where the contractor's claim was based on fraud principles).

109. *MSG Assoc., Inc.*, ASBCA 21,753, 77-2 BCA ¶12, 613 (1977). An allegation that the government in bad faith terminated a contract for its convenience was not susceptible of review by the ASBCA because an abuse of discretion in terminating a contract for convenience is cognizable only as a breach of contract, which the Board lacks authority to remedy.

110. *Id.* The Board concluded that:

In *Globe Air, Inc.*,¹¹¹ in March of 1978, the contractor alleged, before the AGBCA, that the termination of his contract "was arbitrary, unjust, unfair and unreasonable and not in the best interest of the government," and that "the contracting officer's action was not a good faith settlement"¹¹² of the claims. In its decision, the Board refrained from expressing an opinion with respect to this issue due to lack of jurisdiction.¹¹³

Is this the demise of the bad faith doctrine within the Agency Boards or is it that they do not want to become further entangled with breach determinations based on unjust T/C's and wish now to leave the entire issue to the Court of Claims? If the Board was right in its holding that the housekeeping interest of the Agency Board in refusing to review a bad faith allegation overrides a plaintiff-protecting equitable policy, then it appears there is little reason for a plaintiff to even waste its time seeking Board review. Thus, a contractor faces the limited choice, under the new Contract Disputes Act of 1978, of having to bypass the Agency Board and go directly to the Court of Claims.¹¹⁴

B. Bad Faith Approach Under The UCC

Under the Uniform Commercial Code (UCC), the federal courts, applying state law, have been willing to impose a good

Although actions committed to the discretion of procurement officials are not immune from scrutiny to determine whether that discretion has been abused, a finding of bad faith or other abuse of discretion in terminating the instant contract for convenience would be cognizable only, if at all, as a breach of contract, which this Board lacks the authority to remedy. Moreover, even assuming the truth of appellant's allegations, there is insufficient basis to overcome the presumption that the officials involved in terminating appellant's contract were acting conscientiously and without malice in the discharge of their duties.

111. AGBCA 76-119, 78-1 BCA ¶13,079 (1978). The contractor, who supplied a helicopter that had crashed, offered to supply a replacement helicopter of the same type. The government, however, decided to terminate the contract and to postpone use of the helicopters until a study could be performed to determine whether the particular type of helicopter involved was safe. The contractor alleged that the termination was motivated by a subjective, wholly unjustified, bias against the particular helicopter used by the contractor.

112. *Id.*

113. MSG Assoc. Inc., ASBCA 21,753, 77-2 BCA ¶12,613 (1971). "The board does not have jurisdiction to determine what motives caused the Contracting Officer to terminate the contract for convenience of the Government."

114. The ASBCA has taken the position that it has no jurisdiction to determine if a convenience termination was applied in bad faith. The action must be brought in the Court of Claims. Midwest Telecommunications Corp., ASBCA 21,541, 77-2 BCA ¶12,581 (1977).

faith requirement in unilateral termination cases.¹¹⁵ The UCC requires the parties to a contract to act in good faith in the performance of a contract.¹¹⁶ In *De Treville v. Outboard Marine Corp.*,¹¹⁷ the court, in applying the UCC, stated that “[r]egardless of broad unilateral termination powers, the party who terminates a contract commits an actionable wrong if the manner of termination is contrary to equity and good conscience.”¹¹⁸

In order to show bad faith under the UCC, it is not necessary to prove intentional misrepresentation, deceit, or untruthfulness. Between merchants it is merely necessary to show that the standard of “decency, fairness and reasonableness in performance” of the contract and fair dealing in the trade had not been met.¹¹⁹ Thus, the proof required under the UCC to establish bad faith is insufficient in a T/C challenge. A successful T/C challenge requires irrefragable proof of some specific intent to injure the plaintiff. In addition, the Court of Claims and Agency Boards have looked to the UCC only when there is no federal law on point. Thus, after *Kalvar* the applicability of UCC principles may be of limited utility.

Furthermore, it has not been determined what remedy is available to a contractor after he successfully proves a bad faith termination. One can only assume, by way of implication, that a court would hold that a bad faith termination constitutes a breach of contract. The terminated party would be entitled to damages for this breach and presumably his anticipated profits on the entire contract.¹²⁰

115. See *De Treville v. Outboard Marine Corp.*, 439 F.2d 1099 (4th Cir. 1971); *Telecontrols, Inc. v. Ford Industries, Inc.*, 388 F.2d 48 (7th Cir. 1967).

116. U.C.C. §1-201(1)(a) defines good faith as “honesty in fact in the conduct of the transaction concerned.” U.C.C. §1-203 provides that every contract imposes “an obligation of good faith in its performance or enforcement.” U.C.C. §2-103 (1)(b) provides that in the case of a merchant good faith means, in addition to honesty in fact, “the observance of reasonable commercial standards of fair dealing in the trade.”

117. 439 F.2d 1099.

118. *Id.* at 1100.

119. Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666, 668 (1963).

120. In *G. L. Christian & Assoc.*, 312 F.2d 418, 423 (1963), the court said:

If the government terminates a contract without justification, such termination is a breach of the contract and the Government becomes liable for all the damages resulting from the wrongful act. . . . The damages will include not only the injured party's expenditures and losses in partially performing the contract, but also, if properly proved, the profits that such party would have realized if he had been permitted to complete the contract. The objective is to put the injured party in as good a position pecuniarily as he would have been in if the contract had been completely performed. The right to recover for anticipated profits arises only if the termination of the contract by the Government is wrongful and constitutes a breach.

C. Abuse of Discretion/Tort Approach

One might argue that an abuse of discretion resulting in damages¹²¹ to the contractor might give rise to a cause of action in tort. However no such cause of action is presently available. The Federal Tort Claims Act of 1946¹²² removed the traditional immunities from all tort claims against the government. Section 2680(a) creates an exception to liability under which the government retains its sovereign immunity from any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty" of a federal agency or employee,¹²³ "whether or not the discretion involved be abused."¹²⁴

D. Multiple Convenience Terminations Approach

A T/C may be invalid where it represents an attempt to improperly suspend or debar a contractor from government contracting.¹²⁵ In a very recent situation involving the General Services Administration (GSA), a contract was terminated for the convenience of the government because the contractor was impliedly involved in the current GSA "scandals."¹²⁶ In that case, the contractor alleged that the cancellation of the contract was an overreaction to an "endless stream of press articles," and therefore "GSA [was] following a pattern of conduct based on *de facto* debarment."¹²⁷ The contractor further alleged that the contract was terminated for the *sole purpose of preventing an award to Art Metal* and was not rescinded for GSA's convenience.¹²⁸ In addi-

121. Damages may be a result of loss of the contract, loss of anticipatory profits, and possibly some form of consequential default under a mortgage financing scheme based upon the anticipated contract proceeds.

122. See, e.g., 28 U.S.C. §§ 1346 & 1402 (1970).

123. As to what types of acts are considered discretionary, see *United Airlines, Inc. v. Wiener*, 335 F.2d 379 (9th Cir. 1964), *cert. denied*, 379 U.S. 951; 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* §29.13 (1956); and W. PROSSER, *HANDBOOK ON THE LAW OF TORTS*, §131 (4th ed. 1971).

124. W. KEYES, *GOVERNMENT CONTRACTS IN A NUTSHELL*, 149 (1979).

125. *Art Metal - U.S.A. v. Solomon*, 473 F.Supp. 1, (D.D.C. 1978).

126. *Id.*

127. *FED. CONT. REP. (BNA) A-14* (1978).

128. The company, which had been supplying office furniture to GSA for more than 20 years, was low bidder on a nine million dollar contract to supply file cabinets. Within a few hours of the award to Art Metals, the GSA Administrator directed that the contract be terminated for the convenience of the government. The contractor notes that stories in *The Washington Post* and *The Washington Star* quote GSA officials as stating that they are trying to set up a basis for suspending dealings with the Art-Metal company and that there could possibly be grounds for

tion, four other GSA contracts were "held in abeyance" beyond the normal time frame in which they would have been made. The court ordered that GSA reinstate the wrongfully terminated contract award and allow the contractor to bid, receive, and maintain contracts under the same standards applicable to other contractors.¹²⁹ Thus, a contractor may not be improperly suspended or debarred from government contracting by use of a T/C.

E. First To File Approach

The Court of Claims has held that the government can cut off the contractor's right to bring an action for breach of contract by a T/C, after the breaching acts have occurred but prior to institution of suit by the contractor. In *Nolan* the plaintiff argued that, "where the Government has breached the contract - it cannot escape the normal common law consequences of its wrongful action by thereafter terminating the contract for its convenience."¹³⁰ The government has an absolute right to T/C for any reason in the best interest of the government. This absolute right to terminate for convenience would allow such application at any stage of the performance, presumably including a T/C subsequent to initiation of suit by the contractor. In *Kalvar*, the government failed to place orders with a competitor. The Court of Claims held that this was not a breach of contract, but a "'constructive' termination for convenience, thereby limiting the liability of the government for what was an obvious breach."¹³¹ This appears to give the government the right to cut short *any action* for such a breach and so limit the contractor to a T/C recovery.

However, "the Court of Claims has clearly indicated that a contractor who has a valid claim that the government has breached the contract need not submit to termination procedures - if he can assert the breach before the government can terminate."¹³² According to one authority "the contractor might be able to argue that it had, by filing of the breach of contract action, effectively precluded the government from exercising any termination power

debarment. Art Metal goes on to state that the vast majority of its business is conducted with GSA and this conduct is likely to put the company out of business. *Id.* at A-15.

129. 473 F.Supp. at 8.

130. *Nolan Bros., Inc. v. United States*, 405 F.2d 1250, 1254 (Ct. Cl. 1969). See also Dygert, *Implied Warranties in Government Contracts*, 53 MIL. L. REV. 39 (1971).

131. Perlman & Goodrich, *Termination for Convenience Settlements - The Government's Limited Payment for Cancellation of Contracts*, 10 PUB. CONT. L.J. 1, 8 (1978).

132. Dickson, *The Effect of Government Breach of Contract Prior to Termination for Convenience or Default*, 11 NAT'L CONT. MGT. J. 125 (1977-78).

it once possessed."¹³³

X. CONCLUSION

The existing limitations on the application of a convenience termination are not sufficient to prevent abuse. For example, the right to terminate at will gives the government "leverage" which may work to the contractor's disadvantage, as where the contractor may be merely uncooperative and the government simply chooses to terminate the contract for its convenience.¹³⁴ Exercise of the T/C power in order to buy elsewhere at a lower price or to avoid a bad business deal may undermine the competitive bidding system *in toto*.¹³⁵

Following *Colonial Metals*, if the contractor who submits a timely bid is considered the apparent low bidder¹³⁶ and is finally awarded the job, an unsuccessful bidder can subsequently come in with a new lower price.¹³⁷ The unsuccessful bidder can merely challenge the contract award before the General Accounting Office. The government could allege that the original contract, based on the General Accounting Office decision, was illegal and therefore void *ab initio*. The contracting officer may then terminate the contract and re-award to this lower-priced contractor the original contract. Presumably, this action would not constitute *Kalvar-type bad faith* because it has not been shown that there was specific intent to maliciously harm the particular contractor. Even in those instances where it is subsequently determined that the contract was not illegal, the erroneous cancellation would be treated as a T/C.¹³⁸ Thus, although the procurement statutes do

133. *Id.* at 127-28.

134. *See* *Breed Corp. v. United States*, GOV'T CONT. REP. (CCH) §82,291 (1978).

135. *See* 16 C.C. ¶ 173.

136. As a mere speculation, if contractors are faced with possible early terminations, they would tend to make the early completed items of the job reflect a greater percentage of the financing and respectively a greater percentage of the profit. This would enable a contractor to recoup anticipated profits during the early work items of a project. Naturally, the anticipations raised by *Colonial Metals* would tend to promote "unbalancing" in bids that would be difficult to discover.

137. Today with the country on the brink of a recession, contractors could show up at the government's door and offer to take over a contract for a much cheaper price, merely to assure work for the contractor's personnel.

138. *John Reiner & Co. v. United States*, 325 F.2d 438 (Ct. Cl. 1963). *See* Comp. Gen. B-192,941, 79-1 CPD ¶ 38 (1979) the Comptroller General held that "where the Government's termination decision is based on an alleged impropriety in the award process, he will review whether the contract award was actually valid and

not usually permit consideration of late bids, the government can essentially do the same thing by use of a convenience termination. Therefore, one might argue that "interpreting the termination clause so broadly [undermines]" the competitive bidding system and "violate[s] the competitive procurement statutes and implementing regulations."¹³⁹ The use of T/C in cases arising from *Colonial Metals* stretches the "best interest of the Government" test to the point of gross inequity.

A federal statute should be imposed upon the courts, such that the inequities in proving bad faith as required under *Kalvar* are avoided without causing the unnecessary waste to the government which the convenience termination provisions are designed to prevent.¹⁴⁰ Yet it is Congress which must decide whether application of such a limitation would frustrate federal policy. It is the author's opinion that a more reasonable bad faith burden of proof (perhaps as suggested under the UCC) is equitably required.

If limitations on the use of the clause are not statutorily made, then in light of the recognized government interest in exercising a T/C and in consideration of the inadequate protection to a plaintiff contractor, the court must exercise considerable creativity in formulating decisional law. The court must go out of its way to protect the plaintiff. Professor Keyes has succinctly addressed this problem in his commentary regarding the "concept of fairness":

The interest of the public is protected in contracting by government at the federal, state and local levels. Essential fairness to both the public and the contractor is the keystone of public procurement. Unfair or inefficient procurement policies and procedures which tend to cause some contractors either not to bid or to include significant contingencies in their bids are not in the public interest.¹⁴¹

By striving toward the equitable treatment of contractors, the government will receive bids that more realistically reflect actual job costs rather than contain uncertain "plug" price estimates necessary to take into account the risk of a termination for the convenience of the government.

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proper and he will generally determine whether the termination was justified under the facts of the original contract award."

139. 16 G.C. ¶173. In this note case the implication of the *Colonial Metals* decision to bidding practices was reviewed.

140. *Nolan Bros., Inc. v. United States*, 405 F.2d 1250, 1253 (Ct. Cl. 1969). "Certainly the Government would not be compelled to see the Contract work through to the bitter end, no matter what the cost or the trouble or the waste in resources. Rather, in that situation it would be in the government's 'best interests' to use the termination clause. . . ."

141. W. KEYES, *GOVERNMENT CONTRACTS IN A NUTSHELL*, 6 (1979).