BALANCING THE SCALES: APPLYING THE FAIR COMPENSATION PRINCIPLE TO DETERMINE RECOVERY FOR COMMERCIAL ITEM CONTRACTS TERMINATED FOR THE GOVERNMENT'S CONVENIENCE

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I. Introduction

One lovely Monday morning, you return from physical training to find a voice-mail message from the contracting squadron requesting advice about a commercial items[1] contract terminated for the Air Force's convenience. Following up with the contracting officer, you learn that although the contract provided flight simulators for twelve months, the Air Force terminated it for convenience[2] after three months due to budget cuts. The contractor and contracting officer are at loggerheads over the entitled recovery under the Federal Acquisition Regulation (FAR).[3]

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[1] For purposes of this illustration, the flight simulators are "commercial items" as defined in FAR 2.101(b).

[2] Reference to terminations of commercial item contracts will always refer to the convenience of the government unless otherwise stated.

[3] The Federal Acquisition Regulation (FAR), issued as Chapter 1 of Title 48 C.F.R., serves as the primary regulation for all federal executive agencies in their acquisition of supplies and services with appropriated funds. It became effective on April 1, 1984. FAR 1.105-1(b) foreword (Mar. 2005).

The contractor claims that the Air Force owes him a percentage of the contract price reflecting three months of performance, unamortized costs[4] incurred in manufacturing the simulators in anticipation of the year-long contract, post-termination settlement costs, and lost anticipated profit for the remaining nine months of the terminated contract. The contractor claims that, despite diligent efforts, he has been unable to contract out the simulators elsewhere. The contracting officer wants your advice before rejecting the contractor's settlement offer.

Hanging up the phone, you scramble to find FAR 52.212-4(l), the Termination for the Government's Convenience Clause,[5] included in the contract. You stare at its two-part recovery formula, which reads, "Subject to the terms of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate . . . have resulted from the termination."[6] You are unsure about what encompasses "reasonable charges" but are encouraged to find detailed recovery guidelines for terminated traditional government contracts in FAR part 49.[7] However, FAR 12.403(a) states that the "requirements of Part 49 do not apply" but that "[c]ontracting officers may continue to use part 49 as guidance to the extent that part 49 does not conflict with this section and the language of the termination paragraphs in § 52.212-4,"[8] leaving you a bit puzzled. You vaguely

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[4] Here, "unamortized costs" refers to costs incurred by the contractor in providing the simulators in anticipation of the full twelve months of performance but uncompensated for due to early termination.

[5] 48 C.F.R. § 52.212-4(l) (2014).

[6] *Id.* A judge advocate facing a novel or unfamiliar contracting issue would be wise to consult more senior legal advisors, including AFLOA/JAQK (Contract Law Field Support Center). Contracting officers should be aware that the Defense Contracting Management Agency (DCMA) offers support through Termination Contracting Officers, whose sole purpose is to settle delegated contracts terminated for the convenience of the government. DEF. CONTRACT MGMT. AGENCY (DCMA) TERMINATIONS CTR., guidebook.dcma.mil/25/Terminations_Customer_Pamplet.doc (last visited June 10, 2014).

[7] The FAR pt. 49.113 provides that "[t]he cost principles and procedures in the applicable subpart of Part 31 shall, subject to the general principles in 49.201-(a) [b]e used in asserting, negotiating, or determining costs relevant to termination settlements under contracts with other than educational institutions . . . ." 48 C.F.R. § 49.113(a) (2014). Section 31.205-42 lists numerous cost principles peculiar to termination situations, including initial costs and costs continuing after termination, among others. *Id.* § 31.205-42.

[8] 48 C.F.R. § 12.403(a). Neither the mandated § 52.212-4(l) clause nor § 12.403 expressly recognizes the fair compensation principle or loss adjustment principle as applicable to commercial item contract terminations. *Id.* § 52.212-4(l); *id.* § 12.403.

recall from the Contracts course at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia, that a dissatisfied contractor may appeal a contracting officer's final decision to either the Armed Services Board of Contract Appeals (ASBCA) or to the U.S. Court of Federal Claims (COFC) and wonder what you will tell the contracting officer.[9]

Given scant regulatory guidance and few board and court decisions, determining a contractor's entitled recovery can be daunting. Federal Acquisition Regulation 52.212-4(l)'s two-pronged recovery formula[10] for terminated commercial item contracts is short on details, leading to uncertainty over what is recoverable. Further, FAR 12.403(a) fails to define precisely which portions of FAR Part 49 can guide recovery determinations.

A logical, uniform approach to determining recovery for terminated commercial item contracts is especially necessary given the statutory preference for commercial item contracting.[11] With draw-downs in Afghanistan, automatic spending cuts,[12] and budget reductions[13]

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[9] Under the Contract Disputes Act, a contractor may appeal a contracting officer's final decision to the Armed Services Board of Contract Appeals (ASBCA) or bring an action directly on the claim to the United States Court of Federal Claims. 41 U.S.C. § 7101, § 7104(a),(b)(1), § 7105(e)(1)(A) (2014) (granting the ASBCA jurisdiction to decide any appeal from a decision from a contract officer of the Department of Defense (DoD), the Department of the Army, the Department of the Navy, the Air Force, and the National Aeronautics and Space Administration regarding a contract administered by that agency). A contractor may appeal the decision of the ASBCA to the United States Court of Appeals for the Federal Circuit, which also has exclusive jurisdiction to hear an appeal from a final decision of the United States Court of Federal Claims. *Id.* § 7107(a)(1)(A). In maritime claims, United States district courts may also hear appeals from the ASBCA. *Id.* § 7102(d).

[10] 48 C.F.R. § 52.212-4(l) (2014).

[11] 41 U.S.C. § 3307 (2011) (statutory subheading reads "Preference for commercial items").

[12] The Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 240 (requiring total defense spending to decline by $487 billion from FY 2012 through 2021). According to the DoD's Defense Budget Priorities and Choices-Fiscal Year 2014, if sequestration were allowed to continue, between 2010 and 2014, there would be an 18% decline in the inflation-adjusted defense base budget. Sequestration would further reduce average annual defense spending by more than $50 billion each year through 2021. DEF. BUDGET PRIORITIES AND CHOICES-FISCAL YEAR 2014, http://www.defense.gov/pubs/DefenseBudgetPrioritiesChoicesFiscalYear2014.pdf. The National Defense Authorization Act for fiscal year 2014, which authorizes a DoD base budget of $526 billion, however, offers a temporary reprieve from the full effect of sequestration for fiscal years 2014 and 2015. Ros Krasny, *Obama Signs Bipartisan Budget Deal, Annual Defense Bill*, REUTERS (Dec.

projected well into the future, more commercial item contract terminations and recovery disputes are foreseeable.

To help resolve this uncertainty over recovery, fair compensation should apply to FAR 52.212-4(l)'s recovery formula[14] and inform what constitutes "reasonable charges" resulting from the termination in a given case. Moreover, FAR Part 49 and, by extension, FAR Part 31 principles[15] consistent with FAR 12.403 and FAR 52.212-4(l) should guide recovery determinations if implicated by factual circumstances and necessary to achieve fair compensation.

This article begins with a background on terminations of traditional government contracts for the government's convenience, examines provisions to calculate recovery for terminated commercial items contracts, and surveys four views on determining contractor recovery. It next demonstrates from the history of fair compensation, FAR Part 12 itself, and sound public policy that contracting officers should adhere to the principle of fair compensation when determining recovery. This article asserts that contracting officers can and should rely on FAR Part 49 and FAR Part 31 principles consistent with FAR 52.212-4(l)'s recovery formula[16] as circumstances dictate to achieve fair compensation. Lastly, the article discusses potential problems with this approach and poses possible solutions.

26, 2013), http://www.reuters.com/ article/2013/12/26/us-usa-obama- idUSBRE9BP0HK 20131226.

[13] The DoD's baseline budget funding in fiscal year 2015 is currently constrained by law to $496 billion. Daniel Wasserbly, *Pentagon Budget 2015: DoD Seeking Added Readiness Funding and Brac*, IHS JANE'S DEFENCE WKLY. (Feb. 23, 2014), http://www.janes.com/article/34523/pentagon-budget-2015-dod-seeking-added-readiness-funding-and-BRAC-IHS Jane's 360. By way of comparison, the Pentagon's base-line budget for the 2013 National Defense Authorization Act was $527.5 billion. Jim Garamone, *Obama Signs $633 Billion Defense Authorization Act*, AM. FORCES PRESS SERV. (Jan. 3, 2013), http://www.defense.gov/news/newsarticle.aspx?id=118913.

[14] 48 C.F.R. § 52.212-4(l) (2014).

[15] *Id.* § 31.205-42 (2014).

[16] *See supra* note 14.

II. Background

A. Termination for the Government's Convenience

The government has enjoyed a long-standing ability to terminate a contract based upon changes in the expectations in the parties, as happened at the conclusion of the Civil War.[17] The concept of termination for the government's convenience where there has been no fault or breach by the non-government party developed in military war-time procurement[18] during World War I, extended to peacetime military procurement in 1950, and ultimately expanded to peacetime civilian procurement today.[19]

The U.S. Court of Appeals for the Federal Circuit[20] has noted that the government's right to terminate a contract for its convenience is an exception to the common law's required mutuality of contract.[21] A cardinal change in the circumstances is not a prerequisite for a valid termination for the government's convenience.[22] Termination for the government's convenience reduces the government's liability by limiting recovery in comparison with damages for breaching a contract.[23]

Termination of a traditional government contract for the government's convenience transforms it into a cost-reimbursable contract under FAR 52.249-2's non-commercial item termination for convenience clause.[24] Federal Acquisition Regulation Part 49 regulates recovery for non-commercial item contracts, more often referred to as "traditional government contracts," terminated for the government's convenience.[25] A contractor whose traditional government fixed-price contract is terminated for the government's convenience is entitled to recover the following: (1) allowable costs incurred in the performance of the work; (2) costs allowable under a special termination cost principle

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[17] United States v. Corliss-Steam Eng. Co., 91 U.S. 321 (1876).
[18] Torncello v. United States, 681 F.2d 756, 764–65 (Ct. Cl. 1982).
[19] *Id.* (citing NASH & CIBINIC, FEDERAL PROCUREMENT LAW 1106-07 (3d ed. 1980)).
[20] The United States Court of Appeals for the Federal Circuit has jurisdiction over an appeal from final decisions of the United States Court of Federal Claims and of an agency board of contract appeals. 28 U.S.C. § 1295(a)(3), (10) (2014).
[21] Maxima Corp. v. United States, 847 F.2d 1549, 1552 (Fed. Cir. 1988) (noting that termination for convenience serves only the government).
[22] T & M Distributors, Inc., v. United States, 185 F.3d 1279, 1284 (Fed. Cir. 1999).
[23] *Maxima Corp.*, 847 F.2d at 1552.
[24] 48 C.F.R. § 52.249-2 (2014).
[25] *Id.* § 49.002 (2014).

set forth at FAR 31.205-42, including unamortized costs incurred prior to the termination, costs continuing after termination, and settlement expense; and (3) a reasonable profit on the above costs with the exception of settlement expense.[26] Recovery in such cases is subject to the fair compensation principle[27] and to the loss adjustment principle.[28]

B. The Recovery Formula for Terminated Commercial Items Contracts[29]

1. FAR 52.212-4(l) and FAR 12.403(d)

In 1994, Congress passed the Federal Acquisition Streamlining Act (FASA, also known as FASA I)[30] to streamline the "acquisition laws of the federal government . . . [to] facilitate the acquisition of *commercial* products, . . . and increase the efficiency and effectiveness of the laws governing the manner in which the government obtains goods and services."[31] The government then promulgated FAR 12.403 and FAR 52.212-4(l) to govern terminations of commercial item contracts for the government's convenience.[32]

The regulatory guidance for determining recovery for terminated commercial item[33] contracts is far less detailed than similar guidance for

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[26] Paul Seidman, *Termination for Convenience of FAR Part 12 Commercial Item Contracts: Is Fair Compensation Required*, *in* 24 NASH & CIBINIC REP. no. 8, ¶ 37 (2010) (citing 48 C.F.R. § 52.249-2, paras. (f), (g), (i); *id.* §§ 49.113, 49.201, 49.202, and 31.205-42).

[27] The fair compensation principle, as stated in 48 C.F.R. § 49.201(a), provides, "A settlement should compensate the contractor fairly for the work done and the preparations made for the terminated portions of the contract, including a reasonable allowance for profit." 48 C.F.R. § 49.201(a) (2014).

[28] The loss adjustment principle disallows recovery for profit if it appears that the contractor would have incurred a loss, had the entire contract been completed. *Id.* § 49.203.

[29] For the remainder of this article, terminated commercial item contracts will refer to commercial item contracts terminated for the government's convenience.

[30] The Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (codified in scattered sections of 10 U.S.C. and 41 U.S.C.).

[31] S. REP. NO. 103-258, at 1–2 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 2561, 2562 (emphasis added).

[32] 48 C.F.R § 12.403; *id.* § 52.212-4(l). Federal Acquisition Regulation Part 12 makes no reference to the fair compensation principle or the loss adjustment principle for commercial item contracts. *Id.* § 12.

[33] As an introduction, 48 C.F.R. § 2.101(b) defines "commercial items" to include, among other things, items of a type customarily used by the general public and sold,

traditional government contracts.[34] Recovery is determined by a simple, two-pronged formula consisting of "a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate . . . have resulted from the termination."[35] Unlike FAR Part 49, neither FAR 52.212-4(l) nor FAR 12.403 expressly mentions incurred costs, continuing costs, or reasonable profit.[36]

2. The First Prong: Percentage Contract Price

A cursory examination of two board decisions addressing the first prong of the commercial recovery formula suggests that the percentage of the contract price reflecting the percentage of work performed generally refers to actual physical work performed.[37] For example, in *Red River Holdings*, the government terminated a commercial item contract requiring a U.S. flag vessel to perform charter services with just two months remaining on the fifty-nine month charter period.[38] The ASBCA stated that the "work" consisted of providing a suitable U.S. flag vessel for inspection, acceptance, and performance of the fifty-nine-month charter.[39] The ASBCA indicated that the contractor would be entitled to 57 out of 59 months of the contract price under the first prong of the commercial item recovery formula.[40]

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leased, or licensed to the general public as well as certain services. For the complete definition of "commercial items," see *id.* § 2.101(b).

[34] Generally, the termination for convenience provision in FAR Part 12 is approximately 90 percent shorter than comparable termination for convenience provisions governing traditional government contracts. FEDERAL PUBLICATIONS LLC, COMMERCIAL ITEM ACQUISITION 9-37 (2007).

[35] 48 C.F.R. § 52.212-4(l).

[36] *Id.* § 52.212-4(l) (2014); *id.* § 12.403; *id.* § 49. Commercial item contracts are exempted from the Truth in Negotiations Act, thereby relieving contractors of the obligation to submit cost and pricing data to the government. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186. Similarly, a commercial items contractor is not required to comply with the cost accounting standards or with the contract cost principles of FAR Part 31 applicable to traditional government contracts. 48 C.F.R. § 12.403(d)(ii) (2014).

[37] PowerPoint Presentation of Paul J. Seidman, Seidman & Associates, P.C., ABA Section on Public Contract Law Committee on Commercial Items, "FAR Pt 12 Commercial Item Terminations for Convenience: Is Fair Compensation Required?" slide 6 (Oct 19, 2011), *available at* www.seidmanlaw.com/Events/Far-PT-12-Commercial-Item-Terminations-for-Convenience.pdf.

[38] Red River Holdings, LLC, No. 56316, 2009 WL 3838891, at *3–4 (Nov. 4, 2009).

[39] *Id.* at *7.

[40] *Id.*

Similarly, the Civilian Board of Contract Appeals (CBCA) in *Corners & Edges* found that payment of the contract price for the months of actual courier service performed on a terminated commercial service contract reflected the percentage work physically completed prior to notice of termination.[41]

While these two cases are not intended to encompass all possible factual scenarios, they do illustrate an emerging understanding that "percentage of work performed" under the first prong of the commercial item recovery formula[42] frequently translates into the percentage of the contract physically completed.

3. The Second Prong: Reasonable Charges Resulting from Termination

Focusing on the second prong of FAR 52.212-(4)(l)'s recovery formula,[43] this article reviews four differing perspectives of what constitutes "reasonable charges" resulting from termination and potential categories of recoverable costs. The ASBCA's initial *Red River* ruling, the first view, limits the "reasonable charges" prong to settlement expenses.[44] In the opinion of the U.S. District Court, District of Maryland, the second view, the "reasonable charges" prong expands to include costs or costs reasonably incurred in anticipation of contract performance, provided such costs are not adequately reflected as a percentage of the work performed, and provided such costs could not have been reasonably avoided.[45] In its *Russell Sand & Gravel* decision, the CBCA applied the cost-reimbursement construct in FAR Parts 49 and 31 and determined that "reasonable charges" included continuing costs and profits on such costs that could not be discontinued following

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[41] Corners & Edges, Inc. v. Dept. of Health & Human Servs., CBCA No. 693, 08-2 BCA ¶ 33,961.

[42] 48 C.F.R. § 52.212-4(l). What constitutes "work performed" under the first prong, with all the potential factual circumstances and complexities, exceeds the scope of this article. The author intends merely to familiarize the reader with the simplest of prong one circumstances and notes, for example, that neither of the two board cases mentioned concerned contract terminations for common, off-the-shelf stock items that could easily be placed back on the shelf for resale.

[43] *Id.* § 52.212-4(l).

[44] *Red River Holdings, LLC*, 2009 WL 3838891, at *7–8.

[45] Red River Holdings, LLC v. United States, 802 F. Supp. 2d 648, 662 (D.Md. 2011).

termination, the third view.[46] Lastly, a noted legal commentator suggests that "reasonable charges" could even include lost anticipatory profit.[47]

a. ASBCA's Initial Red River Holdings *Ruling*

First, in the *Red River Holdings* decision, the ASBCA found that the "reasonable charges" prong consisted of mere settlement expenses.[48] There, the U.S. Navy had terminated a contract involving a chartered vessel two months prior to its completion date.[49] The contractor, who had taken out a loan to acquire and outfit the vessel, sought a portion of the loan costs and insurance premiums allocable to the final two months of the contract. Although he had been paid the portion of the contract price reflecting the period of performance on the contract, the contractor asserted that the unamortized loan and insurance premium costs allocable to the final two months of the contract were reasonably incurred in anticipation of full contract performance and resulted from the termination.[50]

In its analysis, the ASBCA emphasized the conceptual differences between the commercial item clause in FAR 52.212-4(l), with its two-pronged recovery formula,[51] and FAR 52.249-2's traditional termination for convenience clause,[52] which converts fixed price contracts to cost-reimbursable contracts. In denying the contractor's appeal, the ASBCA concluded that the loan costs and costs incurred in reflagging and modifying the vessel for contract performance were not recoverable under FAR 52.212-4(l)'s "percentage of work performed" prong and did not "result from" the termination of the commercial item contract.[53] While never expressly raising FAR Part 49's fair compensation principle, the ASBCA effectively rejected its applicability to terminated commercial item contracts.

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[46] Russell Sand & Gravel Co., Inc., No. 2235, 2013 WL 6144153, at *5–10 (Nov. 6, 2013).
[47] Ralph C. Nash & Paul J. Seidman, Postscript: Termination for Convenience of Part 12 Commercial Item Contracts, *in* 25 NASH & CIBINIC REP. NO. 8, ¶ 37 add (2011).
[48] *Red River Holdings, LLC*, 2009 WL 3838891, at *7.
[49] *Id.* at *3–4.
[50] *Id.* at *6–7.
[51] 48 C.F.R. § 52.212-4(l) (2014).
[52] *Red River Holdings, LLC*, 2009 WL 3838891, at *6–7; 48 C.F.R. § 52.249-2 (2014).
[53] *Red River Holdings, LLC*, 2009 WL 3838891, at *6–7.

b. The United States District Court's Red River Holdings *Decision*

Next, the U.S. District Court, District of Maryland, in reversing and remanding the ASBCA's decision, referenced "principles of fairness in the administration of government contracts"[54] as applicable to FAR 52.212-4(l)'s recovery formula. The court reasoned that if "reasonable charges" were construed to include only settlement expenses from a termination, "monumental unfairness" could result if a contractor had incurred major preparatory costs in anticipation of full contract performance and the "percentage of the work performed prior to the notice of termination" failed to fully compensate the contractor's expenses.[55]

In the district court's view, recovery under FAR 52.212-4(l)'s second prong entitles a contractor to "payment as compensation for settlement costs or costs *reasonably* incurred in anticipation of contract performance, *provided such costs are not adequately reflected as a percentage of the work performed*, and *provided such costs could not have been reasonably avoided*."[56] The court stated that the second prong "generally does not contemplate *additional* allowances for profit," preventing recovery of profit on incurred costs.[57]

c. The CBCA's Decision in Russell Sand & Gravel

More recently, the CBCA relied upon FAR Part 49 and FAR Part 31 principles when determining "reasonable costs" where the International Boundary and Water Commission (IBWC) had terminated two delivery orders on a firm fixed price requirements contract, incorporating by reference FAR 52.212-4.[58]

In its analysis, the CBCA cited the fair compensation principle and reverted to the cost-reimbursement construct in FAR Parts 49 and 31

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[54] Red River Holdings, LLC v. United States, 802 F. Supp. 2d 648, 660 (D.Md. 2011).
[55] *Id.* at 659.
[56] *Id.* at 662. The court asserts that a contractor may not recover additional amounts, however reasonable or necessary, if already reflected in the percentage-of-work performed payment. *Id.* at 662 n.17.
[57] *Id.* at 662 n.18.
[58] Russell Sand & Gravel Co., Inc., No. 2235, 2013 WL 6144153, at *2–3 (Nov. 6, 2013).

used for traditional government contracts to determine "reasonable charges" that resulted from the termination. Applying the cost principles in FAR 31.205-42(b), for example, the CBCA allowed recovery for continuing costs and profits on such costs that could not be discontinued following termination.[59] This CBCA decision exceeds the *Red River Holdings* ruling for its wholesale adoption of FAR Part 49's recovery scheme for traditional government contracts.

d. Recovery of Anticipated Profit Viewpoint

Lastly, a noted legal commentator suggests that recovery of anticipated profit fulfills FASA I's mandate that the federal acquisition regulation be consistent with standard commercial practice.[60] Section 8002(b)(1) of FASA I requires that the FAR include to the maximum extent practicable only clauses "(A) that are required to implement provisions of law or executive orders applicable to acquisitions of commercial items . . . .; or *that are determined to be consistent with standard commercial practice*."[61] Section 2-708(2) of the Uniform Commercial Code (UCC),[62] which allows recovery of anticipatory profit, has been adopted by forty-nine states[63] and reflects standard commercial practice. Under this rationale, recognizing anticipatory profit as a

[59] *Id.* at *5–10.

[60] Seidman, *supra* note 47, ¶ 37 add. Mr. Paul Seidman's impressive legal career includes service as Assistant Counsel for Contract Claims at Naval Sea Systems Command and as Assistant Chief Counsel for Procurement in the Office of the Chief Counsel for Advocacy at the SBA. Additionally, he has over three decades of experience as a private practitioner in government contract law. He has appeared as an expert witness on procurement-related issues at congressional hearings and drafted procurement-related legislation and regulations. A prolific writer, Mr. Seidman's works have been published in *The Briefing Papers*, *The Nash & Cibinic Report*, and *The Government Contractor*, among others. Elected a Fellow by the National Contract Management Association, Mr. Seidman has served on the Advisory Board of The Government Contractor and on the Data and Patent Rights Committee of the American Bar Association. www.seidmanlaw.com/Attorneys/Paul-J-Seidman.shtml (last visited May 30, 2014).

[61] The Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 8002(b)(1), 108 Stat. 3243 (codified 41 U.S.C. § 3307 (2014)) (emphasis added).

[62] U.C.C. § 2-708(2) (2002) provides that "the measure of damages [for cancellation by the buyer includes] . . . the profit (including reasonable overhead) which the seller would have made from full performance by the buyer . . . ." *Id.* § 2-708(2).

[63] Seidman, *supra* note 47, ¶ 37 add.

"reasonable charge" under FAR 52.212-4(l) satisfies FASA I's mandate.[64]

III. Fair Compensation and Terminated Commercial Item Contracts

Having discussed the history of contract terminations, the two-pronged recovery formula for commercial items contracts, and competing perspectives on determining contractor recovery, this article next addresses the applicability of the fair compensation principle to commercial item contract terminations and analyzes FAR 52.212-4(l) and FAR 12.403. Lastly, the article presents a framework for determining recovery in such circumstances.

A. Historically, Fair Compensation Applied to Such Terminations

1. Statutory and Regulatory History

The fair compensation principle, currently manifested in FAR 49.201(a), asserts that a "settlement should compensate the contractor fairly for the work done and the preparations made for the terminated portions of the contract, including a reasonable allowance for profit."[65] The fair compensation principle applied to terminated government contracts enjoys a rich statutory and regulatory history. During WWI, the Sixty-Fifth Congress passed legislation signed by the President that stated, "Whenever the United States shall cancel, modify, suspend or requisition any contract . . . it shall make *just compensation* therefor . . . ."[66] The Contract Settlement Act of 1944 decreed, "It is the policy of the Government . . . to provide war contractors with speedy and *fair compensation* for the termination of any war contract . . . ."[67] Later that year, the War and Navy Departments issued the Joint Termination

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[64] *Id.*

[65] 48 C.F.R. § 49.201 (2014). Federal Acquisition Regulation 49.201 provides that "[f]air compensation is a matter of judgment and cannot be measured exactly. In a given case, various methods may be equally appropriate for arriving at fair compensation. The use of business judgment, as distinguished from strict accounting principles, is the heart of a settlement." *Id.*

[66] The Urgency Deficiency Appropriation Act, Pub. L. No. 65-23, 40 Stat. 182, 183 (1917) (emphasis added).

[67] Contract Settlement Act of 1944, Pub. L. No. 78-395, 58 Stat 649, 652 (emphasis added).

Regulation, which authorized "fair compensation" for terminated contracts.[68]

Moreover, FAR 49.201 echoes prior regulations, including the Defense Acquisition Regulation (DAR) 8-301[69] and the Federal Procurement Regulation (FPR) 1-8.301(a),[70] which provided fair compensation for the preparations made and the work completed.

2. Case Law Supports the Fair Compensation Principle

A persuasive line of case law buttresses applying the fair compensation principle to terminated commercial item contracts. For example, when considering the recoverability of unabsorbed overhead in a traditional government contract, the Federal Circuit asserted that "the overall purpose of a termination for convenience settlement is to fairly compensate the contractor and to make the contractor whole for the costs incurred in connection with the terminated work."[71] In a case involving a terminated development and construction contract, the Federal Circuit noted the following:

> A contractor is not supposed to suffer as the result of a termination for convenience of the Government, nor to underwrite the Government's decision to terminate. If

[68] Joint Termination Regulation, 9 Fed. Reg. 13,324 (Nov. 10, 1944).

[69] Defense Acquisition Regulations, 32 C.F.R. § 8-301(a) (1984) ("A settlement should compensate the contractor fairly for the work done and the preparations made for the terminated portions of the contract, including an allowance for profit thereon which is reasonable under the circumstances."); *see* Williams Alaska Petr., Inc. v. United States, 57 Fed. Cl. 789 n.7 (2003) (observing that the FAR resulted from an effort that culminated in 1983 to consolidate three separate systems of procurement regulations: the Federal Procurement Regulations, the Defense Acquisition Regulations, and the National Aeronautics and Space Administration Regulations).

[70] Federal Procurement Regulations, 27 Fed. Reg. 11,583, 11,591 (Nov. 27, 1962) (later codified at 41 C.F.R. pt. 1-8.301 but now obsolete) ("A settlement should compensate the contractor fairly for the work done and the preparations made for the terminated portions of the contract, including an allowance for profit thereon which is reasonable under the circumstances.").

[71] Nicon, Inc., v. United States, 331 F.3d 878, 885 (Fed. Cir. 2003) (citing Freedom Elevator Corp., GSBCA No. 7259, 85-2 BCA ¶ 17,964). The Federal Circuit ruled that although FAR's "Termination for Convenience of the Government (Fixed-Price)" clause did not specifically mention unabsorbed overhead as one that would be paid under the settlement, as a matter of law, it could be recovered if properly allowed and allocable. *Id.* at 885.

> he has actually incurred costs . . . , it is proper that he be reimbursed those costs when the Government terminates for convenience . . . .[72]

Both a U.S. district court and the CBCA have acknowledged this long-standing fair compensation principle when determining recovery for terminated commercial item contracts.[73] While the fair compensation principle is not expressly mandated for terminated commercial item contracts by statute or regulation, out of respect for the long-standing practice and precedent, contracting officers should adhere to this venerable principle as a matter of course when deciding recovery for terminated commercial item contracts.

B. FAR 12.403(a) Allows Application of the Fair Compensation Principle

1. Fair Compensation Is Consistent with FAR 12.403(a) and FAR 52.212-4(l)

Notably, FAR 12.403 supports imposing the fair compensation principle currently embodied in FAR Part 49.201 onto commercial item contracts terminated for the government's convenience. Federal Acquisition Regulation 12.403(a) states that "[c]ontracting officers may continue to use part 49 as guidance to the extent that part 49 does not conflict with this section and language of the termination paragraphs in 52.212-4."[74] Further, FAR 49.201(b)'s directive that settlement proposals compensate the contractor fairly for the work done and for preparations made for the terminated portions of the contract is consistent with both FAR 12.403 and FAR 52.212-4(l).[75]

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[72] Jacobs Eng'g Group, Inc., v. United States, 434 F.3d 1378, 1381 (Fed. Cir. 2006) (citing *In re* Kasler Elec. Co., DOTCAB No. 1425, 84-2 BCA ¶ 17374).

[73] Red River Holdings, LLC v. United States, 802 F. Supp. 2d 648, 660 (D.Md. 2011); Russell Sand & Gravel Co., Inc., No. 2235, 2013 WL 6144153, at *6 (Nov. 6, 2013).

[74] 48 C.F.R. 12.403(a) (2014).

[75] *Id.* § 49.201(b) notes that the primary objective of the fair compensation principle is "to negotiate a settlement by agreement." The regulation does not require rigid cost and accounting data but recognizes that "[o]ther types of data, criteria, or standards may furnish equally reliable guides to fair compensation." *Id.* § 49.201(c). Similarly, FAR Part 49.201(c) provides that "[t]he amount of recordkeeping, reporting, and accounting related to the settlement of terminated contracts should be kept to a minimum compatible with the reasonable protection of the public interest." *Id.*

One might object that since FAR 12.403 and FAR 52.212-4(l) do not expressly mention the term "fair compensation," the principle does not apply to terminations of commercial item contracts. The FASA I,[76] FAR 12.403, and FAR 52.212-4(l), however, make no mention of abolishing the long-established fair compensation principle.[77] The statutory and regulatory silence on fair compensation should not be interpreted as intent to abolish the principle. Fair compensation does not conflict with either FAR 52.212-4(l) or FASA I. Indeed, the district court in *Red River Holdings* declined to find that the drafters of FAR 52.212-4(l) intended to modify longstanding fairness principles and stated "that such a modification could well fail as an unreasonable interpretation of the statutory mandate set forth in the FASA . . . ."[78] Federal Acquisition Regulation 12.403(a) empowers contracting officers to incorporate FAR 49.202's fair compensation principle into FAR 52.212-4(l).

2. Recovery Formula of FAR 52.212-4(l) Enables Fair Compensation

When commercial item contracts are terminated, FAR 52.212-4(l)'s recovery formula provides the means to achieve fair compensation. By mandating payment of "a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination" and "reasonable charges the Contractor can demonstrate . . . have resulted from the termination," FAR 52.212-4(l) provides a versatile formula capable of delivering a just settlement under a variety of factual circumstances.[79]

The formula's second prong, FAR 52.212-4(l)'s "reasonable charges" resulting from termination, serves as a vehicle to provide compensation extending beyond mere settlement costs. A proposed earlier version of the second prong did not use the phrase "reasonable charges," but, instead, referenced "actual direct costs that . . . have resulted from the termination."[80] One commentator has observed that the language of the final rule, "*charges* [that] have resulted from

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[76] The Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 8002(b)(1), 108 Stat. 3243 (codified 41 U.S.C. § 3307 (2014)).
[77] 48 C.F.R. § 12.403; *id.* § 52.212-4(l).
[78] *Red River Holdings*, LLC, 802 F. Supp. 2d at 660 n.15.
[79] 48 C.F.R. 52.212-4(l) (2014).
[80] Federal Acquisition Regulations for the Acquisition of Commercial Items (Proposed Rule), 60 Fed. Reg. 11,198, 11,215–16 (Mar. 1, 1995).

termination," envisions amounts that would not have been billed but for the termination, whereas the earlier "costs that . . . have resulted from the termination" would have contemplated covering only amounts that would not have been incurred except for termination.[81] The distinction between "charges" and "costs" matters. The final rule, with its broader "charges" language, might cover costs incurred pre-termination but billed post-termination, while the earlier "cost" version could be construed to encompass only costs incurred post-termination, such as settlement costs.[82] Since payment of such "reasonable charges" is mandatory under FAR 52.212-4(l), what constitutes "reasonable charges" under the second prong determines the government's liability.[83]

The U.S. district court concluded that the drafters of FAR 52.212-4(l) likely chose the "charges" terminology over "costs" to allow recovery of reasonable preparation costs and the like.[84] This court is not alone in concluding that "reasonable charges" could refer to more than just post-termination settlement costs incurred after termination. The General Services Board of Contract Appeals (GSBCA) awarded several pre-termination incurred costs in a terminated commercial item contract.[85] Moreover, the Agriculture Board of Contract Appeals noted that the termination clause's "reasonable charges" language in a commercial item contract could encompass the costs reasonably incurred in anticipation of performing the contract but not fully reflected as a percentage of the work performed.[86]

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[81] *Red River Holdings, LLC*, 802 F. Supp. 2d at 661 n.16 (citing Seidman, *supra* note 26, ¶ 37) (emphasis added).

[82] *Id.*

[83] 48 C.F.R. 52.212-4(l) (2014).

[84] *Red River Holdings, LLC*, 802 F. Supp. 2d, at 661 n.16. The district court in *Red River* concluded that the "reasonable charges" prong serves as a "safety valve" component to allow compensation for any reasonable, unavoidable costs not reflected in the first component. *Id.* at 662 n.18.

[85] Divecon Servs., LP v. Dep't of Commerce, GSBCA No. 15997-COM, 04-2 BCA ¶ 32,656.

[86] Jon Winter & Assocs., No. 2005-129-2, 2005 WL 1423636, at *4 (June 20, 2005); *see also* Dehdari Gen. Trading & Contract'g, ASBCA No. 53987, 2003-1 BCA ¶ 32,249 (in a commercial items case, the ASBCA implied that a contractor would be entitled to pre-termination payments made to a supplier in anticipation of full contract performance if it had submitted evidence to support the alleged payments and proved that such costs could not have reasonably been avoided).

3. Fair Compensation Is Sound Policy

In addition to complying with long-standing practice, case law, and statutory and regulatory intent, fair compensation promotes sound policy. Why would a contractor expend resources competing for a commercial items contract just to face an unacceptable risk of being stuck with uncompensated costs should the government decide to terminate the contract for its convenience? Allocating a disproportionate share of the risk and financial burden onto the contractor's shoulders defeats FASA I's intent, thwarting competition rather than enhancing it. Further, small contractors, particularly sensitive to the current constrained fiscal environment, might be compelled to shutter their doors if forced to absorb unamortized costs reasonably incurred in anticipation of contract performance or other costs resulting from a contract termination.

Fair compensation, on the other hand, offers relief, lessening the disruption of termination, and ultimately promotes greater competition by creating a more secure contracting environment for companies. Fair compensation could preserve businesses in certain circumstances from closure following contract terminations and thereby sustain sources of goods or services the Department of Defense may need to tap for conflicts in the future. Further, fair compensation satisfies the government's obligation to manage limited public funds responsibly, prevents potential injustice, and follows the rule of law. Adhering to the time-tested fair compensation principle for terminated commercial item contracts promotes the national interest and serves as sound policy.

IV. FAR Part 49 and Recovery for Commercial Item Contracts

A. Consistent FAR Part 49 and FAR Part 31 Principles Are Advisory

Although FAR Part 49 was not promulgated to govern FAR Part 12 commercial item contract terminations, contracting officers may rely upon FAR Part 49, and, by extension, FAR Part 31 principles when consistent with FAR 12.403 and FAR 52.212-4(l) to determine "reasonable charges" resulting from termination. At the outset, FAR 49.002(a)(2)[87] asserts as a disclaimer that "[t]his part [FAR Part 49] does not apply to commercial item contracts awarded using part 12 procedures" and cites §12.403 for direction on termination policies for

[87] 48 C.F.R. § 49.002(a)(2) (2014).

commercial item contract. Federal Acquisitions Regulation 49.002(a)(2) declares "for contracts for the acquisition of commercial items, this part provides administrative guidance which may be followed unless it is inconsistent with the requirements and procedures in 12.403 . . . ."[88] Federal Acquisition Regulation 12.403(a) also states, "Contracting officers may continue to use part 49 as *guidance* to the extent that part 49 does not conflict with this section and the language of the termination paragraphs in 52.212-4."[89]

The portions of FAR Part 49 consistent with FAR 12.403 and FAR 52.212-4(l) can,[90] and should, inform FAR 52.212-4(l)'s two-pronged recovery formula. Under the recovery formula's second prong, contracting officers must pay "reasonable charges the Contractor can demonstrate . . . have resulted from the termination."[91] In the absence of any express mention of incurred cost, continuing cost, or reasonable profit in either FAR 12.403 or FAR 52.212-4(l), the salient question becomes which provisions of FAR Part 49 are considered consistent—and relevant—to a contracting officer's determination of "reasonable charges" resulting from termination.

Boards of review have frequently resorted to FAR Part 49 and to related FAR Part 31 principles for guidance when determining recovery of terminated commercial item contracts to the benefit of either contractors or the government. For example, the CBCA relied upon FAR 31.205-42(b)'s specific cost principle in awarding costs continuing after termination despite all reasonable efforts by the contractor to eliminate them.[92] The GSBCA referenced FAR 49.203(a)[93] and declined to award any profit claimed on termination costs where a loss would have been incurred, had the contract not been terminated.[94] Similarly, the ASBCA noted that the termination for convenience clause does not state whether or not profit is payable as a "reasonable charge" and, "[i]n

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[88] *Id.*

[89] *Id.* § 12.403(a) (2014) (emphasis added).

[90] *Id.*

[91] *Id.* § 52.212-4(l) (2014).

[92] Russell Sand & Gravel Co., Inc., No. 2235, 2013 WL 6144153, at *8 (Nov. 6, 2013).

[93] 48 C.F.R. § 49.203 (a) (2014) states, "In the negotiation or determination of any settlement, the [termination contracting officer] (TCO) shall not allow profit if it appears that the contractor would have incurred a loss had the entire contract been completed." *Id.* § 49.203 (a).

[94] Divecon Servs., LP v. Dep't of Commerce, GSBCA No. 15997-COM, 04-2 BCA ¶ 32,656. Relying upon FAR Part 49.202(a), the GSBCA disallowed recovery for anticipated but unearned profit on work not performed. *Id.*

the absence of other guidance," decided to follow FAR 49.202(a)'s[95] language disallowing recovery of profit on settlement expenses.[96]

Bearing in mind the overarching principle of fair compensation, contracting officers should analyze FAR Part 49, and, by extension, the relevant FAR Part 31 provisions, and decide which principles are consistent with FAR 12.403 and FAR 52.212-4(l) and reasonably applicable to the particular facts of the case at hand. Elaborating on all the possible categories for recovery exceeds the scope of this article, but, as a boundary, a strong argument can be made that contractors cannot recover for lost anticipated profit for unperformed work on a terminated commercial item contract.[97] There may be instances where fair compensation implicates recovery based on FAR 31.205-42(b)'s costs continuing after termination principle.[98]

B. Potential Pitfalls and Possible Solutions

While contracting officers and boards have incorporated FAR Part 49 principles into their recovery calculations on occasion, potential pitfalls include uneven application of FAR Part 49 principles by contracting officers and a lack of consensus among reviewing authorities on what categories of expenses are recoverable as "reasonable charges"[99] under FAR 52.212-4(l)'s second prong.[100] Also, FAR 12.403(a)'s[101] discretionary grant to contracting officers on whether to follow

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[95] 48 C.F.R. § 49.202(a) (2014) precludes recovery of profit on settlement expenses, lost profit, and consequential damages. *Id.* § 49.202(a).

[96] Appeals of Alkai Consult., LLC, ASBCA No. 56792, 10-2 BCA ¶ 34,493.

[97] *See* Appendix.

[98] 48 C.F.R. § 31.205-42(b) (2014) provides in part, "Despite all reasonable efforts by the contractor, costs which cannot be discontinued immediately after the effective date of termination are generally allowable." *Id.* § 31.205-42(b).

[99] Red River Holdings, LLC, No. 56316, 2009 WL 56316 at *7–8 (Nov. 4, 2009) (limiting recovery under FAR 52.212-4(l)'s "reasonable charges" prong to settlement expenses); Red River Holdings, LLC v. United States, 802 F. Supp. 2d 648, 662 (D.Md. 2011) (allowing recovery for settlement costs reasonably incurred in anticipation of contract performance if such costs are not adequately reflected as a percentage of the work performed and could not be reasonably avoided); Russell Sand & Gravel Co., Inc., No. 2235, 2013 WL 6144153 at *8–11 (Nov. 6, 2013) (recovery for "reasonable charges" under FAR 52.212-4(l) included costs incurred, profits on cost incurred, costs continuing after termination, and profit on such continuing costs).

[100] 48 C.F.R. § 52.212-4(l) (2014).

[101] *Id.* § 12.403(a) (2014).

consistent FAR Part 49 principles for recovery determinations could lead to their uneven application and to disparate outcomes.

A similar difficulty in this still-evolving area also occurs when boards and courts differ as to which FAR Part 49 provision and Part 31 cost principles apply to terminated commercial item contracts. For example, one commentator believes the district court's decision in *Red River Holdings* might preclude recovery of continuing costs and profits on incurred costs.[102] The CBCA, however, has allowed recovery for continuing costs and profits on such costs.[103] In the future, the Court of Federal Claims and ASBCA could potentially disagree on what costs are recoverable, inviting forum shopping.

While specific facts of a particular case are decisive in determining recovery, the Federal Circuit may ultimately resolve which FAR Part 49 and FAR Part 31 principles apply to terminated commercial item contracts. Congress could also pass legislation, or, more likely, the FAR Council could amend the FAR and specify which provisions of FAR Part 49 and FAR Part 31 apply to terminated commercial item contracts for recovery purposes. Other potential reforms include narrowing the definition of "commercial items" to exclude complex items more appropriate for FAR Part 49 governance.[104] Given this dynamic legal terrain, contracting officers should consult their contracting attorney before conducting settlement negotiations.

V. Conclusion

Having advocated for an approach to determining recovery that fuses the fair compensation principle with FAR 52.212-4(l)'s two-part recovery formula and consistent FAR Part 49 principles when reasonably applicable, it is now appropriate to apply it. Returning to the article's opening scenario, the contracting attorney should advise the contracting officer that pursuant to FAR 52.212-4(l), the contractor is entitled to payment of the contract price reflecting three months of contract performance as well as settlement costs.[105] While the *Red River*

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[102] Seidman, *supra* note 47, ¶ 37 add.

[103] *Russell Sand & Gravel Co., Inc.*, 2013 WL 6144153, at *8–11.

[104] Parties could consider tailoring termination clauses specifying which costs are recoverable.

[105] 48 C.F.R. § 52.212-4(l) (2014). This vignette presupposes consultation with higher headquarters.

Holdings case is pending on remand with the ASBCA,[106] in light of the district court's decision and the CBCA's *Russell Sand & Gravel* opinion, other costs beyond mere settlement costs not compensated for by a percentage of the contract price may be recoverable under FAR 52.212-4(l)'s "reasonable charges" prong[107] if the contractor can demonstrate they resulted from termination and could not be reasonably avoided. Additionally, FAR Part 49 and Part 31 principles deemed consistent with FAR 12.403(a) and FAR 52.212-4(l) should be considered if relevant and necessary for fair compensation.

While fair compensation is a matter of judgment,[108] the contractor will have to provide satisfactory evidence to obtain recovery of costs incurred in anticipation of contract performance, and this proof requirement will undo an unsubstantiated claim. Following existing case law, the contracting attorney should advise the contracting officer to disallow recovery for lost anticipated profit.

This illustration is not merely an intellectual exercise but could prove useful in the future. Faced with historic fiscal pressure to reduce spending and a pending withdrawal from Afghanistan, the Department of Defense will inevitably resort to terminating commercial item contracts to comply with the Budget Control Act of 2011.[109] In all likelihood, recovery disputes will continue to arise over FAR 52.212-4(l)'s general two-pronged recovery formula.[110] In these fiscally challenging times, the long-established fair compensation principle should serve as a guidepost for determining recovery for terminated commercial item contracts.

Under the current regulatory scheme, FAR 52.212-4(l)'s two-pronged recovery formula[111] can accommodate a range of factual circumstances. While both prongs of the formula play important roles, the "reasonable charges" prong provides a flexible mechanism to incorporate consistent FAR Part 49 and FAR Part 31 principles,

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[106] The ASBCA has yet to publish a response to the district court's reversal. Red River Holdings, LLC v. United States, 802 F. Supp. 2d 648, 662 (D.Md. 2011). Although the Federal Circuit has not ruled on this issue, the CBCA found that more than settlement expenses can be recovered where the government terminates a commercial item contract for its convenience under FAR 52.212-4(l). *Russell Sand & Gravel Co., Inc.*, 2013 WL 6144153, at *8–11.

[107] 48 C.F.R. § 52.212-4(l).

[108] *Id.* § 49.201(a) (2014).

[109] The Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 240.

[110] 48 C.F.R. § 52.212-4(l) (2014).

[111] *Id.*

depending on the facts. Contracting officers must continue to use their judgment in looking to FAR Parts 49 and 31 for guidance and pursue fair compensation in their individual cases within the current matrix of board of review cases and court decisions.

Appendix

Recovery for Anticipated Profits Is Disallowed

While identifying all the FAR Part 49 and FAR Part 31 provisions relevant to terminated commercial item contracts exceeds the scope of this paper, a strong case can be made that anticipated profits should be disallowed. Federal Acquisition Regulation 49.202(a) states that "[a]nticipatory profits and consequential damages shall not be allowed."[112] The appropriate analysis asks whether this limiting provision is consistent with FAR 12.403 and FAR 52.212-4(l), and, therefore, able to guide contracting officers in determining recovery.[113]

In the analysis of FAR 52.212-4(l)'s clause, a basic principle of contract interpretation requires construing the "plain language" of the contract.[114] This involves "giving the words of the agreement their ordinary meaning unless the parties mutually intended and agreed to an alternative meaning."[115] The paragraph entitled "Termination for the Government's convenience" contained within FAR 52.212-4(l)'s Contract Terms and Conditions—Commercial Items[116] makes no express mention of recovery for lost anticipated profit or any hint of such recovery. On the contrary, if anything, FAR 52.212-4(l) affirms the traditional bar on recovery for lost anticipated profit. The clause's very title, "Termination for the Government's convenience," conveys meaning. The clause is not entitled "Breach of Contract for the Government's Convenience," which suggests intent to permit recovery of lost anticipated profit or consequential damages. Instead, the clause's opening words hearken to the government's long-held ability to terminate a contract for its convenience without incurring liability for lost anticipated profit.

Historically, termination of a contract for the government's convenience has disallowed recovery for lost anticipated profit on unperformed work as a unique sovereign benefit.[117] Within this context

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[112] 48 C.F.R. § 49.202(a) (2014).
[113] *Id.* § 12.403(a) (2014).
[114] McAbee Const., Inc. v. United States, 97 F.3d 1431, 1435 (Fed. Cir. 1996).
[115] Harris v. Dep't of Veterans Affairs, 142 F.3d 1463, 1467 (Fed. Cir. 1996).
[116] 48 C.F.R. § 52.212-4(l) (2014).
[117] Marc Pederson, *Rethinking the Termination for Convenience Clause in Federal Contracts*, 31 CONT. L.J. 83, 86–87 (2001) (reviewing the historical development of the

and in the absence of express statutory or regulatory language expressing intent to allow recovery for anticipated profits, the most logical conclusion is that the drafters did not intend the "reasonable charges" language of FAR 52.212-4(l) to include lost anticipated profits. Notwithstanding FASA I, Section 8002(b)(1)'s language favoring standard commercial practices,[118] there is no specific indication in FASA I or FAR 52.212-4(l) that Congress or the DAR Council intended to cede the government's long-standing civil immunity from lost anticipated profits during terminations for the government's convenience and bestow on contractors a gratuitous windfall. Surely Congress and the DAR Council would have more clearly provided for the recovery of anticipatory profits for terminated commercial item contracts had such a policy shift with its vast financial consequences been intended.

In addition to the long-established association of the title "Termination for the Government's Convenience" with excluding recovery of anticipated profits and the complete absence of language allowing recovery of anticipated profit, § 49.202(a)'s restriction[119] on recovering anticipated profits is consistent with § 12.403 and § 52.212-4(l) and reasonably applicable under FAR 12.403(a).[120] Moreover, the Court of Federal Claims has found in *Praecomm* that anticipatory profits are not recoverable for such terminations of commercial item contracts.[121] Based upon practice, regulation, and case law, anticipatory profits are not recoverable under FAR 52.212-4(l)'s "Termination for the Government's Convenience" clause.[122]

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government's sovereign ability to terminate contracts without facing common law breach damages).

[118] The Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 8002(b)(1), 108 Stat. 3243 (codified 41 U.S.C. § 3307 (2014)).

[119] 48 C.F.R. § 49.202 (2014) precludes a terminated contractor from recovering anticipatory profit.

[120] *Id.* § 12.403(a) (2014).

[121] Praecomm, Inc. v. United States, 78 Fed. Cl. 5, 12 (2007) (citing Int'l Data Prods. Corp. v. United States, 492 F.3d 1317, 1323–24 (Fed. Cir. 2007)).

[122] 48 C.F.R. 52.212-4(l) (2014).