KEEPING COMMITMENTS: A BALANCED APPROACH TO TERMINATION FOR CONVENIENCE

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I. Introduction

When the United States Government enters into contracts, it sheds the cloak of sovereign immunity and subjects itself to the same contracting risks as private parties.[1] Like any government action, however, there are exceptions to this basic rule. One major exception is the use of termination-for-convenience clauses. Termination-for-convenience (T4C) clauses are mandated in federal contracts and give agencies discretion to terminate a contract, at any time, without paying expectation or consequential damages.[2]

Termination for the convenience of the government originated as a tool to prevent public waste by cancelling mass wartime acquisitions at the end of armed conflicts.[3] Federal rules have since extended T4C clauses to all federal contracting for use in a wide range of circumstances.[4] While seemingly advantageous to federal agencies, the broad use of T4C clauses creates inequities for innocent contractors that turn costly for the government. These clauses act as a crutch to enable mistakes in

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[1] Lynch v. United States, 292 U.S. 571, 579 (1934). "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Id.*

[2] FAR 12.403, 49.502, 49.503, 52.212-4(l), 52.249-1 to -6 (2018).

[3] JOHN CIBINIC, JR. ET AL., ADMINISTRATION OF GOVERNMENT CONTRACTS 941–42 (5th ed. 2016).

[4] *See* discussion *infra* Part II.

acquisitions by shifting risk from the government onto its contractors.[5] Because an agency can readily terminate a contract and reset the solicitation process, the government is incentivized to conduct hastily planned acquisitions riddled with mistakes. Contractors then charge the government higher prices to accommodate the additional risks assumed by the use of T4C clauses.[6]

Courts and boards have struggled to find limitations on the use of T4C clauses and have created a confusing, and shifting, set of tests.[7] Cases currently apply either a bad faith or abuse of discretion standard but have not consistently defined those standards.[8] In 1982, however, the Court of Claims proposed a balanced approach based on the original justification for T4C: T4C can only be exercised in response to a post-award change in circumstances.[9] The Court of Appeals for the Federal Circuit later rejected the changed circumstances requirement.[10]

A changed circumstances requirement would provide a better risk balance but may not be the best option for every situation in modern contracting. For example, a strict changed circumstances requirement would eliminate flexibility to use terminations to comply with statutory competition requirements.[11] A multifaceted approach that limits the use of T4C clauses while maintaining some flexibility would mitigate the problems inherent in a discretionary T4C scheme without eliminating an important mechanism to preserve public resources.

To do this, Congress should pass legislation to restrict the use of T4C to three situations: (1) upon agreement of the parties; (2) to comply with competition requirements where the government pays the innocent contractor its total bid and proposal costs; or (3) when circumstances change after award. These changes would shift some risk back to the government. They would also dis-incentivize inefficient contracting,

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[5] *See* Torncello v. United States, 681 F.2d 756, 763–64 (Ct. Cl. 1982).
[6] *See* discussion *infra* Section III.C.
[7] *See* discussion *infra* Section III.A.
[8] *See* discussion *infra* Section III.A; CIBINIC, JR. ET AL., *supra* note 3, at 948–58.
[9] Torncello v. United States, 681 F.2d 756, 772 (Ct. Cl. 1982).
[10] Krygoski Constr. Co. v. United States, 94 F.3d 1537 (Fed. Cir. 1996).
[11] In *Krygoski Constr.*, the Court of Appeals for the Federal Circuit noted that "to accommodate [the Competition in Contracting Act's] fairness requirements, the contracting officer may need to terminate a contract for the Government's convenience to further full and open competition." *Id.* at 1543 (citations omitted). Under a strict changed circumstances rule, the contracting officer would be unable to terminate if the purpose is to correct an error made during initial competition.

lower costs, and provide assurances to contractors that agencies intend to uphold their agreements.

Part II of this article summarizes the history, rationale, and use of T4C clauses. Part III discusses the problems caused by a discretionary T4C scheme. Part IV introduces the proposed changes and discusses implementation of the new requirements.

II. Rationale, Development, and Use of T4C Clauses

Convenience termination schemes appeared after the Civil War and were accepted in common law.[12] The justification for allowing the government to terminate contracts was the public interest in preserving resources after war had ended and mass supplies were no longer needed.[13] The concept "originated in the reasonable recognition that continuing with wartime contracts after the war was over clearly was against the public interest."[14] In the earliest recognized termination case, *United States v. Corliss Steam-Engine Co.*, the Supreme Court assumed that the government had the authority to unilaterally terminate its contracts.[15] The thrust of the case was whether the military had fiscal authority to compensate the innocent contractor to make it whole.[16] Making contractors whole is a primary concern that permeates the development and use of T4C clauses.[17]

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[12] *See Krygoski*, 94 F.3d at 1540–41. The United States Supreme Court expressly acknowledged the military's authority to terminate wartime contracts when the cessation of armed conflict negated the necessity of the procurements. *Id.*

[13] *Torncello*, 681 F.2d at 764. "Terminations for the [g]overnment's convenience developed as a tool to avoid enormous procurements upon completion of a war effort." *Krygoski*, 94 F.3d at 1540.

[14] *Torncello*, 681 F.2d at 764.

[15] United States v. Corliss Steam-Engine Co., 91 U.S. 321, 323 (1875) ("[I]t would be of serious detriment to the public service if the power of [federal agencies] did not extend to providing for all such possible contingencies by modification or suspension of the contracts, and settlement with the contractors.").

[16] *Id.* This case concerned the cancellation of a contract for two steam engines after the end of the Civil War. Corliss Steam-Engine Co. v. United States, 10 Ct. Cl. 494, 498 (1874).

[17] "'A contractor is not supposed to suffer as the result of a termination for convenience of the [g]overnment . . . ." Jacobs Eng'g Grp. v. United States, 434 F.3d 1378, 1381 (Fed. Cir. 2006) (quoting *In re* Kasler Elec. Co., DOTCAB No. 1425, 84-2 BCA ¶ 17374). *See also* James E. Murray, *Contract Settlement Act of 1944*, 10 LAW & CONTEMP. PROBS. 683, 683 (1944) (noting that a primary principle of the Contract Settlement Act of 1944 was to pay contractors to "avoid mass business failures and

The use of convenience terminations evolved beyond common law authority as procurement law developed. During World War I, the Urgent Deficiency Act of 1917 allowed the President to pay "just compensation" to contractors for wartime contracts that were terminated.[18] The World War II era brought more statutes and regulations facilitating contract terminations for post-war drawdowns.[19] Termination for convenience rules and clauses were subsequently expanded to include peacetime contracting.[20] Laws and regulations began to require T4C clauses in most military and civilian contracts.[21] Those statutes and regulations gave agencies broad discretion to terminate contracts.[22] This discretion is prevalent in the current T4C scheme under the Federal Acquisition Regulation (FAR).[23]

Under the modern T4C scheme, federal agencies can terminate contracts, in whole or in part, if a contracting officer determines that "it is in the [g]overnment's interest."[24] When an agency fails to invoke the T4C clause, but "end[s] the contractual relationship in some other way," courts and boards will find a constructive termination for convenience.[25] Constructive termination "can justify the government's actions" when "the

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widespread unemployment"). The Dent Act of 1919 concerned exclusively with the War Department's ability to compensate contractors that provided goods under agreements that did not meet the technical requirements of the law. Dent Act of 1919, Pub. L. No. 65-322, 40 Stat. 1272 (1919). The Act prohibited payment of expectation damages on terminated agreements, a requirement that has carried forward to modern termination for convenience (T4C) clauses. *Id.*

[18] Urgent Deficiency Appropriation Act of 1917, Pub. L. No. 65-23, 40 Stat. 182 (1917).

[19] *Torncello*, 681 F.2d at 765; CIBINIC, JR. ET AL., *supra* note 3, at 942.

[20] Krygoski Constr. Co. v. United States, 94 F.3d 1537, 1541 (Fed. Cir. 1996). "Thus, termination for convenience—initially developed for war contracts—evolved into a principle for [g]overnment contracts of far-ranging varieties, both civilian and military." *Id.*

[21] CIBINIC, JR. ET AL., *supra* note 3, at 942.

[22] *Id.*

[23] *See* FAR 52.212-4(l), 52.249-1 to -7 (2018); *Torncello*, 681 F.2d at 765 ("For World War II, the Corliss concept was embodied in a mandatory termination clause for fixed-price supply contracts, the direct predecessor of the modern termination for convenience clause.").

[24] FAR 49.101(b), 52.249-1 to -7. Note that the Federal Acquisition Regulation (FAR) prescribes slightly different language for termination of commercial items contracts: the termination must be "in the best interests of the [g]overnment." FAR 12.403(b). Arguably, there is no practical difference between the two standards.

[25] CIBINIC, JR. ET AL., *supra* note 3, at 963. For example, the Court of Federal Claims found a constructive termination when the U.S. Forest Service failed to complete a required environmental assessment, thus preventing the contractor from performing any work. Zip-O-Log Mills, Inc. v. United States, 113 Fed. Cl. 24, 31–32 (2013).

government has stopped or curtailed a contractor's performance for reasons that turn out to be questionable or invalid."[26] Additionally, if an agency fails to include a T4C clause in a contract, courts and boards will read it into the contract because the clause is mandated by regulation and is a "deeply ingrained strand of public procurement policy."[27] Thus, an agency enjoys the benefits of a T4C clause whether it explicitly invokes the clause or just abandons contract performance. These benefits accrue whether or not the contract actually contains the T4C clause. Upon termination, the contractor is entitled to compensation for costs incurred and reasonable profit for any work performed, but the contractor is not entitled to anticipatory profit or consequential damages.[28]

With this expanded use and application, T4C has developed into a broad tool that federal agencies exercise in a variety of situations. Agencies often exercise T4C instead of the termination-for-default or termination-for-cause clauses even when contractor performance is not acceptable. [29] This strategy provides some compensation to the underperforming contractor, but it allows the agency to avoid costly litigation.[30] Agencies also exercise T4C in a variety of other situations to avoid continuing contractual agreements that might otherwise turn sour for the government.[31]

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[26] Torncello v. United States, 681 F.2d 756, 759 (Ct. Cl. 1982).

[27] G.L. Christian & Assoc. v. United States, 312 F.2d 418, 426 (Ct. Cl. 1963).

[28] FAR 49.202(a). For general fixed-priced contracts, the contractor receives cost and profits for work completed, but "[a]nticipatory profits and consequential damages shall not be allowed." *Id.* The clause specific to commercial-items contracts provides for "a percentage of the contract price reflecting" work performed and costs "result[ing] from the termination" but not for anticipatory profit or consequential damages. FAR 52.212-4(l). *See* Red River Holdings, LLC. v. United States, 802 F. Supp. 2d 648, 655 (D. Md. 2011) (noting that courts do not allow anticipatory profit or consequential damages under any T4C clause, including for commercial items). By definition, contractors performing under cost-reimbursement contracts would only receive reimbursement for costs incurred during pre-termination performance. *See generally* FAR 16.301-1. Contractors are also entitled to the cost incurred in settling and closing out the terminated contract. *See, e.g.*, FAR 52.249-2(g)(3).

[29] *See, e.g.*, Nexagen Networks, Inc. v. United States, 124 Fed. Cl. 645, 649 (2015).

[30] Contractors can be liable for damages under terminations for default or cause. *See* FAR 49.4. A contractor's remedy for an improper termination for default is a conversion to a T4C, which will provide some compensation to the contractor. *See, e.g.*, Pinckney v. United States, 88 Fed. Cl. 490, 516 (2009). Thus, the contractor has an incentive to sue for wrongful default termination and conversion to a T4C. If the agency is unsure about the strength of its position, it may rely on a T4C to avoid litigation altogether.

[31] In one case, the agency procured specific software, but terminated because the software was incompatible with the agency's existing systems. McHugh v. DLT Sol., Inc., 618 F.3d 1375, 1382 (Fed. Cir. 2010).

A common use of T4C is to facilitate compliance with contract competition rules.[32] The Competition in Contracting Act requires federal agencies to generally engage in full and open competition when soliciting work.[33] If a federal agency violates the provisions of the Competition in Contracting Act, a disappointed company can protest the contract award with the Government Accountability Office or the Court of Federal Claims.[34] In response to an adverse protest decision, or to avoid an adverse decision altogether, an agency may exercise T4C to terminate the awarded contract and reset the competition process.[35] Even without the threat of protest, agencies exercise T4C clauses when they independently determine the need to preserve full and open competition.[36] These clauses provide a flexible tool to preserve public resources, but discretionary T4C also creates challenges for both the government and contractors.

III. Problems with a Discretionary T4C Scheme

The government's discretionary use of T4C creates inequities for contractors and hurts the efficiency of federal procurement. Courts have struggled to place limitations on this broad power and have developed a confusing history of case law, making it difficult for agencies and contractors to know how courts will interpret their agreements. Additionally, discretionary T4C acts as a crutch that masks mistakes in government acquisition work and leads contractors to increase prices to accommodate the increased risk they assume in each contract.

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[32] CIBINIC, JR. ET AL., *supra* note 3, at 947.

[33] Competition in Contracting Act, Pub. L. No. 98-369, 98 Stat. 1175 (1984). The full and open competition requirement is codified at 10 U.S.C. § 2305(a)(1)(A)(i) (2018) and 41 U.S.C. § 3301 (2018).

[34] *See* 31 U.S.C. §§ 3551–3556 (2018) (establishing the Government Accountability Office's jurisdiction to hear bid protests on contract decisions); 28 U.S.C. § 1491(b)(1) (2018) (giving bid protest jurisdiction to the Court of Federal Claims).

[35] *See, e.g.*, Salsbury Industries v. United States, 905 F.2d 1518, 1521–22 (Fed. Cir. 1990) (noting that the agency was forced to partially terminate the contract to comply with a court order).

[36] *See, e.g.*, T&M Distributors, Inc, v. United States, 185 F.3d 1279, 1281 (Fed. Cir. 1999) (noting that after determining that the value of the contract was over 400% more than originally estimated, the contracting officer elected to terminate the contract and resolicit bids to ensure full and open competition).

A. Courts Struggle to Find a Standard

"The phrase 'termination for the convenience of the government' makes clear that a contractual relationship can been halted by the government simply because it no longer desires to continue it."[37] Despite this clear judicial declaration, courts and boards recognize some need for meaningful limitations on the use of T4C.[38] The cases have struggled to determine what that limitation should be, and they have developed a changing set of rules that seem to shift in reaction to the particular facts of each case.[39] Nevertheless, courts and boards rarely find an exercise of T4C to be improper.[40]

Current cases typically apply a modified version of the common law duty to act in good faith.[41] In 1976, the Court of Claims determined an exercise of T4C to be improper if the agency acted in bad faith or abused its discretion.[42] The court did not distinguish between bad faith and abuse of discretion and suggested they may be the same.[43]

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[37] Securiforce Int'l Am., LLC v. United States, 125 Fed. Cl. 749, 781–82 (2016), *vacated in part*, 879 F.3d 1354 (Fed. Cir. 2018).

[38] "[C]ourts and boards have sought for many years to put some bounds on the [g]overnment's right in order to avoid having all [g]overnment contracts be illusory because the right was so broad that the [g]overnment gave no consideration in entering into a contract." Ralph C. Nash, *Terminations for Convenience: When are They Improper?*, 26 No. 10 NASH & CIBINIC REP. ¶ 52, Oct. 2012 [hereinafter NASH & CIBINIC REPORT (2012)]. They "are still searching for meaningful limitations that will accommodate the government's legitimate needs and leave the contractor with some rights under this clause." CIBINIC, JR. ET. AL., *supra* note 3, at 949.

[39] NASH & CIBINIC REPORT (2012), *supra* note 38. "[I]t is important that we have a clear definition of the limitations on the [g]overnment's right to terminate for convenience. Yet there still seems to be some doubt on this issue." *Id.*

[40] "The judicial interpretation of the government's rights under this clause has led some commentators to conclude that there are 'virtually no limitations on the [g]overnment's right to terminate.'" CIBINIC, JR. ET AL., *supra* note 3, at 948 (quoting Mathew S. Pearlman & William W. Goodrich. Jr., *Termination for Convenience Settlements—The Government's Limited Payment for Cancellation of Contracts*, 10 PUB. CONT. L.J. 1, 7 (1978)).

[41] The Restatement (Second) of Contracts defines the good faith requirement in broad terms. Good faith "may require more than honesty," and prohibits "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance . . . ." RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (AM. LAW INST. 2016).

[42] Kalvar Corp. v. United States, 543 F.2d 1298 (Ct. Cl. 1976).

[43] "We need not decide whether bad faith is tantamount to abuse of discretion . . . . However, many of our prior decisions seem implicitly to accept the equivalence of bad faith, abuse of discretion, and gross error." *Id.* at 1306 n.1.

Courts and boards presume that government officials act in good faith,[44] and the general rule is that bad faith requires "some specific intent to injure" the contractor.[45] This subjective animus requirement separates the standard from the common law requirement to deal in good faith.[46] Under the broadest view, extreme recklessness or an intentional disregard for proper procedures by the government would not constitute bad faith without "proof of malice or conspiracy."[47] Additionally, courts require contractors to show this bad faith by clear and convincing evidence,[48] a requirement that also strays from common law.[49] Thus, the limited definition of bad faith as applied to T4C betrays the concept that the government should be treated like any other private party when it contracts.

Colonial Metals Co. vs. United States represents the broadest and most literal application of the intent to injure standard.[50] The Navy contracted with Colonial Metals to provide several thousand tons of copper at above-market prices.[51] The Navy terminated the contract a month later to obtain the copper for a cheaper price.[52] Even if the contracting officer knew about the cheaper price prior to contract award, the Court of Claims found no bad faith because there was no evidence of malice.[53] Rather, prior knowledge of the better price "mean[t] only that the contract was awarded improvidently and d[id] not narrow the right to terminate."[54]

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[44] *See* CIBINIC, JR. ET AL., *supra* note 3, at 951.
[45] *Kalvar*, 543 F.2d at 1302.
[46] Under the common law, "[n]o specific intent, malice, or animus toward the other party need be shown to prove a breach of good faith duties (i.e., bad faith). It can be occasioned by neglect, stupidity, breach of law or other duty, or intent to advantage oneself, one's employer, or other third parties." Frederick W. Claybrook, Jr., *A Twice-Told Tale: The Strangely Repeated Story of 'Bad Faith' in Government Contracts*, 24 FED. CIR. B.J. 35, 61 (2014).
[47] Colonial Metals Co. v. United States, 494 F.2d 1355, 1361 (Ct. Cl. 1974), *overruled by* Torncello v. United States, 681 F.2d 756 (Ct. Cl. 1982).
[48] AM-PRO Protective Agency, Inc. v. United States, 281 F.3d 1234, 1239–40 (Fed. Cir. 2002).
[49] In common law, "[b]reach of good faith duties, or bad faith, need only be proven by the same burden as every other contractual breach, by a preponderance." Claybrook, Jr., *supra* note 46, at 61.
[50] *Colonial Metals*, 494 F.2d at 1361.
[51] *Id.* at 1357.
[52] *Id.*
[53] *Id.* at 1361.
[54] *Id.*

In a 1982 opinion, *Torncello v. United States*, the Court of Claims, sitting *en banc*, overturned *Colonial Metals* and introduced a changed circumstances test.[55] In this case, the Navy awarded a multiple line-item grounds maintenance contract.[56] One line item called for as-needed pest control, for which the contractor bid a higher price than other bidders. The Navy never placed an order against this item but hired another bidder at a cheaper price for this specific service.[57] All of the judges agreed that the Navy's actions constituted an improper constructive exercise of the T4C clause.[58]

A plurality of three judges went further by articulating the requirement for a post-award change in circumstances before exercising T4C. The plurality traced the development of T4C as a tool to "allocate the risk of changed circumstances."[59] The plurality noted that a changed circumstances requirement was inherit in past judicial precedent, even though it was not expressly articulated.[60]

The *Torncello* plurality did not expressly reject the bad faith or abuse of discretion standard, and concurring opinions felt the same result could be reached using those tests.[61] The plurality also failed to articulate the boundaries of the changed circumstances test.[62] As a result, lower courts and boards struggled to determine the proper test. Many courts and boards ignored or distinguished *Torncello*, relying instead on the bad faith or

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[55] Torncello v. United States, 681 F.2d 756, 772–74 (Ct. Cl. 1982).
[56] *Id.* at 758.
[57] *Id.*
[58] *Id.* at 763–64, 772–74.
[59] *Id.* at 765.
[60] *Id.* at 765–66 ("[C]ases recognized that the termination for convenience clause was only to be applied where there was some change from the parties' original bargain and was not to be applied as broadly as an untutored reading of the words might suggest.").
[61] Chief Judge Friedman concurred in the result merely stating the Navy could not use T4C to escape an agreement it never intended to fulfill. *Id.* at 773. Judge Davis agreed with overturning *Colonial Metals Co. v. United States*, but felt that both bad faith and abuse of discretion would have given the same result. *Id.* at 773–74. Judge Nichols likewise found the bad faith standard to be adequate. *Id.* at 774.
[62] *See* Major Karl M. Ellcessor, III, *Torncello and the Changed Circumstances Rule: "A Sheep in Wolf's Clothing,"* ARMY LAW., Nov. 1991, at 18, 21.

abuse of discretion standard.[63] "[T]he *Torncello* doctrine began to unravel almost as soon as it was created."[64]

In 1996, the Court of Appeals for the Federal Circuit—the successor to the Court of Claims—expressly rejected the changed circumstances test in favor of the bad faith or abuse of discretion standard.[65] The three-judge panel in *Krygoski Construction Co. v. United States* declared the changed circumstances test to be dicta.[66] The court's opinion centered on the Competition in Contracting Act, which Congress passed after *Torncello*.[67] The court noted that agencies may be forced to terminate contracts to comply with competition requirements, thus there is a need for a "lenient convenience termination standard."[68]

With the *Krygoski* opinion, the bad faith or abuse of discretion standard was fully reinvigorated. But the court did not add clarity to its application. The court approved the *Torncello* result and approved overturning *Colonial Metals* based on bad faith grounds.[69] "A contracting officer may not terminate for convenience in bad faith, for example, simply to acquire a better bargain from another source."[70] This seemed to imply that specific intent to injure was no longer the measure of bad faith. In more recent cases, however, the Federal Circuit affirmed the intent to injure standard without stating whether it would have changed the outcomes in *Torncello* and *Colonial Metals*.[71] To add to the confusion, in

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[63] *See, e.g.*, Simmons, ASBCA No. 34049, 87-3 BCA ¶ 19,984 ("[We] will follow the bad faith/abuse of discretion rule regarding convenience terminations until the 'changed in circumstances' rule is adopted by a clear majority."). *See also* Ralph C. Nash & John Cibinic, *Termination for Convenience: Searching for the Changed Circumstances Rule*, 4 No. 9 NASH & CIBINIC REP. ¶ 55, Sept. 1990 [hereinafter NASH & CIBINIC REPORT (1990)] ("In the eight years since *Torncello*, the courts and boards have struggled with determining whether there is a 'changed circumstances' rule and, if so, what constitutes such a change.").

[64] Joseph J. Petrillo & William E. Conner, *From Torncello to Krygoski: 25 Years of the Government's Termination for Convenience Power*, 7 FED. CIR. B.J. 337, 360 (1997).

[65] Krygoski Constr. Co. v. United States, 94 F.3d 1537, 1542–45 (Fed. Cir. 1996).

[66] *Id.* at 1541. In this case, the Army Corps of Engineers failed to discover the presence of asbestos laden tiles prior to entering a contract for demolition services. Because the amount of asbestos abatement would have significantly increased the cost of the contract, the agency exercised T4C and reset the procurement process to comply with full and open competition requirements. *Id.* at 1539–40.

[67] *Id.* at 1542–43.

[68] *Id.*

[69] *Id.* at 1542.

[70] *Id*.

[71] AM-PRO Protective Agency, Inc. v. United States, 281 F.3d 1234, 1240 (Fed. Cir. 2002).

2010, the Federal Circuit entertained a changed circumstances argument, rather than dismissing it as an invalid test.[72] This suggests that the court may consider changed circumstances arguments from contractors.

Kyrgoski and subsequent appellate cases also failed to clarify whether there is a real difference between bad faith and abuse of discretion. Two recent opinions from the Court of Federal Claims addressed the issue by looking at whether contracting officers failed to exercise independent judgment.[73] These opinions held that without an intent to injure, an exercise of T4C is an abuse of discretion if the contracting officer defers completely to the judgment of other officials.[74] The Federal Circuit circumscribed this rule, allowing a termination decision to be made by an appropriate official other than the contracting officer, unless otherwise specified in the contract.[75] The Federal Circuit was silent on whether any type of official abdication would constitute abuse of discretion. If it survives, this abdication rule will not put a meaningful limitation on the T4C power. It merely serves as a warning to agencies to ensure poor decision-making is independently affirmed by an official with authority to terminate the contract.[76]

Thus, the courts have created a bad faith standard that requires an intent to injure, but not in all cases; an abuse of discretion standard that may just mean abdication by government officials; and a discredited changed circumstances test that courts may nevertheless be willing to entertain. "The bad faith and abuse of discretion standards have been, at best, only superficially examined in the opinions, and many inconsistencies exist between the facts of the cases and the language of the decisions."[77] This superficial approach may be caused, in part, by a tacit

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[72] McHugh v. DLT Solutions, Inc., 618 F.3d 1375, 1382 (Fed. Cir. 2010) ("[I]n light of those findings of changed circumstances, we conclude that the government was justified in utilizing the termination for convenience clause in terminating the contract . . . .").

[73] Securiforce Int'l Am., LLC v. United States, 125 Fed. Cl. 749, 781–82 (2016), *vacated in part*, 879 F.3d 1354 (Fed. Cir. 2018); TigerSwan, Inc. v. United States, 118 Fed. Cl. 447, 452–53 (2014).

[74] *Securiforce*, 125 Fed. Cl. at 785–86 (2016) (finding that the contracting officer deferred to the judgment of a supervisor); *TigerSwan*, 118 Fed. Cl. at 452–53 (2014) (finding that the contracting officer deferred to other officials).

[75] Securiforce Int'l Am., LLC v. United States, 879 F.3d 1354, 1363–64 (Fed. Cir. 2018).

[76] "[T]he government's obligation to avoid clear abuses of discretion is only an illusion. Without any other limits, the concept of discretion is meaningless." Torncello v. United States, 681 F.2d 756, 771 (Ct. Cl. 1982).

[77] CIBINIC, JR. ET AL., *supra* note 3, at 949–50.

recognition that a discretionary T4C scheme results in inequities for contactors and inefficiencies for the government.

B. The T4C Crutch: A Mask for Inefficient Contracting

1. Discretionary T4C Enables Contracting Mistakes

The discretionary T4C scheme enables inefficient contracting processes. Not only do these clauses shift risk, but they also shift the burden of the government's acquisition mistakes onto contractors. This creates perverse incentives that have costs for both the government and contractors.[78] Broad T4C clauses allow federal agencies to substitute T4C for proper procurement planning.[79] For example, rather than obtaining an accurate assessment of needs, agencies may grossly over-procure knowing they can terminate once the needs are filled.[80] This T4C crutch also incentivizes hasty acquisitions that have incomplete compliance with competition or other requirements. In this case, T4C clauses become a do-over switch to cover for mistakes. This problem is likely more pronounced when acquisition offices are undermanned and under pressure to quickly complete purchases.[81]

The facts of a recent case demonstrate this T4C crutch. In *Securiforce International America, LLC v. United States*, the Defense Logistics Agency procured fuel supply services for eight U.S. Department of State sites in Iraq.[82] The agency failed to obtain a necessary waiver for fuel sourced from outside the United States.[83] Procurement officials knew

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[78] *See generally* Daniel R. Fischel & Alan O. Sykes, *Governmental Liability for Breach of Contract*, 1 AM. L. & ECON. REV. 313, 354–57 (1999).

[79] "The Termination for Convenience clause may discourage government agencies from taking steps to accurately and efficiently plan their acquisition strategies . . . ." Marc A. Pederson, *Rethinking the Termination for Convenience Clause in Federal Contracts*, 31 PUB. CONT. L.J. 83, 98 (2001).

[80] *Id.*

[81] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-750, STATE AND DOD SHOULD ENSURE INTERAGENCY ACQUISITIONS ARE EFFECTIVELY MANAGED AND COMPLY WITH FISCAL LAW (2012) ("Underlying that sense of urgency [to quickly procure services for U.S. Department of State locations in Iraq] was the insufficient capacity and expertise of State's acquisition workforce.").

[82] Securiforce Int'l Am., LLC v. United States, 125 Fed. Cl. 749, 786–87 (2016), *vacated in part*, 879 F.3d 1354 (Fed. Cir. 2018).

[83] *Id.*

about the waiver requirement prior to entering the contract.[84] After entering the contract, the agency obtained a waiver for six of the sites but determined that officials from a different agency needed to approve the waiver for the remaining two sites.[85] Rather than seeking an expedited waiver, the agency decided to exercise T4C to find an alternative source of fuel for those two sites.[86] The T4C was necessitated by agency failure to identify and plan for the waiver requirement during acquisition planning.[87] The resulting situation would surely be more costly to a contractor and the government.[88] The contractor lost bargained-for work and the benefit of economies of scale. The government likely paid a higher cost for fuel that was sourced elsewhere and bore the costs of managing two contracts.

2. Discretionary T4C Enables Competition Mistakes

Correcting violations of competition requirements is a common use of the T4C crutch.[89] An agency may lose a bid protest and be forced to reset contract competition,[90] or the agency may independently determine that a violation requires a competition reset.[91] Either way, an agency would terminate the recently awarded contract to effectuate this reset. Termination for convenience provides a low-cost way to reset contract competition, and the government does not bear the full burden of its mistakes. This diminishes the incentive to perform the competition

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[84] *Id.* at 755–56.

[85] *Id.*

[86] *Id.* at 786–787. Note that the Court of Appeals for the Federal Circuit deferred to the agency determination that a waiver would require four to six weeks to obtain, which was too late to meet operation needs. Securiforce Int'l Am., LLC v. United States, 879 F.3d 1354, 1365 (Fed. Cir. 2018). The case facts do not clarify whether the agency thoroughly investigated the possibility of obtaining an expedited waiver.

[87] The trial court found the T4C exercise to be an abuse of discretion. *Securiforce*, 125 Fed. Cl. at 787. This determination hinged on the fact that the contracting officer's supervisor had directed the T4C, and the court concluded that the contracting officer failed to make an independent determination. *Id.* at 785–86. The appellate court vacated this decision, concluding that the government's authority to terminate the contract was not limited to a particular official. *Securiforce*, 879 F.3d at 1365.

[88] As it turned out, the contractor had other problems, leading to a valid default termination for the work it was allowed to keep. *Id.* at 1367–68.

[89] *See* CIBINIC, JR. ET AL., *supra* note 3, at 947–48.

[90] *See, e.g.*, Salsbury Indus. v. United States, 905 F.2d 1518, 1519–20 (Fed. Cir. 1990).

[91] *See, e.g.*, T&M Distributors, Inc. v. United States, 185 F.3d 1279, 1281 (Fed. Cir. 1999).

process correctly in the first instance and may lead acquisition personnel to hastily award contracts using flawed processes.[92]

Because contracting officers make Competition in Contracting Act-based terminations shortly after contract award, government agencies will likely owe little compensation to the innocent, winning contractor.[93] If an agency terminates before the contractor performed any work, the agency will likely owe nothing because contractors are only entitled to compensation for costs and profit for work actually performed.[94] The innocent contractor will not recover consequential damages. The contractor may have also lost alternative opportunities because it committed to the government.[95] Thus, the contractor bears the burden of the agency's failure to abide by competition principles.[96] "[I]f the government [violates competition requirements] when it awards a contract, one should not be surprised when the government forces an innocent recipient of that contract to bear part of the cost of the government's misconduct. Persons doing business with the government should take heed."[97] This T4C crutch may drive away potential contractors that would otherwise efficiently provide goods and services to

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[92] In *T&M Distributors*, the contracting officer failed to understand the scope of a requirement for auto parts. *Id.* A government representative visited the site *after* contract award and discovered the original estimate to be grossly underestimated. *Id.* The contracting officer then exercised T4C to reset the contract competition. *Id.*

[93] Protests on contract award before the Government Accountability Office must be filed within ten days after the protester learned, or should have learned, about the protest basis. 4 C.F.R. § 21.2(a)(2) (2019). The Court of Federal Claims does not have a specific time-limitation to file protests. *See* Michael J. Schaengold et al., *Choice of Forum for Federal Government Contract Bid Protests*, 18 FED. CIR. B.J. 243, 309–11 (2009). But a delay in filing would harm the protestor's ability to obtain the sought after contract. *Id.* Thus, any protest leading to a T4C will likely be filed shortly after contract award.

[94] *See supra* note 28 and accompanying text.

[95] For a contractor, opportunity cost is the value or benefit of other work it could have undertaken had it not committed to work for the government. *See* ALFRED MILL, ECONOMICS 101 at 15 (2016).

[96] In *T&M Distributors, Inc. v. United States* the winning contractor raised questions about the scope of the work, but was still willing to perform. *T&M Distributors*, 185 F.3d at 1280–81. The contractor's questions spurned the site visit by the government representative who discovered the solicitation estimates to be far below the actual need. *Id.* at 1281. Citing the Competition in Contracting Act (CICA), the contracting officer decided to terminate and re-compete the contract because the contractor had not begun performance, and the government's cost to terminate would be "minimal." *Id.* The contractor, although willing to perform, bore the costs of the agency's failure to adequately prepare for the acquisition.

[97] Salsbury Industries v. United States, 905 F.2d 1518, 1524 (Fed. Cir. 1990) (Duff, J., dissenting).

the government.[98] The T4C crutch also drives up costs for the government.

C. The T4C Premium: Increased Costs for the Government

While contractors bear risk for government mistakes, the government pays for this risk in higher contract costs. It is a basic economic principle that increased risk comes with increased costs.[99] Contractors have likely taken heed of the risks posed by T4C clauses and have responded by increasing the price they charge for all contracts that contain these clauses.[100] There is wide agreement that the government pays this T4C premium.[101] Overprotection of the government "inhibits the [g]overnment's freedom to contract, with 'the certain result of undermining the [g]overnment's credibility at the bargaining table and increasing the cost of its engagements.'"[102] To avoid potentially paying large sums of anticipatory profit for a few terminated contracts, T4C

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[98] This is especially true for small business that rely on a small number of contracts to stay in business. Policies, such as discretionary T4C, that discourage small business from bidding on government contracts may lead to limited competition and increased costs for the government. *See* Thomas A. Denes, *Do Small Business Set-Asides Increase the Cost of Government Contracting?*, 57 PUB. ADMIN. REV. 441, 444 (1997) ("[S]mall business set-asides do not lead to higher cost of contracted services as long as the pool of bidders is not reduced.").

[99] *See, e.g.*, LARRY E. SWEDROE, THE ONLY GUIDE TO A WINNING INVESTMENT STRATEGY YOU'LL EVER NEED 97 (2005) ("[I]nvestors must be compensated with higher returns for accepting that higher level of risk.").

[100] In his analysis, Major Bruce D. Page presented a mathematical hypothetical to support his argument that T4C clauses increase costs for all government contracts. Major Bruce D. Page, Jr., *When Reliance is Detrimental: Economic, Moral, and Policy Arguments for Expectation Damages in Contracts Terminated for the Convenience of the Government*, 61 A.F. L. REV. 1, 15 (2008).

[101] "[C]ourts have inferred from the very existence of a termination clause that the [g]overnment pays a premium on the contract price in exchange for the right to terminate." Pederson, *supra* note 79, at 85. "[T]he government's broad right to terminate its contracts for its convenience guarantees the government will pay more for the goods and services it procures, all else being equal." Page, Jr., *supra* note 100, at 15. "[T4C clauses] confer a 'major contract right' on the holder 'with no commensurate advantage' to the other side—though we should expect prices to reflect the agreement and the legal rule." Julie A. Roin, *Public-Private Partnerships and Termination for Convenience Clauses: Time for a Mandate*, 63 EMORY L.J. 283, 284 (2013) (quoting JOHN CIBINIC, JR. & RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 1073 (3d ed. 1995)).

[102] Stuart B. Nibley & Jade Toteman, *Let the Government Contract: The Sovereign has the Right, and Good Reason, to Shed its Sovereignty When it Contracts*, 42 PUB. CONT. L.J. 1, 14 (2012) (quoting United States v. Winstar Corp., 518 U.S. 839, 884 (1996)).

clauses are mandated for all federal contracts under the FAR.[103] But mandating these broad clauses, even for basic goods and services, assumes risk where no risk may actually exist. In response to this fabricated risk, contractors may unnecessarily increase prices, and the government may unnecessarily pay more for its contracts.[104]

The important question for the government is whether the aggregate of the T4C premium paid on all contracts is greater than the savings from the contracts that are terminated.[105] Unfortunately, empirical analysis has not been conducted to measure this effect.[106] Without T4C clauses, there are certainly situations in which an agency would be liable for a large amount of anticipatory profit for contract termination; this would likely occur when an agency terminates the contract shortly after the contractor begins performance.[107] Paying a large amount of anticipatory profit on one contract would be more visible and politically damaging than paying a small increase on all contracts, thus ensuring the staying power of the broad T4C regime. "Ex ante increases in price due to an inefficient termination for convenience clause may be less visible and weigh less heavily" on decisions made by politicians and acquisition professionals.[108] A new approach is needed to mitigate these challenges.

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[103] *See* FAR 12.403, 49.502 (2016).

[104] "[T]he government should always be the possessor of greater information relative to the likelihood of [termination]." Page, Jr., *supra* note 100, at 22. A requirement to include a T4C clause, even when there is little risk of termination, prevents agencies from taking advantage of this superior knowledge. *Id.*

[105] "The resultant contract price reductions [of eliminating the T4C], in the aggregate, may outweigh any potential increase in damages that the [g]overnment may pay as a result of its occasional breach." Pederson, *supra* note 79, at 85.

[106] The lack of uniform and comprehensive data is a pervasive problem for government acquisitions. "Despite the importance of data, most observers believe that the Department of Defense (DOD), and other government agencies lag behind the private sector in effectively incorporating data analyses into decisionmaking. These analysts argue that by using data more effectively to support acquisition decisionmaking, DOD could save billions of dollars, more efficiently and effectively allocate resources, and improve the effectiveness of military operations." MOSHE SWARTZ, CONG. RESEARCH SERV., R44329, USING DATA TO IMPROVE DEFENSE ACQUISITIONS: BACKGROUND, ANALYSIS, AND QUESTIONS FOR CONGRESS, Summary (2016)).

[107] *See, e.g.*, G.L. Christian & Assoc. v. United States, 312 F.2d 418, 423 (Ct. Cl. 1963) (finding that the Army terminated a large construction project after the contractor had completed just over two-percent of the project) .

[108] Fischel & Sykes, *supra* note 78, at 357.

IV. Finding a Balanced Approach

Discretionary use of T4C allows agencies to escape obligations for reasons under government control. This creates a back door that dismantles the premise that the government assumes the same duties as a private party when it contracts.[109] To correct this, Congress should enact a multi-faceted approach that mitigates the problems caused by discretionary T4C while accommodating the complexities of modern contracting. Such an approach should provide flexibility for the government to preserve public resources. It should also dis-incentivize inefficient behaviors and reduce inequities for contractors.

An approach that includes the changed circumstances requirement would bring T4C within the original rationale that justified its advent. The changed circumstances requirement is "well reasoned and logically sound . . . . [and] is based on a fair allocation of risks."[110] As the *Torncello* plurality demonstrated, T4C developed to avoid wasteful spending when circumstances outside government control make contracts obsolete.[111]

Modern contracting, however, is more complicated in the Competition in Contracting Act era and requires flexibility to ensure compliance with competition requirements.[112] Federal agencies should bear the burden of their contracting mistakes. But requiring anticipatory profit for every competition-based termination could devastate agency budgets while enriching contractors that have completed little or no work. Therefore, a multi-faceted approach to T4C is necessary.

Congress should enact legislation that incorporates the changed circumstances requirement as the default rule but allows variation for agency compliance with competition requirements. To preserve

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[109] "[T]he Supreme Court has held as early as 1923 that the government may not, by simple contract, reserve to itself a power that exceeds that which a private person may have." Torncello v. United States, 681 F.2d 756, 763 (Ct. Cl. 1982) (citing Willard, Sutherland & Co. v. United States, 262 U.S. 489 (1923)).

[110] NASH & CIBINIC REPORT (1990), *supra* note 63.

[111] *Torncello*, 681 F.2d at 765 ("[C]onvenience termination, as it was developing, was intended just to handle changed conditions, relieving the government of the risk of receiving obsolete or useless goods. The risk was shifted to the contractor that it could lose the full benefit of its expectations if circumstances changed too radically.").

[112] The *Krygoski* opinion focused on the CICA, noting that *Torncello* was decided pre-CICA and contracting officers may now be forced to terminate contracts to comply with the law's requirements. Krygoski Constr. Co. v. United States, 94 F.3d 1537, 1542–43 (Fed. Cir. 1996).

flexibility, the legislation should explicitly provide for T4C when the parties agree. The legislation should also allow T4C to comply with competition requirements but require agencies to compensate the innocent contractor for its total bid and proposal costs. For all other situations, T4C should be permitted only when there is a post-award change in circumstances. This modified rule returns T4C to the original rationale of protecting public funds from unforeseen circumstances, but it also accommodates modern contracting realities.

A. Termination by Agreement

Under the discretionary T4C scheme, agencies and contractors have the implicit ability to agree to contract termination. A more restrictive T4C scheme, like that proposed here, should explicitly provide an agreement provision to maintain this flexibility. Providing for T4C by agreement preserves the government's ability to negotiate with contractors. When a contractor fails to adequately perform, the government can still rely on T4C in lieu of a termination for default if it is beneficial for the government.[113] Using T4C compensation as an incentive, the government can persuade the contractor to accept termination and avoid costly litigation. The parties can also terminate when both otherwise agree that the contract is no longer beneficial to both. This might occur when the contractor is operating at a financial loss and the government determines that the final results will not meet the agency's needs.[114]

B. Competition in Contracting Act-Based Termination

When an agency terminates a contract for convenience, it must compensate the contractor for costs incurred.[115] Requiring compensation whenever an agency terminates a contract to comply with competition requirements mitigates the T4C crutch. The costs of the government's mistakes shift back to the government, and this incentivizes agencies to properly plan acquisitions. If an agency is understaffed or overworked, bearing the costs of these mistakes incentivizes the government to make proper resource adjustments. But if a contract is terminated shortly after

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[113] *See supra* notes 29–30 and accompanying text.
[114] *See* CIBINIC, JR. ET AL., *supra* note 3, at 942.
[115] *See supra* note 28 and accompanying text.

award, and "the contractor has incurred no costs, there is no recovery."[116] The innocent contractor cannot recover consequential damages and suffers the opportunity costs of other work it forewent when it committed to the government.[117] A T4C policy that requires compensation even if the contractor has not begun work would ensure the government pays a penalty for acquisition mistakes that affect contractors.

A pragmatic approach should be taken to avoid a waste of public funds. Requiring payment of anticipatory profit for every termination would create unearned windfalls for contractors who have performed little substantive work.[118] This windfall could be very large in some cases.[119]

Under current rules, when an agency exercises T4C, the contractor submits a settlement proposal that includes recovery of the costs it incurred.[120] Federal Acquisition Regulation Part 49 directs contracting officers to apply established cost principles to termination settlements.[121] A termination settlement could presumably include some costs incurred in preparing the bid or proposal, as these costs are allowable under FAR Part 31.[122] The FAR rules governing payment of these costs are complicated, and contractors are not always entitled to full recovery.[123] For example, FAR Part 31 only allows bid and proposal costs to be invoiced through

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[116] CIBINIC, JR. ET AL., *supra* note 3, at 977. Note that FAR 49.109-4 directs contracting officers to enter no-cost settlements if "[t]he contractor had not incurred costs for the terminated portion of the contract." FAR 49.109-2(a)(2018).

[117] Consequential damages have been determined to include "the cost of bankruptcy, the loss of existing business," the loss of future contracts, "damages to the company's standing and reputation, impairment of the company's credit, and loss of production." CIBINIC, JR. ET AL., *supra* note 3, at 977 (citations omitted).

[118] Requiring payment of anticipatory profit for CICA-motivated exercises of T4C will not completely eliminate CICA violations. There will be cases when an agency reasonably believes it complied with the CICA requirements, but the Government Accountability Office or Court of Federal Claims sides with a protestor. This would force an agency to terminate the contract.

[119] The U.S. Air Force's acquisition of tanker aircraft was reset multiple times, including after a bid protest. Had the government paid anticipatory profit when the multi-billion dollar contract was terminated, the innocent contractor would have received a substantial payout for no work. *See* Christopher Drew, *Boeing Wins Contract to Build Air Force Tankers*, N.Y. TIMES (Feb. 24, 2011), http://www.nytimes.com/2011/02/25/business/25tanker.html.

[120] FAR 49.104(h)(2018).

[121] FAR 49.4113.

[122] FAR 31.205-18(c).

[123] "Bid and proposal costs are allowable in accordance with FAR 31.205-18(c) but only under narrowly defined circumstances." J.W. Cook & Sons, Inc., ASBCA No. 39691, 92-3 BCA ¶ 25,053.

indirect cost pools.[124] Contractors are generally not allowed to charge directly for the actual costs of preparing the bid or proposal.[125] Bid and proposal costs are not allowed at all for cooperative agreements.[126] Additionally, because it is not clear in the T4C clauses, a small business or non-traditional defense contractor may not be cognizant of its rights to claim these costs in a termination proposal.

For a competition-based T4C, a bright line rule that requires the government to pay the total bid and proposal costs would more effectively make an innocent contractor whole, which has been a primary concern in the use of convenience terminations.[127] This rule should be a FAR Part 49 terminations provision that is separate from the allowability and allocability rules of FAR Part 31. The termination clauses would outline the contractor's rights to receive the total amount of these costs as if they were charged directly to the contract. Additionally, the government would be required to pay these costs regardless of the specific contractual instrument used. A strict rule requiring the agency to pay the total amount of the bid and proposal costs would eliminate any doubt as to the agency's responsibility to compensate the contractor.

The inherent unfairness of shifting the burden of the government's mistakes onto innocent contractors should be a compelling reason to modify the use of T4C clauses for competition violations.[128] Requiring the payment of total bid and proposal costs would force agencies to bear

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[124] FAR 31.205-18(c).

[125] "Costs incurred pursuant to competitive bidding are costs of doing business and belong in overhead or G&A pools. No contractor has a reasonable expectation that bidding costs, when incurred, will be directly reimbursed by the Government since no contractor has a reasonable expectation of award when it puts together its bid. This should not change when the contract is awarded and subsequently terminated for convenience." Orbas & Associates, ASBCA No. 50467, 97-2 BCA ¶29,107. An indirect allocation of bid and proposal costs to a particular contract is proper if it "[i]s necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown." FAR 31.201-4. If the allocation is less than the amount actually spent on that particular contract, the contractor could theoretically obtain full recoupment through allocations to other contracts from the indirect cost pool. But this would mean that other agencies or customers pay for the costs of the competition mistake. A detailed analysis of the accounting and cost principles of government contracting is beyond the scope of this article. The rules relating to bid and proposal costs are found at 4 CFR § 9904.420 (2019).

[126] FAR 31.205-18(a).

[127] *See supra* note 17 and accompanying text.

[128] *See generally* Page, Jr., *supra* note 100, at 23–33 (arguing the moral reasons for modifying the broad T4C regime).

more of the costs of their acquisition mistakes. This would also help mitigate the T4C crutch.

C. Changed Circumstances

Under the rules proposed here, if a T4C is not based on mutual agreement or exercised unilaterally to comply with competition requirements, it must meet the changed circumstances test. Contractors would still bear the risk of unknown future circumstances outside of the control of the contracting parties.[129] But a government agency would be responsible for its own conduct. It would not matter whether the government is motivated by an intent to injure the contractor or just engages in reckless, negligent, or less culpable conduct. The proposed rule eliminates the confusing bad faith or abuse of discretion standards applied by the courts.[130] This rule balances the need to preserve public resources with the sacrosanct notion that the government should act with fairness and be bound to its own commitments.[131] If an agency terminates without a change in circumstances, it will be liable for anticipatory profit and consequential damages.[132]

This modified changed circumstances rule would likely increase termination settlement costs overall and deter agencies from terminating in some cases. The government would see aggregate benefits as well. The risk borne by contractors is a narrower, better-defined risk, and the T4C premium paid by the government on all contracts should be reduced.[133] Contractors may see the government as more trustworthy, and the number of companies competing for contracts may increase. Additionally, by forcing the government to absorb the costs of its own mistakes, agencies would be incentivized to improve the accuracy of work statements and

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[129] "[C]onvenience termination was an allocation of the risk of changed conditions." Torncello v. United States, 681 F.2d 756, 763 (Ct. Cl. 1982).

[130] *See supra* Section III.A for a discussion of the bad faith and abuse of discretion standards.

[131] "It is as much the duty of [g]overnment to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals." President Abraham Lincoln, First Annual Message (Dec. 3, 1861).

[132] An option beyond the scope of this article is to use a liquidated damages clause against the government. The FAR does not currently provide for liquidated damages against the government, but such clauses could prospectively limit the government's liability for breach to a pre-negotiated figure.

[133] *See* Fischel & Sykes, *supra* note 78, at 356 (noting that of all judicial statements, the changed circumstances test "comes the closest" to an efficient T4C regime).

contract specifications.[134] This should lead to a decrease in protests, disputes, and costly modifications.

A changed circumstances test, however, will inevitably be subject to litigation to determine exactly what constitutes a changed circumstance. The *Torncello* plurality defined it as a "substantial change" in the "expectations of the parties" from their "original bargain."[135] This would include situations where "full performance became unneeded," such as the cessation of military hostilities.[136] Modern contracting also faces a large variety of situations which could be considered to be changed circumstances.[137] For example, the rapid development of better technologies may render previous acquisitions useless, thus necessitating termination to prevent a waste of public resources. A new executive administration may have different political objectives, forcing agencies to abandon specific programs. As situations arise, agencies and contractors will likely find themselves in court to parse out the boundaries of changed circumstances.

This is not necessarily a departure from the current state of case law, which is struggling to determine what constitutes bad faith or abuse of discretion.[138] The advantage of the rules proposed here is a congressional narrowing of the categories of cases that are litigated and a greater assurance that the government is committed to its agreements. This should motivate agencies to make better contracting decisions and should reduce unnecessary costs for both the government and its contractors.

V. Conclusion

The historical use of convenience terminations subsequent to the end of major military action made sense to prevent waste and preserve public resources. The current use of T4C clauses in all federal contracts under

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[134] "[B]ecause government agencies are able to terminate contracts for convenience for virtually any reason, subject to the good faith requirement, they do not have a compelling incentive to carefully plan their procurements in advance." Pederson, *supra* note 79, at 99.

[135] Torncello v. United States, 681 F.2d 756, 766 (Ct. Cl. 1982).

[136] *Id.* at 763.

[137] *See, e.g.*, NASH & CIBINIC REPORT (1990), *supra* note 63 (discussing whether discovery of a cheaper source after contract award should qualify as a changed circumstance).

[138] *See supra* section III.A.

the FAR provides great flexibility to the government at a cost to federal agencies and contractors. Agencies have a cheap do-over switch, which incentivizes hasty and mistake-ridden acquisitions. Contractors, knowing that agencies can terminate their agreements at any time, charge more to accommodate the extra risk. In the face of broad government discretion, courts and boards have not tempered these problems but have created a set of unclear standards that contort the common law definition of bad faith.

The answer is not to eliminate T4C clauses. These clauses can be beneficial tools in preserving public funds. The changed circumstances test, articulated in *Torncello*, advances a balanced approach based on the original rationale for T4C. Requiring changed circumstances for every termination, however, would prove costly and ineffective under modern competition requirements. Rather, a multi-faceted approach that accommodates the challenges of modern contracting should be developed to mitigate the harms caused by the discretionary T4C scheme.

The proposal to allow T4C when the parties agree, to comply with competition requirements for a financial penalty, or when there is a change in circumstances, attempts to create such a balance. Contractors will have a better assurance that the government will adhere to its agreements, thus bringing down the cost of the T4C premium. Agency acquisition personnel will also be better incentivized to perform more accurate and efficient acquisitions. This modified T4C scheme will not solve all problems preventing efficient acquisitions, but it does mitigate the problems caused by discretionary T4C. It should also provide a better balance of risks between the government and its contractors.