

High-Speed Afghanistan Troop Pullout: A Good Time to Check Subcontract Termination Procedures and Prepare for Action

July 2021

In April 2021, President Biden announced that all U.S. forces would be out of Afghanistan by September 11, 2021, ending twenty years of U.S. troop presence in the distant, Southwest Asia country. Recent reports suggest that the withdrawal will be completed as early as July 2021. While reportedly only about 3,500 uniformed service members remain in-country, roughly 16,000 contractors accompanying the force currently work in Afghanistan, including 6,000 U.S. citizens. That population suggests the continued existence of many active contracts. While many contracts may continue—for a while, after relocation to other neighboring countries such as Kuwait—the long-term need for this workforce, and the contracts they represent, is unsettled. Contract incumbents should expect to see, if they have not already, partial or total termination notices accompanying this transition. Moreover, if the troops are out by July, and some contractors lag in their departures, the residual workforce may face new security challenges. There's a great deal to think about.

A “termination for convenience”—the Government’s way of ending contracts before their terms are up—is supposed to make contractors (mostly) whole. But that’s not a blank check permitting recovery of any and all costs that a contractor may incur because of termination. Contractors must exercise due care and seek to recoup only “reasonable” costs, which the Federal Acquisition Regulation (FAR) defines as those which “a prudent person in the conduct of a competitive business” would incur. FAR 31.201-3(a). What’s reasonable in Afghanistan during a fast-paced drawdown and departure, with local or third-country subcontractors and employees,

Practice Areas

Government Contracts
Requests for Equitable Adjustment, Claims, and Terminations
Teaming Agreements, Strategic Alliances, and Subcontracting

may be very different than an orderly, if premature, termination of a stateside contract. But the fundamentals are the same, and having good systems and internal controls to manage convenience terminations, as well as early and continuous communications with stakeholders at all levels, are essential to maximizing cost recovery while maintaining relationships and reputations with agency customers, subcontractors, and vendors. So even if a company has no contracts affected by the Afghanistan withdrawal, this highly-visible contractual “mass extinction” event is a golden opportunity to check and, where necessary, update those systems and controls. Here are some things to think about.

- **Feel the churn.** Many terminations occur because the agency curtailed or ended a program, which typically involves assignment of new program management and contracting personnel. Those with whom a contractor has been dealing—and who know a great deal about realities on the ground and business decisions long made and accepted by all—may be gone in a flash. Stay in contact with agency personnel; document any unwritten “understandings” and the facts underlying them; and work to promote smooth transitions by educating newly-assigned personnel. Where unusual or higher than anticipated termination costs loom, let the agency know right away.
- **What does the contract say?** Looking both ways is critical. Facing the agency, assess the prime contract for unique terms with termination implications, and make sure you know which FAR clause is in the contract—it can make a difference. Inventory and assess all subcontracts and employment agreements. Know when key notices need to be issued to be effective, what termination liabilities could apply, whether the prime contractor even has a termination flow-down right, and what financial and logistical obligations the company has to employees being reassigned or terminated. Relative to the Afghanistan withdrawal: does the contract call for U.S. troop security on bases about to be closed? If so, discuss internally and with agency counterparts and subcontractors how the contractor will provide for security while pulling out: costs, length of time, who will do what, and how services will be procured. Document everything.
- **Settling with subs.** Some of the most contentious and intractable disputes stem from early contract terminations. Especially with local or third-country subcontractors on contingency operations contracts, convenience termination may be an alien concept. Worse, the subcontract might not even reserve a convenience termination right for the prime. Early and continuous communication with subs about prospects and agency actions, and explanation of processes, expectations, and deadlines for settlement proposals are critical to avoiding disputes and generating compliant subcontract settlement proposals to support timely prime contract settlements.
- **Bring the receipts.** Terminations involve dislocation and often confusion. Contemporaneous records may have huge significance and resolution of issues may occur many months or even years after the fact. **And then there are audits and investigations.** There’s no substitute for good documentation—preserve records, catalog them, and make sure they’re retrievable.

Whether all U.S. troops are out of Afghanistan in July, September, or even later, this massive operation, once involving over 100,000 service members, is ending. Wise contractors will prepare for this, follow through, pursue sound strategies to maximize recovery, and keep everyone happy. The same model and best practices

that will work during this withdrawal will work for any termination. Now is a good time to take a look.