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# TETON UPDATE

TETON CONSTRUCTION CONSULTANTS

CONTRACT ADMINISTRATION    CLAIMS PREVENTION    DISPUTE RESOLUTION

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## TERMINATION FOR CONVENIENCE

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### *Avoiding Loss and Maximizing Recovery*

Your contract is behind schedule and beset with a multitude of open change orders, claims, and also contractor problems. Cash flow is tight and the project is in the red.

The government terminates your contract for convenience due to a base closure, a major differing site condition, or a design bust. You read the termination notice and referenced FAR provisions – it appears simple – you are entitled to recover the cost of work completed to include overhead and a profit. The simplicity ends there.

The government will typically:

Seek detailed records supporting costs in a format not maintained by most construction contractors. Failure to understand your rights will limit recovery.

Ignore change requests, delays, and impact costs, which often stem directly from the government problem that caused the termination.

Audit the contractor's costs and find that the costs exceed the amount of work reflected in the progress payments. This will result in the government claiming that the contractor was in a loss position and must therefore refund monies already paid and forego profit on work completed. No further payment will be made and recovery is found years later through litigation.

The above scenario is an all too common situation in Federal contracting today. Typically, neither party at the working level fully understands its rights and obligations under a termination for convenience. This results in protracted settlements or litigation, which seems contrary to the simple language of the clause.

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Contractors have rights that are all too often overlooked or misunderstood:

- “Fair Compensation” versus strict accounting for costs is a unique provision of the termination clause that can allow for otherwise unrecoverable costs.
- The contract provisions can be applied to force action and start the interest clock when the settlement actions languish.
- Loss adjustments by the government can be defeated by sustaining claims and closing open changes. The government has the burden of proof when claiming the contractor was in a loss position. This burden, for a complicated project with multiple owner delays, can be difficult at best.
- Profit is not limited to 10% or weighted guidelines but rather the rate that would have actually been earned if the project had gone to completion. Contractors have recovered rates of 15%-25% profit.
- Consulting, accounting, and legal costs associated with the preparation of the termination settlement proposal are normally recoverable. Professional assistance should result in maximum recovery in the shortest possible time.

The axiom, “knowledge is power,” is especially true when dealing with the Federal regulations, policy, and procedures. Understand your rights and plan ahead to avoid loss and maximize recovery.

#### **About the Author**

Mr. Forget founded Teton Construction Consultants in 1984. His background is unique in that he has concentrated primarily on the early resolution of construction changes and claims based on his extensive knowledge of government procurement regulations. Steve is a nationally recognized instructor on the subject of construction contract negotiations and is frequently called upon by the Corps of Engineers to present dispute resolution programs to its contract administrators. Prior to 1984 Steve was a military officer and civilian with the Corps of Engineers, negotiating changes and claims on construction contracts. His expertise in contracting was recognized by his selection to a blue ribbon panel that reviewed and recommended changes to the Federal construction contract provisions and policy.