

# PRATT'S GOVERNMENT CONTRACTING LAW REPORT

---

VOLUME 7

NUMBER 10

October 2021

---

<b>Editor's Note: Developments</b> Victoria Prussen Spears	313
<b>Government Contractor Best Practices in Light of Afghanistan Withdrawal</b> Merle M. DeLancey Jr. and Craig Stetson	315
<b>GSA Mandates Disclosure of Foreign Ownership/Financing of High-Security Leased Spaces</b> Ronald A. Oleynik, Libby Bloxom, and Robert C. MacKichan Jr.	321
<b>Issues for Government Contractors and the Private Sector Under the Cybersecurity Executive Order</b> Steven G. Stransky, Mona Adabi, Tom Mason, and Thomas F. Zych	324
<b>Recent Developments Under the Executive Order on Improving the Nation's Cybersecurity</b> Susan B. Cassidy, Robert K. Huffman, and Ryan Burnette	328
<b>Procurement Collusion Strike Force Secures First International Guilty Plea Agreement</b> John M. Hindley, David Hibey, James W. Cooper, Sonia Kuester Pfaffenroth, and C. Scott Lent	332
<b>In the Courts</b> Steven A. Meyerowitz	335

**QUESTIONS ABOUT THIS PUBLICATION?**

---

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:

Heidi A. Litman at ..... 516-771-2169  
Email: ..... heidi.a.litman@lexisnexis.com  
Outside the United States and Canada, please call ..... (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at ..... (800) 833-9844  
Outside the United States and Canada, please call ..... (518) 487-3385  
Fax Number ..... (800) 828-8341  
Customer Service Website ..... <http://www.lexisnexis.com/custserv/>

For information on other Matthew Bender publications, please call

Your account manager or ..... (800) 223-1940  
Outside the United States and Canada, please call ..... (937) 247-0293

---

Library of Congress Card Number:

ISBN: 978-1-6328-2705-0 (print)

ISSN: 2688-7290

Cite this publication as:

[author name], [article title], [vol. no.] PRATT’S GOVERNMENT CONTRACTING LAW REPORT [page number] (LexisNexis A.S. Pratt).

Michelle E. Litteken, GAO Holds NASA Exceeded Its Discretion in Protest of FSS Task Order, 1 PRATT’S GOVERNMENT CONTRACTING LAW REPORT 30 (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2021 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. Originally published in: 2015

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office  
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862  
[www.lexisnexis.com](http://www.lexisnexis.com)

MATTHEW  BENDER

# *Editor-in-Chief, Editor & Board of Editors*

---

**EDITOR-IN-CHIEF**

**STEVEN A. MEYEROWITZ**

*President, Meyerowitz Communications Inc.*

**EDITOR**

**VICTORIA PRUSSEN SPEARS**

*Senior Vice President, Meyerowitz Communications Inc.*

**BOARD OF EDITORS**

**MARY BETH BOSCO**

*Partner, Holland & Knight LLP*

**PABLO J. DAVIS**

*Of Counsel, Dinsmore & Shohl LLP*

**MERLE M. DELANCEY JR.**

*Partner, Blank Rome LLP*

**J. ANDREW HOWARD**

*Partner, Alston & Bird LLP*

**KYLE R. JEFCOAT**

*Counsel, Latham & Watkins LLP*

**JOHN E. JENSEN**

*Partner, Pillsbury Winthrop Shaw Pittman LLP*

**DISMAS LOCARIA**

*Partner, Venable LLP*

**MARCIA G. MADSEN**

*Partner, Mayer Brown LLP*

**KEVIN P. MULLEN**

*Partner, Morrison & Foerster LLP*

**VINCENT J. NAPOLEON**

*Partner, Nixon Peabody LLP*

**STUART W. TURNER**

*Counsel, Arnold & Porter*

**ERIC WHYTSELL**

*Partner, Stinson Leonard Street LLP*

**WALTER A.I. WILSON**

*Partner Of Counsel, Dinsmore & Shohl LLP*

*Pratt's Government Contracting Law Report* is published 12 times a year by Matthew Bender & Company, Inc. Copyright © 2021 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 9443 Springboro Pike, Miamisburg, OH 45342 or call Customer Support at 1-800-833-9844. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house counsel, government lawyers, senior business executives, and anyone interested in privacy and cybersecurity related issues and legal developments. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to *Pratt's Government Contracting Law Report*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

# Government Contractor Best Practices in Light of Afghanistan Withdrawal

*By Merle M. DeLancey Jr. and Craig Stetson\**

*This article first focuses on the contract administration aspects that contractors supporting operations in Afghanistan should be thinking of now to prepare for and mitigate downstream and currently unknown risks. It then considers the cost management, documentation, and government audit aspects that contractors should be thinking about to prepare for and mitigate downstream and currently unknown risks.*

It is hard to describe the manner in which the United States is withdrawing from Afghanistan. At this point, the safety and security of Americans and those who provided critical assistance to U.S. operations in Afghanistan are at the forefront of everyone's thoughts. However, contractors in Afghanistan must confront the repercussions of shutting down operations in Afghanistan or dealing with significant changes in contract performance requirements. Translated—this means ensuring fair compensation for terminated or changed contracts.

This article first focuses on the contract administration aspects that contractors should be thinking of now to prepare for and mitigate downstream and currently unknown risks; below is a list of issues for contractors supporting operations in Afghanistan to consider.

This article then considers the cost management, documentation, and government audit aspects that contractors should be thinking of now to prepare for and mitigate downstream and currently unknown risks.

## **CONTRACT ADMINISTRATION**

### **Terminations**

One potential scenario is a termination for convenience (complete or partial) of the contract. The government has wide discretion to unilaterally terminate contracts, or may, preceding a formal termination for convenience, direct a contractor to temporarily suspend or stop work. Termination for convenience actions are governed by Federal Acquisition Regulation ("FAR") 52.249-2 (fixed-price) or FAR 52.249-6 (cost reimbursement). Suspension and stop-work situations are governed by FAR 52.242-14 and 52.242-15, respectively.

---

\* Merle M. DeLancey Jr. (mdelancey@blankrome.com), a partner at Blank Rome LLP, and a member of the Board of Editors of *Pratt's Government Contracting Law Report*, focuses his practice on a wide variety of government procurement law, with an emphasis in the healthcare industry. Craig Stetson is a partner with Capital Edge Consulting, where he focuses on assisting contractors interpret and apply the accounting and regulatory compliance requirements associated with federal government contracts.

Regardless of the mechanism used, contractors forced to temporarily or permanently stop performance will face immediate challenges and unanticipated responsibilities. Below are key steps contractors should take in response.

- Stop work as instructed. Notify affected employees and direct them how to capture time going forward as the settlement process evolves.
- Notify all subcontractors and vendors and instruct them to do the same.
- Establish discrete cost accounting charge numbers to accumulate applicable costs. Initiate cost mitigation efforts and maintain related documentation of efforts to do same for future demonstration to the government.
- Identify situations and root causes giving rise to incurrance of unforeseen costs due to government-directed action—for example, increased site and personnel safety, transportation, evacuation, employee severance, etc.
- Protect and preserve to the extent possible all contractor- and government-owned equipment and property. Identify alternatives to dispose of or abandon in place property based on the logistics and circumstances at the site.

Contractors terminated or directed to stop work may be entitled to seek applicable financial relief pursuant to the FAR clauses referenced above. These government actions, simply due to the circumstances surrounding the current and developing environment in Afghanistan, likely will cause a variety of unforeseen and extraordinary situations directly impacting contractors' ability to effectively manage and/or settle their existing contracts and recover costs incurred arising from these government actions.

Contractors should be proactive and consider now the possibility of termination or stop work situations; what the potential implications may be; and actions to take to address or mitigate associated compliance, performance, and cost risks.

### **Changes**

Some affected contracts may not be terminated but will continue under changed circumstances. For example, some contract requirements may include continued performance remotely, outside of Afghanistan, or a contract involving the management of government-owned property in Afghanistan may be transitioned to services securing such property in another country and/or transporting the equipment to the United States or another location. Contract-

tors must consider whether the foregoing would involve a compensable change under one of the FAR 52.243 Changes clauses or Defense Federal Acquisition Regulation (“DFAR”) 252.217-7003.

Given the rapidly and constantly evolving environment in Afghanistan, contractors are not likely to receive a Change Order reflecting a contracting officer’s unilateral change of contract requirements. More likely, a contractor will need to timely notify its contracting officer of a constructive change to its contract performance requirements. A constructive change occurs when a contracting officer’s action or omission has the same effect as a formal Change Order. Regardless of whether considered a change or constructive change, unless extended, a contractor must assert its right to a cost or price adjustment within 30 days of receipt of a change order or other notice from its contracting officer. Notwithstanding the change, unlike in the commercial world, a contractor must continue performance.

In addition, contractors should:

- Confirm that the change direction comes from its contracting officer. Only contracting officers hold a warrant and are able to modify the terms or conditions of a government contract.
- Consider funding issues—namely, that the cost of the change will not result in the cost of performance exceeding the applicable FAR or DFAR Limitation of Funds clause.
- Become familiar with what constitutes a change. Changes to performance requirements are relatively easy to identify but schedule changes (i.e., delay, disruption, accelerated delivery) and unforeseeable constructive changes—such as increased costs involved with delivery because supply lines are constrained or a different mode of transportation is required—are more subtle. When in doubt as to whether a change has occurred, a contractor should assert its rights for a contract adjustment within 30 days. Such assertion can always be withdrawn but missing the deadline could be fatal to recovery.

## **OTHER ISSUES AND RISKS**

Contractors also should be focused on cost management, documentation, and government audit issues and should prepare for and mitigate downstream and currently unknown risks.

### **Requesting Payment/Compensation**

Responding to a change or termination will likely involve submitting a request for payment or compensation. The label placed on a contractor’s request for payment depends on whether its contract has been terminated or has

experienced a “change.” The type of request for payment also can vary depending on the type of contract involved (i.e., cost reimbursement, fixed price, or labor hour).

In response to a “change,” a contractor can request an equitable adjustment (“REA”) or request a contracting officer’s final decision by filing a claim (depending on the amount at issue, a certified claim). Other “changes” may require only a contract modification, such as extending a delivery schedule, if there is no need for monetary compensation. While contractors normally are eager to be paid for changes, the Contract Disputes Act allows a contractor to file a claim within six years of the date when a claim accrues.<sup>1</sup>

Different rules apply in the context of termination. While similar to REAs and claims, there are some important differences when seeking compensation as part of a full or partial contract termination.

First, a contractor is required to use certain standard government forms when submitting a termination settlement proposal and the correct forms depend on the type of contract involved.<sup>2</sup>

Second, a prime contractor must submit its “final” termination settlement proposal to the government within one year of the effective date of the termination. The “effective date of termination” is the date on which the notice of termination requires the contractor to stop performance.<sup>3</sup>

Third, if faced with a partial termination, a contractor will likely be required to submit a termination settlement proposal for the portion of work being terminated and a request for equitable adjustment for the work that will continue.

Regardless of how a request for compensation is labeled, contractors should prepare such requests assuming they will be audited. This means having accurate and contemporaneous records supporting the amounts sought.

## **BEST PRACTICES**

Adequate preparation, presentation, and support of REAs, claims, or termination settlement proposals generally requires a heightened level of diligence to achieve a successful outcome.

---

<sup>1</sup> See FAR 33.201 “the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known.”

<sup>2</sup> See *e.g.*, FAR 49.602-1.

<sup>3</sup> FAR 49.206-1(a) (note: FAR 52.249-2(c) requires complete inventory schedules to be submitted within 120 days of the effective date of termination if a termination proposal uses an inventory basis).



First, a contractor should focus on its bases for entitlement for compensation. Entitlement arguments vary depending on whether there has been a change or termination. With respect to a change, a contractor must be able to persuasively demonstrate there was a change to the contract for which compensation is due.

Second, the quantum (cost impact) element needs to be calculated. This should logically follow the entitlement arguments. Ideally, the entire REA, claim, or termination settlement proposal should be constructed on a discrete item basis rather than a total cost basis. While modified total cost is an acceptable method of recovery, this approach generally requires a contractor to identify and quantify actions for which the contractor is responsible and deduct these amounts from the total reimbursement sought.

Contractors should fully understand and utilize best practices when preparing an REA, claim, or settlement proposal to enhance the probability of government acceptance and financial recovery. Two critical aspects of the process are communication and documentation.

Early and continuous communication with the government contracting officer is critical. There should be no surprises to the government upon receipt of a contractor's REA, claim, or termination settlement proposal. Communication with the contracting officer should occur, for example, to notify the government of:

- Unique or non-recurring cost elements;
- Challenges or impossibilities of performance;
- Requests for guidance or direction;
- Supply chain difficulties;
- Timing and scheduling expectations; and
- Access to records or documentation.

Documentation is equally, if not more, important to successfully navigating the government audit process. The audit process is often performed by a different party than the contracting officer (i.e., the Defense Contract Audit Agency), and may lag the submission of a proposal by several months. Government and contractor personnel come and go, contractors change information systems, records get lost or otherwise disappear, etc., thereby reinforcing the need for contractors to develop and preserve all supporting documentation in the event it needs to be provided at some point downstream. Frequent forms of documentation that should be maintained include:

- Communication with the government;
- Internal decisions regarding treatment of costs and efforts to mitigate;

- Agreements or mutual understandings;
- All calculations and bases of estimate supporting claimed costs; and
- Supply chain settlements and submission for government ratification.

It is hard to ponder government contract compensation when so many lives remain in harm's way. Nevertheless, we hope the above information provides a useful guide for contractor's facing a change or termination due to the Afghanistan withdrawal.