Partial "T4C" Versus Deductive Change: The Amount of the Decrease Is Not Always the Same

by Jerome S. Gabig, Jr.

With large reductions forthcoming in the Department of Defense (DOD) budget, work inevitably will be deleted from many existing contracts. Customarily there are two clauses in federal procurement contracts that permit the government to unilaterally reduce some of a contractor's performance obligations.[1] Depending on the facts, it is possible that the reduction could be processed under either the Termination for Convenience (T4C) of the Government clause or the Changes clause. The dollar amount of the price reduction, however, is calculated differently depending on whether the decrease is treated as a partial termination for convenience or a deductive change. No hard and fast line emerges from the case law that addresses which clause is appropriate for reduction in work.[2] This article focuses on the advantages and disadvantages of each clause.[3] Under some circumstances, one clause can be more financially advantageous than the other.

Which Clause Applies?

On one extreme, major reductions clearly fall under the T4C clause. Generally, "a reduction of the number of units or supplies to be delivered, elimination of identifiable items of work, reduction in the quantity of work required under the contract, or similar reductions in contract tasks" are considered major deductions.[4] For example, the deletion of 20 percent of the total work on a construction contract has been held to be a major reduction.[5] On the other extreme, minor reductions fall under the Changes clause. Generally, minor reductions are "changes in the specifications or in the scope of work which cause a decrease in the cost of or time required for performance of any part of the contract work."[6] Illustrative of work that was properly deleted under the Changes clause was a 12 percent reduction in the number of insulation blankets that a contractor was obligated to install on water heaters for a military housing complex.[7]

Despite this guidance, it can be difficult to distinguish which clause is appropriate because "factual situations do not always demand the exclusive use of either the termination for convenience or the changes clause to the exclusion of the other."[8] Hence, where the reductions are neither major nor minor, there is leeway to use either a partial termination for convenience or a deductive change. This leeway is augmented by uncertainty involving the scope of the Changes clause. For fixed-price supply contracts, the clause authorizes changes "within the general scope of this contract . . . [to] drawings, designs, or specifications when the supplies to be furnished are to be specifically manufactured for the government in accordance with the drawings, designs, or specifications."[9] Sometimes the decision whether the Changes clause applies depends on whether the reduced work was a "specification." Generally, specifications are the written de-

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scription of the work to be done (i.e., the contract requirements).[10] Often there is uncertainty whether the deleted work was part of the specification or a revision to the contract quantity. For instance, the Housing and Urban Development Board of Contract Appeals (HUD BCA) has broadly interpreted the term "specification" to include the number of mobile home units to be delivered under a contract.[11]

In contrast to the HUD BCA, the General Services Board of Contract Appeals (GSBCA) took a strict interpretation of the term "specification" regarding a lease of a mainframe computer, software, training, maintenance, and support services. The agreement also required the contractor to provide the government access to the contractor's test facility for 1,936 hours at "no charge." Hours in excess of 1,936 were to be charged at a rate of $325 an hour. After using only 1,588 hours, the government unilaterally issued a deductive change of $113,000 for the unused 348 hours. Because the reduction in hours did not alter the specifications for the computer system, the reduction was determined not to fall within the changes clause for a supply contract.[12] As indicated by these two divergent examples, whether a tribunal will strictly or broadly construe the term "specifications" is uncertain. This uncertainty contributes to the confusion whether the Changes clause or the T4C clause should apply.

If the deleted work is neither major nor minor, a board or court may defer to how the parties contemporaneously treated the deleted work. Hence, if the parties initially approached the reduction as a deductive change, a tribunal is likely to price the deleted work under the Changes clause. Correspondingly, if the parties initially treated the reduction as a partial termination, a tribunal is likely to price the deleted work under the T4C clause. It is important to recognize, however, that a board or court will give deference to the contemporaneous characterization of the parties only where the reduction is neither major nor minor. If a tribunal is convinced that the reduction was either minor or major but the parties improperly characterized the deleted work, the board or court may independently decide whether the action should be treated as a deductive change or a partial termination for convenience.[13] Nevertheless, if the parties sign a bilateral agreement concerning the deleted work, the agreement will be dispositive and it will be too late to question which clause applied to the pricing of the reduction.[14]

Where it is apparent that work will be deleted, each party should calculate how the deduction would be priced under both clauses. If both parties realize that the pricing under one clause is more financially advantageous than the other, the contractor is at a disadvantage. Where the deleted work is neither major nor minor, the government has a unilateral right to proceed under either clause. Hence, if the government prefers a deductive change, the contracting officer (CO) can proceed by issuing a Standard Form 30, "Modification of Contract," which identifies in block 13A that the authority for the modification is the Changes clause. Similarly, if the government prefers a partial termination for convenience, the CO should issue the notification required by Federal Acquisition Regulation (FAR) 49.102.

Frequently, when confronted with having to delete work, COs do not prepare a comparative price analysis and are indecisive about whether to use a deductive change or partial termination for convenience. Under these circumstances, a contractor has greater opportunity to influence the selection of the clause that is to be used. One technique for the contractor to influence the selection is to prepare all correspondence to underscore the use of the preferred clause. If a partial termination is favored, the contractor should consider seeking guidance from the CO on contracting officer on his preference for the format of the settlement proposal or to inquire whether he would be receptive to the use of a total cost basis.[15] If the contractor perceives that a deductive change better serves its financial interests, another technique would be to quickly furnish cost or pricing data with an explanation that the contractor is complying with its ob-

ligations under FAR 15.804 for a deductive change.

Sometimes a CO merely issues a modification without properly documenting whether the deleted work was under the Changes clause or the T4C clause. In those instances, the techniques described above may still prove to be beneficial. Later, if a dispute occurs over which clause applies, a tribunal is likely to use a rule of contract interpretation that regards the contemporaneous correspondence between the parties as highly probative of what the parties intended.[16]

Pricing Differences

Regrettably, there is no easy "rule of thumb" to predict which clause is more beneficial to a particular party. Even if the focus of attention is limited to fixed-price contracts, there are four distinct factual patterns to be considered: profitable contracts where the deleted work was also profitable, profitable contracts where the deleted work was unprofitable, loss contracts where the deleted work was profitable, and loss contracts where the deleted work was also unprofitable. One prominent author has made the following observation concerning fixed-price contracts:

Such differences [between the two clauses for the pricing of the deleted work] will be minimal when the deleted work can be done by the contractor for an amount approximating the amount he included in the contract for the work. However, if the deleted work will cost more than originally anticipated, an equitable adjustment under the Changes clause will be greater than the amount recovered by the Government under the Termination For Convenience clause. Conversely, if the deleted work will cost less than originally anticipated, the Government will normally recover a greater amount under the Termination clause than under the Changes clause.[17]

Rather than rely on any rules of thumb, both the CO and the contractor should perform the calculations to determine whether, under the particular facts, the use of either clause would result in any significant financial advantage. Stated in simple terms, the basic concept is that a partial termination for convenience is priced by adding up from zero all the costs incurred for the completed work as well as the anticipated costs for the remaining work whereas a deductive change is priced by subtracting the estimate of future costs to perform the deleted work from the existing contract price.[18] (In other words, add up from zero for a partial termination for convenience and subtract down from the original contract price for a deductive change.)

To limit the scope of this discussion, only the pricing formulas for fixed-price contracts will be examined.

Partial Termination For Convenience

Under the T4C clause applicable to fixed-price contracts, a contractor is entitled to its direct and indirect costs incurred to perform the terminated portion of the contract as well as a reasonable profit on the completed work.[19] Costs that normally are treated as overhead expenses can be allocated directly to the partially terminated contract and recovered in a settlement agreement.[20] No profit is allowed on subcontracted work if the subcontractor has not delivered the work to the prime as of the date of the termination. In calculating profit on completed work, the percentage of profit can increase or decrease in relationship to the percentage of profit originally contemplated by the parties.[21] A significant factor to consider is the level of difficulty of the completed work in comparison to the deleted work.[22] Unlike a deductive change, the rate of profit on a DOD contract that is partially terminated for convenience is not required to follow the weighted guidelines method.[23] Where the contractor is anticipated to sustain a loss, no profit is allowed on the completed work.[24]

The preferred accounting method for submitting a settlement proposal is the inventory basis.[25] Under the inventory basis, the costs for the continued work are segregated from the costs allocated to the terminated

work. Typically, the inventory basis results in a settlement proposal that has extensively itemized expenses incurred for the deleted work. Under this method, the contractor is entitled to the sum of (1) the contract price for the remaining work and (2) the cost incurred for the terminated work as well as a reasonable profit on those costs.

The only other accounting method identified in the FAR for submitting a settlement proposal is the total cost basis.[26] This method requires the prior approval of the termination contracting officer (TCO).[27] The case law indicates that the total cost basis usually is inappropriate for a partial T4C.[28] The total cost basis generally is used where the contract line items are not structured to accurately price the deleted work. Because it is not feasible to separate the costs of the deleted work from the continued work, this method is analogous to converting the entire contract to a cost reimbursement contract.[29]

Unlike a cost reimbursement contract, the rules in FAR Part 31 on unallowable costs do not strictly apply.[30] Additionally, a contractor is not required to have in place an accounting system that is based on incurred costs.[31] Moreover, a contractor need not document each and every cost item; instead, all that is required is credible evidence that the cost was incurred and that the contractor should recover the cost in order to be made whole.[32] Relying on FAR 49.201(a) and predecessor provisions, tribunals have evolved the term "fair compensation" into a principle known as the "fairness concept."[33] Under this principle, fundamental fairness is the overriding criterion in the formulation of appropriate terms for settling a convenience termination of a fixed-price contract.[34] A significant disadvantage to the total cost basis is that a settlement proposal cannot be submitted under the total cost basis until the continued portion of the contract is complete.[35]

The contractor also may recover an equitable adjustment where the partial termination results in increased costs in performing the continued portions of the contract.[36] Furthermore, the contractor's cost of preparing the termination proposal is allowable. Costs involving a termination settlement proposal may include legal, accounting, and management expenses incurred to negotiate a settlement.[37] The contractor may recover the costs of preparing the settlement proposal even if the total costs exceed the ceiling on a fixed-price contract.[38] No profit is paid on the cost of preparing the settlement proposal, however. Unlike the cost of preparing a settlement proposal, the cost of preparing a request for equitable adjustment for a deductive change probably is not recoverable.[39] This distinction should be a key discriminator for those frequent instances where there is minimal monetary difference between the two clauses for the pricing of the deleted work.

For a fixed-price services contract, the CO may select a "short form" clause that limits the government's liability to pay only for services rendered before the date of termination.[40] Yet before placing the clause in the solicitation the CO must determine that, because of the kind of services rendered, the successful offeror will not incur substantial charges preparing to perform the contract.[41] Although the clause is harsh on contractors, the contract appeals boards have enforced it.[42] Nevertheless, a contractor might be able to avoid the harsh consequences of the "short form" clause if the contractor can show that the CO's decision to use the clause was arbitrary. Where evidence supports that the successful offeror must incur substantial expenses preparing to perform the contract, two contract appeals boards have held that the use of the "short form" clause constituted an abuse of discretion by the COs.[43] Using the Christian doctrine, the boards removed the short form clause from the contract and inserted the basic T4C clause.[44]

Where the contractor would have incurred a loss had the entire contract been completed, the formula on the following page applies.

$$\text{Total Recovery} = \text{Settlement Expenses} + \text{Contract Price For Accepted Work} + \left(\text{Remaining Cost} \times \text{Loss Ratio}\right)$$

FAR 49.203 directs the following method for deriving the loss ratio where the settlement is on an inventory basis:

$$\text{Loss Ratio} = \frac{\text{(Total Contract Price)}}{\text{[(Total Cost Incurred) + (Estimated Cost to Complete)]}}$$

To minimize the decrement under the loss ratio, the contractor should consider seeking to maximize the numerator (i.e., the total contract price) by pursuing any valid price adjustments for matters such as changes to the specifications, government-caused delays, overzealous inspections, or failure of the government to cooperate.[45]

Deductive Change

Under the Changes clause, the government is entitled to an equitable adjustment for a deductive change. This downward adjustment in price is determined by the actual cost the contractor avoided by not having to perform the deleted work.[46] In pricing deductive changes, the guiding principle is that the eliminated portion of the work should have no effect on the relative profit or loss position of the contractor as established by the original work before the change was ordered.[47] Accordingly, the government also is entitled to a reduction for both the overhead and profit when calculating a deductive change.[48] If the contractor was sustaining a loss on the entire contract, however, the downward equitable adjustment probably should not include a reduction for profit.[49]

The equitable adjustment for a deductive change is based on what it would have cost the contractor to complete the deleted work even if the contractor did not include any costs for the deleted work in its price proposal. Stated another way, the equitable adjustment for a deductive change is predicated on the net savings to the contractor. "This approach upholds the integrity of the competitive bidding system by placing on the contractor, which has possibly obtained a pricing edge by omitting the cost of required work that it ultimately hopes will not be necessary, the risk of a later reduction in the contract price."[50]

For contracts based on an unbalanced bid, a deductive change should not alter the contractor's profit or loss position from what it would have been if the change had not occurred.[51] An illustrative decision involves a contract for floodwater retarding structures. The awardee's price to construct subgrade slabs using medium grade concrete was $60 a cubic yard. The price to construct cradles and antiseep collars using high-grade cement was $500 a cubic yard. Although the forming of the cradles and collars was more labor intensive than forming the slabs, the board observed that the contractor had submitted an unbalanced bid.[52] The difference between a cubic yard of the two types of concrete was the addition of two bags of cement. The increased cost to the contractor for the two bags of cement was $3 dollars. After contract award, the government ordered the contractor to pour only medium-grade concrete because "there was no sufficient technical advantage to be gained to justify the expenditure" for the top-grade concrete.[53]

Because the parties were unable to agree on an amount for the deductive change, the CO unilaterally issued a modification reducing the price from $500 to $225 per cubic yard. The Department of Agriculture Board of Contract Appeals resolved the pricing dispute by recognizing that the purpose of an equitable adjustment is to keep a contractor whole when the government modifies a contract. Consequently, to prevent any increase or decrease in profit, the contractor

was entitled to $497 per cubic yard for concrete that had been changed from high grade to medium grade.[54]

If the deleted work has not been performed and is the subject of a priced contract line item (CLIN), the general rule is that the CLIN price is the amount of the downward equitable adjustment.[55] Hence, if a contractor submitted an unbalanced bid, the contractor assumes the risk that a deductive change of one or more separately priced line items will undermine the anticipated profit structure.[56] Conversely, a contractor can clearly benefit when a deductive change eliminates one or more CLINs that represented work that would resulted in a financial loss.

Unlike a partial termination for convenience that requires the contractor to submit a settlement proposal within one year, the onus is on the government to assert a downward adjustment under the Changes clause. There are no strict time limitations on when the government must seek an equitable adjustment. If a claim is not asserted within a reasonable time or if the delay results in prejudice to the contractor, however, the government can lose its right to seek an equitable adjustment.[57] In actual practice, the government is at a significant disadvantage because it has the burden of proof concerning the amount of the downward adjustment.[58]

Since the contractor possesses the cost information, the government should audit the contractor's books and records. If possible, the CO should require certified cost and pricing data.[59] Where actual costs are available because the work has been completed, those amounts should be used to calculate the downward adjustment. Finally, if the government elects to use the Changes clause to delete work from a contract, but a partial termination for convenience would be more advantageous for the contractor, the contractor should encourage the government to calculate the deduction in the same manner as if it were a partial termination for convenience.[60]

Summary

If there is a major reduction of work, the decrease in price should be calculated under the T4C clause. Conversely, if there is only a minor reduction in work, the decrease in price should be calculated under the Changes clause. If the deleted work is neither major nor minor, a CO has discretion to use either clause. Frequently there will be only a minimal difference in the bottom line dollar amount regardless of whether the deduction is priced under the Changes clause or the T4C clause. Nevertheless, it is not uncommon for situations to arise where one clause can provide a significant financial advantage. Consequently, where it is apparent that work will be deleted, each party should calculate how the deduction would be priced under both clauses. Where the government is indecisive about selecting a clause, a contractor should consider seeking to sway the CO to use the clause that better serves its financial interests.

Endnotes

1. Although not addressed in this article, the Variation In Estimated Quantity clause might be applicable where work is deleted from the contract. This clause is also the subject of some confusion on how deductions are priced. *See generally Foley Company v. United States,* 26 Cl. Ct. 936 (1992).

2. *J. W. Bateson Company v. United States,* 308 F.2d 511, 513 (5th Cir. 1962).

3. There are other advantages and disadvantages to each clause, not addressed in this article, that also merit consideration. Examples include time limitations to submit a settlement proposal compared to a request for equitable adjustment, the accruing of interest, finality, rights to termination inventory and work in progress, and whether the government will be represented by a TCO. Federal fiscal law might even be a factor. *See generally* 59 Comp. Gen. 518 (1980).

4. *Lucas Aul, Inc.,* ASBCA No. 37803, 91-1 BCA ¶ 23,609 at 118,315. There is authority that a major deduction still can be a deductive change if the deleted work is substituted with additional work. *Ideker, Inc., Eng.,* BCA No. 4602, 87-3 BCA ¶ 20,145.

5. *Ideker, supra* note 4.

6. *Lucas Aul, Inc., supra* note 4, at 118,315.

7. *American Construction & Energy, Inc.,* ASBCA No. 34934, 88-1 BCA ¶ 20,361.

8. *Lucas Aul, Inc., supra* note 4, at 118,315-16.

9. FAR 52.243-1(a)(1). Alternative I applies to contracts for services other than architect-engineer or other professional services. For services, the clause authorizes "changes within the general scope" of the following type: description of the services to be performed, time of performance, and place of performance.

10. *Ralph Construction, Inc.,* HUD BCA No. 83-801-C15, 84-1 BCA ¶ 16,975.

11. *Id.* This dubious decision also held that a reduction of 75 percent in the number of mobile home units "was not so extensive" as to exceed the scope of the Changes clause.

12. *Burroughs Corporation,* GSBCA No. 5019-R, 80-2 BCA ¶ 14,487. The decision might have reached a different result if the government had argued that an hour of utilizing a test facility was an expendable commodity and hence a "supply." For a perplexing decision that struggles with whether deleting components from "sets" of VHF electronic equipment is a change to the specification, *see Doughboy Industries, Inc.,* FAACAP No. 67-3, 66-2 BCA ¶ 5712.

13. *Lucas Aul, Inc., supra* note 4; *Gyrodyne Company of America, Inc.,* ASBCA No. 17415, 73-2 BCA ¶ 10,208.

14. *Robinson Contracting Company v. United States,* 16 Cl. Ct. 676 (1989).

15. The total cost basis is an accounting method for the settlement proposal that requires the prior approval of the CO. *See* discussion that accompanies note 26, *infra.*

16. *See generally supra* note 13 and Lt Col Jerome S. Gabig, USAF, and Capt Charles L. Cook, USAF, "A Guide to Interpreting Contracts," *National Contract Management Journal,* vol. 23, issue 1, 1989.

17. R. Nash, *Government Contract Changes* at 18-28 (1989). Elsewhere, Professor Cibinic has commented: "change order pricing is more favorable (a) to the contractor on a profitable contract and (b) to the Government on a loss contract," *N&CR,* vol. 2, ¶ 46 at 117.

18. *General Builders Supply Co. v. United States,* 409 F.2d 246, 250 (Ct. Cl. 1969).

19. FAR Subpart 49.2.

20. *General Electric Company,* ASBCA No. 24111, 82-1 BCA ¶ 15,725 at 77,801.

21. *See* FAR 49.202 for some of the factors that can influence the amount of profit.

22. *Quality Seeding, Inc.,* IBCA No. 2297, 88-3 BCA ¶ 21,020.

23. Defense Federal Acquisition Regulation Suppplement 215.903(b)(3)(D).

24. FAR 49.203(a); *Tubergen and Associates, Inc.,* ASBCA No. 34106, 90-3 BCA ¶ 23,058. If the government substantially contributed to the increased costs, however, the requirement to disallow profit is not applicable where it is not possible to separate government-caused losses from contractor-caused losses. *M. E. Brown,* ASBCA No. 40043, 91-1 BCA ¶ 23,293.

25. FAR 49.206-2(a).

26. If the contractor wishes to use another basis, FAR 49.206-2(c) requires the prior approval of the chief of the contracting or contract administration office.

27. FAR 49.206-2(b).

28. *Ideker, supra* note 4.

29. *Brown, supra* note 24. The analogy has been criticized as an "oversimplification." *See Tom Shaw, Inc.,* Eng., BCA No. 5540, 93-2 BCA ¶ 25742 at 128,073.

30. FAR 31.102 and FAR 49.201.

31. *Fiesta Leasing and Sales, Inc.,* ASBCA No. 29311, 87-1 BCA ¶ 19,622.

32. *Industrial Refrigeration Services Corp.,* VABCA No. 2532, 91-3 BCA ¶ 24,093.

33. The seminal case is *Codex Corp. v. United States,* 226 Ct. Cl. 693 (1981). *See generally General Electric Company,* ASBCA No. 24111, 82-1 BCA ¶ 15,725; *Bos'n Towing and Salvage Company,* ASBCA No. 41357, 92-2 BCA ¶ 24,864.

34. *Codex Corp., supra* note 33, at 694.

35. FAR 49.206-2(b)(3). Before seeking to use the total cost basis, a contractor should consider the potential loss of interest that can result from the delay of having to wait for the completion of the continued portion of the contract.

36. FAR 49.208.

37. The cost of the prosecution of claims or appeals against the federal government, however, is unallowable. FAR 31.205-47(f)(1).

38. *Systems & Computer Information, Inc.,* ASBCA No. 18458, 78-1 BCA ¶ 12,946.

39. "Moreover, with respect to appellant's claim for costs for estimating and preparing change order proposals that were not accepted by the Government, we note that such costs are generally not recoverable since the contractor is normally responding voluntarily to a Government request for information. . . . Although the cases recognize that recovery may be had under circumstances where, *inter alia*, an authorized Government directive compels a contractor to undertake complex and costly preparatory work in submitting a proposal . . . appellant has failed to establish such a case here." *Kinetic Engineering & Construction, Inc.,* ASBCA No. 30726, 89-1 BCA ¶ 21,397 at 107,872.

40. Essentially this clause at FAR 52.249-4 is an advance cost agreement that disallows, for purposes of a termination for convenience, costs incurred "in preparation for and in carrying out" the required services. This advance cost agreement arguably is analogous to an "accounting principle" which FAR 49.201 permits the CO to disregard in the interest of a "fair compensation."

41. FAR 49.502(c).

42. *See Maibens, Inc.,* ASBCA No. 25915, 82-1 BCA ¶ 15,668 and cases cited therein. In *Drain-A-Way Systems,* GSBCA No. 7022, 84-1 BCA ¶ 16,929 at 84,215 the board observed, "All Termination For Convenience clauses are exculpatory devices. Their use is particularly unfair where the contract contains the so called 'short form' Termination For Convenience clause that permits recovery only for services furnished prior to the effective date of termination."

43. *Carrier Corporation,* GSBCA No. 8516, 90-1 BCA ¶ 22,409; *DWS, Inc. Debtor-in-Possession,* ASBCA No. 29742, 90-2 BCA ¶ 22,696.

44. The Christian doctrine is further explained in "Mandatory Clauses: The Regulations Override The Contract," *N&CR,* vol. 4, February 1990, ¶ 13, at 27.

45. This tack, if successful, might produce an additional benefit. If the increases from equitable adjustments result in the contract no longer being performed at a loss, then the contractor may be entitled to profit on costs allocated to the deleted work. *See generally* FAR 49.203(a).

46. *ACS Construction Co.,* ASBCA No. 33550, 87-1 BCA ¶ 19,660. If there is no cost avoidance, the government is not entitled to a downward adjustment to the contract price. *Celesco Industries,* ASBCA 22251, 79-1 BCA ¶ 13,604.

47. *Santa Fe Engineering, Inc.,* ASBCA No. 31762, 91-1 BCA ¶ 23,571. *See generally,* "Change Order Pricing," 80-5 Briefing Paper (Oct. 1980) at 3.

48. *Andrews & Parrish Co.,* ASBCA No. 30689, 88-3 BCA ¶ 20,976.

49. *CRF, a Joint Venture,* ASBCA No. 17340, 76-1 BCA ¶ 11,857, affirmed in an unpublished opinion of Cl. Ct., 1979 WL 16484. *See also Keco Industries, Inc. v. United States,* 364 F.2d 838, 843, n.2 (Ct. Cl. 1966).

50. *Plaza Maya Limited Partnership,* GSBCA No. 9086, 91-1 BCA ¶ 23,425 at 117,500. *Bruce-Andersen Co.,* ASBCA No. 35791, 89-2 BCA ¶ 21,872.

51. *J.F. Shea Company, Inc. v. United States,* 10 Cl. Ct. 620, 627 (1986).

52. *Richard P. Murray, Inc.,* AGBCA No. 77-152, 80-1 BCA ¶ 14,448 at 71,218.

53. *Id.* at 71,212.

54. The *Murray* case exemplifies the difference between the two clauses. A primary purpose of the T4C clause is to prevent a contractor from obtaining a windfall profit for unperformed work. *J. F. Shea Company, Inc., supra* note 51. The CO in the *Murray* case might have been successful in preventing a windfall to the contractor had he partially terminated for convenience the portion of the contract requiring the top-grade cement. Once the termination was contractually established, the CO might then have negotiated to place the top-grade cement on the contract at a reasonable price pursuant to a bilateral modification. If Murray were unwilling to agree to a bilateral modification, the CO's safest course of conduct would have been to issue a new solicitation for the deleted work.

55. *Holtzen Construction Co.,* AGBCA No. 413, 75-2 BCA ¶ 11,378; *Groesbeck-Durbin, Inc.,* DOT BCA No. 70-24, 72-1 BCA ¶ 9,251.

56. *Gregory & Reilly Associates, Inc.,* FAACAP 65-30, 65-2 BCA ¶ 4918; *C.F.S. Air Cargo Inc.,* ASBCA No. 36113, 91-1 BCA ¶ 23,583.

57. *Roberts v. United States,* 357 F.2d 938, 174 Ct. Cl. 940 (1966).

58. *J. S. Alberici Construction Co.,* GSBCA No. 10961, 91-3 BCA ¶ 24,068. For a termination for convenience, the burden of proof is not as clear. The contractor has the burden of proving its costs. *Kinetic*

Engineering & Construction, Inc., supra note 39. Yet, "the Government has the burden of proof as to both the extent to which the contract requirements were reduced and the saving which resulted therefrom regardless of whether the reduction is deemed a partial termination for the convenience of the Government or a deductive change." *Celesco Industries, supra* note 46, at 66,681.

59. The Truth In Negotiations Act might lack its normal potency. Under FAR 52.215-22, "Price Reduction For Defective Cost Or Pricing Data," the government has a right to be reimbursed if the contract price "was increased by any significant amount" because of defective price or cost data. Normally the clause serves to discourage contractors from inflating prices. In this instance, however, the contractor's best interest is served by deflating the cost of the deleted work. Moreover, the contract price is not going to be "increased" but rather the real concern is the amount the decrease.

60. If a partial termination for convenience is more advantageous for the contractor, but the government issues a deductive change, a contractor should not assume that the government's motive was based on a comparative price analysis. Perhaps the government's choice was haphazard or based on one of the factors identified in note 3, *supra*. For example, in some agencies procuring contracting offices prefer to avoid using terminating contracting officers and consequently strain to processing any deleted work as a deductive change. Therefore, since the government's decision may not have been motivated by financial considerations, the contractor should encourage the CO to price the deductive change under FAR 49.002(c), which authorizes the equitable adjustment to be calculated in the same manner as a partial termination for convenience.