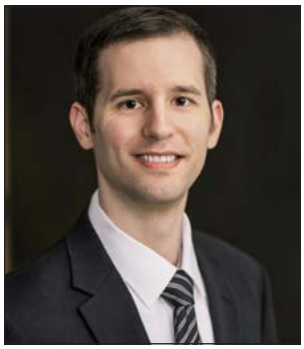
It Ain't Over 'Til It's Over: Limitations on the Government's Right to Terminate Government Contracts for Convenience

BY DAN RAMISH AND MICHAEL MAROULIS

Dan Ramish



Michael Maroulis

A longstanding and fundamental principle of federal government contracting is that agencies have the right to unilaterally terminate contracts for the convenience of the government. Convenience termination authority is thought to have evolved during the Civil War to allow the government to avoid "proceeding with wartime contracts after an end to hostilities."[1] Nearly all government contracts include a termination for convenience clause authorizing the government to terminate the contract without incurring liability for breach of contract.[2] Government contract convenience termination rights apply to both cost-type contracts (FAR 52.249-6) and fixed-price contracts (*see, e.g.*, FAR 52.249-2) and extend to contracts for commercial products and services (FAR 52.212-4(l)). A convenience termination clause may even be read into a government contract if one is not expressly included.[3]

The government has broad latitude to terminate contracts for convenience. The contracting officer generally need only determine that termination is "in the Government's interest."[4] Moreover, the contracting officer enjoys a presumption of regularity: With regard to the official acts of public officers, "in the absence of clear evidence to the contrary, it must be presumed that they have properly discharged their official duties."[5] The government also enjoys a further presumption of acting in good faith.[6] Together, the flexible termination standard and presumptions of proper action taken in good faith make it difficult for contractors to challenge convenience terminations.

In 2025, encouraged by the Department of Government Efficiency (DOGE), federal agencies terminated an unusual volume of government contracts in a brief timeframe. Through early January 2026, DOGE

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Dan Ramish is a partner and Michael Maroulis is an associate in the government contracts, grants, and construction practice groups of Haynes and Boone, LLP.

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reported terminating 13,440 government contracts valued at approximately $61 billion.[7] This widespread and rapid termination of contracts warrants closer examination of the limitations that courts and boards of contract appeals have placed on the government's termination authority, and the circumstances in which contractors are entitled to breach damages, including lost anticipatory profits.

Courts and boards have long recognized that a convenience termination can be challenged based on government bad faith or abuse of discretion. *Kalvar Corp. v. United States* was a landmark case articulating this formulation.[8] There, because the plaintiff did not distinguish between bad faith and abuse of discretion, the court treated them as equivalent for purposes of its decision. Since *Kalvar*, the caselaw has not always clearly distinguished the two concepts, even though abuse of discretion is substantially broader than bad faith, as reflected in other government contracts decisions outside of the convenience termination context.

In 1982, the U.S. Court of Claims, the predecessor to the U.S. Court of Appeals for the Federal Circuit, issued an en banc decision in *Torncello v. United States*.[9] A sharply divided court produced a plurality opinion that added a further restriction: A convenience termination requires a change in "the circumstances of the bargain or the expectations of the parties."[10]

In the wake of *Torncello*, courts and boards of contract appeals struggled to determine which elements of the split decision constituted binding precedent. Ultimately, in *Krygoski Constr. Co. v. United States*, a Federal Circuit panel characterized the "changed circumstances" doctrine as dicta, stating that "*Torncello* applies only when the Government enters a contract with no intention of fulfilling its promises."[11] At the same time, the court acknowledged that terminating a contract for convenience "simply to acquire a better bargain from another source" can amount to bad faith.[12] Since *Krygoski*, many courts and boards have applied the rule prohibiting convenience termination to obtain a better bargain.

Post-*Krygoski* termination-for-convenience cases have not fully addressed the concern that animated the plurality in *Torncello*: that without any constraint beyond bad faith or abuse of discretion, the government's convenience termination right undermines consideration in government contracts.[13]

This article examines the overlapping bases for challenging a termination for convenience, including (1) bad faith, (2) abuse of discretion, (3) the *Torncello* and *Krygoski* tests; and (4) post-*Krygoski* challenges. The article then considers (5) how these principles might apply in practice across a range of scenarios.

Bad Faith

Contractors bear a heavy burden to demonstrate that the government acted in bad faith, with regard to both what the contractor must prove and the burden of proof. To overcome the presumptions of regularity and good faith, courts and boards have often required the contractor to (1) demonstrate that the government had "specific intent to injure" the contractor and (2) demonstrate such intent with "well-nigh irrefragable proof."[14] "Specific intent to injure" includes (a) actions that are "motivated alone by malice" or "actuated by animus toward" the contractor, (b) a "proven conspiracy to get rid of" the contractor, or (c) the use of "designedly oppressive" measures.[15] "Well-nigh irrefragable proof," although it sounds daunting, has been equated with the more familiar "clear and convincing evidence" standard.[16]

In practice, contractors rarely succeed in proving that the government acted in bad faith in terminating a contract for convenience—or in other contexts.[17]

An example of circumstances in which a government contracts tribunal found that the government terminated a contract in bad faith is *Apex Int'l Mgmt. Servs. Inc.*[18] There, the Navy terminated its maintenance contract with Apex for default. Apex asserted claims for wrongful termination and bad faith breach of contract. The board awarded breach damages cataloguing 20 separate breaches by the government and specifically found that "the record before us establishes irrefragably that the Government acted in bad faith by any of the foregoing standards: (1) specific intent to injure appellant; (2) motivated alone by malice; (3) conspiracy to get rid of the contractor; and (4) designedly oppressive."[19] Facts supporting the finding of bad faith included (a) the installation commander sending a telegraphic message stating "words to the effect of 'we're going to get the contractor'"; (b) remarks made by the base maintenance superintendent to government workers that "he would see that appellant 'was gotten rid of' and that maintenance of the base would be restored to the [government] public works personnel"; and (c) a Navy inspector general report finding that "many of the assertions made by [Navy installation] officials in their efforts to block contract award were overstated, invalid, and incorrect and that some of their allegations were so misleading as to border on intellectual dishonesty."[20]

In another default termination case, *Libertatia Associates*, the Court of Federal Claims held that the Army's default termination of a grounds maintenance contract was improper based on a finding of bad faith.[21] The court found that the Army Contracting Officer's Representative (COR) "threatened to run [the contractor] off the Army base, repeatedly expressed contempt for [the contractor and its] personnel, and then expressed pleasure

in terminating [the contractor] for default."[22] Evidence of the COR's personal animus toward the contractor's officers included testimony of a former government employee and a third-party contractor.[23] One witness testified that the COR used a vulgar epithet to refer to the contractor's president and made "unprofessional personal comments" about the company's officers.[24] The court found that the COR had "expressed ill will and intent to injure" sufficient to demonstrate bad faith.[25] The contracting officer was "on notice of the COR's bad faith toward plaintiff" and "did nothing to remove the COR's influence over the administration of the contract."[26] The court applied the test established in *Struck Construction Company*, which is used when "more than one person acts on behalf of the government": "If the aggregate of the actions of all the agents would, if all done by one individual, fall below the standard of good faith, the entity for whom the various agents acted should be held to have violated that standard."[27]

Bad faith does not always require animus or a specific intent to injure the contractor; it may rest on other improprieties. *Advanced Team Concepts, Inc. v. United States* is an example of a case in which a government attempt to terminate a contract for convenience was held to constitute bad faith notwithstanding the absence of animus toward the contractor.[28] There, the Leadership Development Center (LDC), the national customer service training facility for the Immigration and Naturalization Service (INS), had an ongoing arrangement with the management consulting firm Advanced Team Concepts (ATC). The LDC director would obtain training services for INS personnel from ATC by circulating a schedule, inducing ATC to reserve instructors to teach the classes, the services of which were subsequently invoiced by the contractor. The LDC director eventually retired and was replaced by a new director. Three weeks later, the new director cancelled scheduled courses with ATC and discontinued future courses, instead turning to a firm headed by the previous director to provide the course instructors. The Court of Federal Claims held that ATC had an implied-in-fact contract with LDC to teach a series of classes for the 2001 academic year and that LDC breached the contract by cancelling ATC's remaining classes. The court declined to allow a convenience termination, finding that the government had improperly replaced the contractor with an inside candidate: "On the facts here it seems clear that the termination for convenience was not for the government's benefit but for that of a former employee. This is bad faith."[29]

The ASBCA has held that conduct analogous to a "bait and switch" can amount to bad faith sufficient to invalidate a termination for convenience.[30] In *Teresa A. McVicker, P.C.*, the government had been negotiating with an incumbent contractor's employees to hire those individuals as federal employees, but the government was unable to negotiate employment terms by the time the incumbent contract expired. Without disclosing its intentions, the government negotiated a contract with Ms. McVicker, urging her to hire the incumbent employees. But once the government had processed the employment applications shortly after award, the government informed Ms. McVicker that the employees she had just hired were now government employees, resulting in a "*de facto* partial termination of most of the [] contract." After the company filed a breach of contract claim, the contracting officer issued a partial termination for convenience. Recognizing that the government has considerable discretion in terminating a contract for convenience, the ASBCA held that the government had abused its discretion in terminating the contract. The board reasoned that, regardless of whether there was any intent to defraud, the government had "misled the [contractor] to its detriment here." Analogizing the government's conduct to a "bait and switch," the ASBCA explained: "The government may be liable for damages when the subsequent government action is specifically designed to reappropriate the benefits the other party expected to obtain from the transaction, thereby abrogating the government's obligations under the contract."[31]

The Court of Claims' decision in *Kalvar Corp.* illustrates types of conduct that do *not* rise to the level of bad faith.[32] Kalvar was awarded a requirements contract with the General Services Administration (GSA) to provide certain film to fill orders placed by various government agencies through Federal Supply Schedules. The Internal Revenue Service (IRS), one of the covered agencies, then made special requests for films from GSA. GSA determined that IRS film requests were outside the scope of Kalvar's requirements contract and sought to secure a portion of the film from Kalvar and a portion from the predecessor contractor, Xidex. Kalvar brought a suit for breach of contract. The government asserted constructive termination for convenience. Kalvar argued it was entitled to breach damages based on government bad faith. The Court of Claims held that the contractor's recovery was limited to costs reimbursable under the convenience termination because it determined that none of the conduct of which Kalvar complained constituted governmental bad faith:[33]

- **Incorrect reading of contract.** Kalvar argued GSA had a contractual obligation to disclose the IRS special request. The Comptroller General ruled that GSA had no such duty, but even if the agency and the Comptroller General interpretations of the contract were wrong, "an incorrect reading of the contract by Government officials is not tantamount to malice or bad faith."[34]
- **Erroneous determinations.** Kalvar argued that GSA demonstrated bad faith by rejecting a prior offer Kalvar made for out-of-spec film during Xidex's predecessor contract while accepting Xidex's out-of-spec offer during its own contract. GSA's actions were consistent, however, because it had believed Kalvar's offer

to be within the spec of Xidex's requirements contract, whereas it believed Xidex's offer to be out of spec of Kalvar's contract. Even if GSA's determinations were erroneous, that would not rise to the level of bad faith.

- **Misguided or unwise reliance on contractor representations.** GSA relied on Xidex's representation that the company's film was beyond the scope of Kalvar's contract without conducting independent tests. GSA had always relied on manufacturer's representations because it had no testing equipment of its own. Even though GSA later adopted a new testing procedure, and even if its practice of accepting contractor representations was unwise or misguided, that was not sufficient to show bad faith.
- **Disparate treatment based on proposal differences.** Finally, Kalvar argued GSA showed bias by contracting for only one thickness of film from Kalvar while contracting for three thicknesses from Xidex. However, GSA's approach was driven not by bad faith but by the contractors' respective offers: Kalvar offered to supply one thickness of film whereas Xidex offered three.

Proof of bad faith typically requires some form of evidence independent of the contractor. For example, in *Rice Sys., Inc. v. United States*, the court granted the Air Force's request for summary judgment on a contractor's claim alleging that its SBIR prototype contract was terminated for convenience in bad faith based on gender and national origin discrimination.[35] The contractor submitted a declaration from its female president stating that the male government employee who was the chief contract administrator mistreated her at the kick-off meeting because of her gender and that the same individual forced her to hire a male as co-principal investigator on the project to keep the contract.[36] The court acknowledged that discrimination based on gender or national origin in a convenience termination decision could constitute bad faith,[37] but the court found that the contractor's uncorroborated gender discrimination allegations did not demonstrate clear and convincing evidence of bad faith.[38] The contractor also alleged that the government rejected its proposed principal investigator because of his national origin. The court found, however, that the agency's decision was made in good faith based on review of the individual's credentials.[39]

Abuse of Discretion

The Federal Circuit has consistently recognized that a contracting officer's abuse of discretion in terminating a contract for convenience constitutes a breach.[40] Litigants and tribunals, at times, have conflated abuse of discretion with bad faith.[41] Caselaw outside of the convenience termination context offers guidance, however. Decisions in the default termination context–more common than convenience termination challenges–are particularly instructive.[42]

To show that an agency abused its discretion in terminating a contract, the contractor must demonstrate that the termination decision was arbitrary and capricious.[43] Depending on "the type of error or dereliction committed by the Government," courts and boards may consider the following factors in assessing allegations of abuse of discretion: "(1) subjective bad faith on the part of the [contracting officer], (2) the reasonableness of the decision, (3) the amount of discretion delegated to the [contracting officer], and (4) any violations of an applicable statute or regulation."[44]

The Court of Claims in *Keco Industries, Inc. v. United States*, which originated the four factors in the context of a bid protest, noted, among other things, that "proof that there was 'no reasonable basis' for the administrative decision will … suffice, at least in many situations," to establish abuse of discretion, and that "the degree of proof of error necessary for recovery is ordinarily related to the amount of discretion entrusted to the procurement officials by applicable statutes and regulations."[45] Courts have sometimes required proof of abuse of discretion by "clear and convincing evidence," though there is conflicting authority as to whether that standard applies generally to all allegations of improper termination.[46]

Convenience termination generally requires a determination that termination is "in the Government's interest."[47] For convenience termination of commercial products and services, the FAR requires that termination be "in the *best* interests of the government."[48] It is unclear whether there is a practical difference between the "interest" and "best interests" standards. In any case, the Federal Circuit has explained that "[i]t is not the province of the courts to decide *de novo* whether termination was the best course. 'In the absence of bad faith or clear abuse of discretion the contracting officer's election to terminate is conclusive.'"[49]

When it comes to default terminations, Federal Circuit precedent requires "a reasonable, contract-related basis" for the termination decision.[50] In the default context, there must specifically be a "nexus between the decision to terminate for default and *contract performance*" or else the termination may be an abuse of discretion.[51] Convenience terminations are not so restricted, but the decision to terminate a contract for convenience should nevertheless be made for reasons related to that contract. A convenience termination may be improper if it is pretextual or driven by an ulterior motive.[52] The termination decision must represent the contracting officer's "judgment as to the merits of the case," not a "decision arrived at for an irrelevant reason."[53]

To properly exercise discretion to terminate a contract for convenience, the contracting officer is generally required to exercise his or her independent judgment. The primary convenience termination clauses for fixed-price and cost-reimbursement contracts specifically require the contracting officer to determine that termination

is in the government's interest.[54] The commercial products and services convenience termination clause refers to "the government's" right to terminate the contract for convenience, without mentioning the contracting officer.[55] However, FAR 12.403 clarifies the contracting officer's role, stating that "the *contracting officer* should exercise the Government's right to terminate a contract for commercial products or commercial services either for convenience or for cause only when such a termination would be in the best interests of the Government."[56]

The contracting officer's exercise of personal and independent judgment in terminating contracts for convenience is important in view of the contracting officer's unique role. In addressing disputes under a contract, the contracting officer "must not act as a representative of one of the contracting parties, but as an impartial, unbiased judge."[57] The FAR emphasizes that contracting officers must "ensure that contractors receive impartial, fair, and equitable treatment."[58] Other agency officials may favor the government's positions and are not necessarily expected to "call balls and strikes" in their dealings with contractors.

The contracting officer may, of course, consult with other government officials in the decision-making process, provided that "in the end he [puts] his own mind to the problems and [renders] his own decisions."[59] However, the contracting officer may not "merely rubber-stamp[ ] a subordinate's or superior's findings."[60] It is an abuse of discretion if "the contracting officer was improperly influenced … to terminate the contract … rather than … exercise … independent judgment in the light of the factors set out in the regulations."[61]

In *TigerSwan, Inc. v. United States*, the U.S. Court of Federal Claims denied a government motion to dismiss a contractor convenience termination challenge.[62] The contractor alleged the contracting officer abused his discretion in terminating its contract for convenience because he deferred completely to his customer and accepted facts provided by the customer as true without confirming them for himself. The court ruled that the challenge to the convenience termination could go forward to determine whether the record supported the justification given for the termination decision.

Part of the contracting officer's exercise of discretion is performing some investigation of the facts to assess their validity. In *Gulf Group General Enterprises Co. W.L.L. v. United States*, the contracting officer terminated certain latrine and dumpster contracts purportedly due to an alleged security incident.[63] Army personnel offered inconsistent information regarding the reasons for the termination, however, and the contracting officer neglected to make any inquiry into the incident. It then came to light within days after the termination that the security concerns were unfounded. The Court of Federal Claims held that the convenience termination was an abuse of discretion, observing that "the issuance of a termination without making a 'judgment as to the merits of the case' is an 'abdication of responsibility,' which a court will not sanction 'where there is administrative discretion under a contract.'"[64]

The Federal Circuit has recognized a limited exception to the general rule that contracting officers must exercise independent judgment in terminating a contract when the language of the specific termination clause does not specify that the contracting officer will make the termination decision. In *Securiforce Int'l Am., LLC v. United States*, the Federal Circuit overturned the trial court's determination that a convenience termination of a commercial item contract was an abuse of discretion.[65] At trial, the contracting officer testified that her supervisor made the decision to terminate the contract for convenience:

> [T]he contracting officer testified that she failed to exercise independent judgment in executing the partial termination for convenience. When asked: "Did you decide it was in the government's best interest to partially terminate the contract for convenience?", contracting officer Phyllis Watson surprisingly replied: "No, my supervisor." She was then asked: "Did you reach an independent conclusion or determination that it was in the government's best interest, or did you do what Ms. Shepherd just asked you to do?". Ms. Watson replied: "I did not have an independent decision." She also did not recall what documents she had reviewed or the content of any discussions that were held prior to the termination.[66]

The Federal Circuit nevertheless held that this was not an abuse of discretion because the contract convenience termination clause, FAR 52.212-4(l), "required only that '[t]he Government' make the termination decision," without any explicit reference to the contracting officer.[67] The court noted that its "cases interpreting similarly worded clauses in the default context do not require a decision by a particular official."[68]

Securiforce filed a petition for a writ of certiorari seeking U.S. Supreme Court review of the questions "(1) May discretionary government procurement determinations be upheld as reasonable when the authorized official expressly disavows making the required predicate findings? and (2) May courts rely on grounds other than those of the authorized official to uphold discretionary determinations of 'the Government'?"[69] Securiforce asserted that the Federal Circuit panel decision had "altered the foundational principle that the government may act only through its authorized contractual agents."[70] The contractor further asserted that the decision ignored regulations making clear that "the government's termination decision is delegated exclusively to the CO"[71] and disregarded 100-year-old precedent from the Court of Claims, stating: "We need not multiply citations to the effect that where one is vested with discretion to do or not to do a certain thing, he alone must act."[72] The Supreme Court denied certiorari.[73]

As to the requirement that the contracting officer exercise independent judgment, *Securiforce* is the exception that proves the rule. There is little doubt that the trial court's determination that the contracting officer abused her discretion would have been correct on the facts if the contract had required the contracting officer to make the termination decision.

Torncello and *Krygoski*: No Changed Circumstances vs. No Intention of Fulfilling Promises

In *Torncello v. United States*, the Court of Claims, sitting en banc, reviewed the limitations on convenience terminations and arrived at a fractured decision.[74] The Navy awarded contractor Soledad a requirements contract that encompassed 12 different line items, which included pest control. Instead of issuing orders to Soledad for pest control as the contract contemplated, the Navy fulfilled pest control needs by using the Navy's Public Works Department, which had been a competing bidder on the original solicitation. Soledad brought an action for breach damages. The Armed Services Board of Contract Appeals (ASBCA) denied the appeal, holding that the Navy's failure to use the pest control line item was unimportant because the government had the right to constructively terminate the contract for convenience.[75]

The Court of Claims issued a three-judge plurality opinion, written by Judge Bennett and joined by Judges Kashiwa and Smith. The plurality reasoned that the government's convenience termination rights must be constrained by more than the obligation not to act in bad faith or abuse discretion. Otherwise, the convenience termination clause may render government contracts unenforceable for lack of consideration as a matter of black letter contract law. The government duty to act in good faith cannot act as a meaningful obligation to support a contract, particularly because, for the government, "good faith is presumed unless bad faith is shown."[76] Nor can abuse of discretion serve as a sufficient obligation when the government claims an unlimited right to terminate for convenience, as abuse of discretion depends on limits "derived from something else."[77] Therefore, the plurality established a new rule that the government was not permitted to terminate a contract for convenience unless there was "some kind of change from the circumstances of the bargain or in the expectations of the parties."[78] Because nothing had changed and the Navy had known at the outset it could obtain pest control at a lower price, the constructive termination for convenience was impermissible, and thus the contract was breached.[79] In reaching its decision, the plurality specifically overruled the court's earlier decision in *Colonial Metals*.[80] There, the panel had upheld the government's convenience termination of a contract to supply a fixed quantity of copper in order to procure copper at a cheaper price from another source that was known (or ought to have been known) at the time of contracting.[81] The *Torncello* plurality disagreed: "We cannot condone termination based on knowledge of a lower cost when that knowledge preceded award of the contract."[82]

The three other judges on the panel who did not join the plurality each wrote their own concurring opinions, agreeing with the outcome but disagreeing in various respects with the reasoning of the plurality.

- **Judge Davis concurrence.** Judge Davis's concurring opinion agreed with the plurality that the contract must be construed to prohibit the use of the convenience termination clause to obtain a lower price that the contracting officer knew of before executing the contract lest the contract be invalid for lack of consideration.[83] He further agreed that *Colonial Metals* should be overruled. However, Judge Davis disagreed that "abuse of discretion" was an inadequate standard for gauging whether termination was in the government's interests, likening it to the "public interest" standard "often used to control administrative rulings in the regulatory field."[84] He also took a broader view of bad faith than the plurality, indicating that the type of bad faith described in the plurality opinion, requiring malice or animus, was but one variety. Judge Davis would have held that the government's convenience termination to obtain a better price, known at the time of contracting, was an abuse of discretion and demonstrated bad faith. On the other hand, he disagreed with the plurality "that the convenience termination clause cannot be utilized when a better price appears after the contract is made."[85] Some commentators view Judge Davis as a fourth vote supporting a form of the "changed circumstances" test, yielding majority support for the test.[86]
- **Judge Nichols concurrence.** Judge Nichols' concurring opinion questioned whether the requirement for pest control was unsupported by consideration if the 11 other items on the contract were "not similarly avoidable on the government side."[87] He further suggested that, given that a convenience termination is only valid absent bad faith or clear abuse of discretion, constructive termination should not be viewed as "exonerating [the government] from all its commitments, if the act would be an abuse of discretion."[88] Judge Nichols, like Judge Davis, viewed the termination as an abuse of discretion, but not because the government knew of the lower prices before award. Rather, he explained that the government acted improperly by terminating only the more expensive items and retaining the favorable prices because that was inconsistent with the underlying solicitation, which had required bidders to bid and be evaluated on all items:

> Here the government stated it would evaluate bids on all the items as an entirety and make the award only to one who had bid on all items. Having promised this, it would be estopped to eliminate from the award by termination any

items just because, separately considered, they were at unfavorable prices, while retaining all those bid at favorable prices. The administration of the contract must be consistent with the rules used in evaluating the bids, to which the bidders conformed in bidding.[89]

- **Chief Judge Friedman concurrence.** The chief judge concurred in the result on the specific facts in the case, without offering a rationale, stating simply:

> As I understand the court's opinion, the court holds only that when the government enters into a requirements contract, knowing that it can obtain an item the contract covers for less than the contract price and intending to do so, there cannot be a constructive termination for convenience of the government when the government follows that course. On that basis, I join in the opinion.[90]

Commentators have observed that Chief Judge Friedman's suggestion that the government awarded the contract "intending to" constructively terminate the pest control and procure it from another source at a lower price was "not supported either by the other opinions in *Torncello* or by the ASBCA's findings of fact."[91] Thus, a government intent to terminate the contract for convenience at the time of award cannot be a requirement of *Torncello*, both because only one of six judges referenced it as part of a rule and because no case with such facts was before the court.

Courts and boards of contract appeals struggled to discern the holding of the divided decision in *Torncello*.

- **Court of Federal Claims.** In *Municipal Leasing Corp. v. United States*, the Court of Federal Claims (at the time, the "Claims Court") applied the *Torncello* plurality's "change in circumstances" test: "The termination for convenience clause can appropriately be invoked only in the event of some kind of change from the circumstances of the bargain or in the expectations of the parties."[92]
- **Federal Circuit.** Subsequent Federal Circuit panel decisions had diverging interpretations of the holding in *Torncello*. The first panel to consider it, in *Maxima Corp. v. United States*, referenced the "change in circumstance" test, citing *Municipal Leasing*.[93] Later panels in *Salsbury* and *Caldwell* adopted the chief judge's concurrence: "[*Torncello*] stands for the unremarkable proposition that when the government contracts with a party knowing full well that it will not honor the contract, it cannot avoid a breach claim by adverting to the convenience termination clause."[94] Again, nothing in the record in *Torncello* indicated that the government entered into the contract with the intention of repudiating it. Panel decisions also cannot overturn Court of Claims precedent, much less an *en banc* decision.[95]
- **Armed Services Board of Contract Appeals.** The board specifically declined to follow the change in circumstances rule because it was not adopted by a "clear majority." As the *Vec-Tor, Inc.* decision explained: "In *Torncello*, three of the six judges *en banc* subscribed to the 'change in circumstances' rule while the remaining three concurred in result only, one on unstated grounds and two on the grounds that the facts showed the termination was in bad faith and an abuse of discretion. We agree with the concurring opinions and will follow the bad faith/abuse of discretion rule regarding convenience-termination until the 'change of circumstances' rule is adopted by a clear majority of the Court."[96] When the ASBCA upheld a convenience termination challenge in *Operational Service Corp.*, it did so specifically relying on the finding that, at the time of award of a lawn maintenance contract, the government planned to terminate the contract for convenience and procure the services from others—consistent with Chief Judge Friedman's concurrence.[97] In *Fiesta Leasing and Sales*, the board declined to apply *Torncello*, suggesting it was confined to requirements contracts and did not extend to fixed-price, definite-quantity contracts.[98] However, that interpretation is unsupportable. While *Torncello* itself involved a requirements contract, it explicitly overruled *Colonial Metals*, which involved a supply contract for a definite quantity of copper.[99]
- **Civilian Boards.** Like the ASBCA, civilian agency boards tended to read *Torncello* narrowly. For example, in *S & W Tire Services*, the General Services Board of Contract Appeals (GSBCA) alluded to the "broad" language of the *Torncello* plurality but stated that "particularly in light of the three concurring opinions, the precise holding of *Torncello* is quite narrow," endorsing the interpretation from Judge Davis's concurrence: "the case holds only 'that a convenience termination clause could not be used to end [a] requirements contract where the Government knew, at the time it entered into the agreement, that it could obtain a better price from another person.'"[100] The board went on to invalidate a constructive convenience termination based on *Torncello*, holding that the contractor was entitled to breach damages, including lost profits. However, the board's decision was based on a finding that the government intended at the time of award to terminate S&W's tire recapping contract for convenience because it had already decided to outsource all government motor pool work to a third-party contractor.

In *Krygoski Construction Company*, a Federal Circuit panel revisited the *Torncello* decision and attempted to considerably limit the holding.[101] There, Krygoski was awarded a contract with the U.S. Army Corps of Engineers to demolish an abandoned airfield and missile site. When Krygoski began performance, the company encountered substantially more asbestos than was

anticipated, such that proceeding with the contract was expected to increase the total contract cost by more than 33 percent. The contracting officer viewed this as a cardinal change and, as a result, terminated the contract for convenience and resolicited bids. The Court of Federal Claims, applying the *Torncello* plurality "change in circumstances" rule, held that the termination was improper and an abuse of discretion, awarding $1.4 million in breach damages, including anticipatory lost profits.

On appeal, the Federal Circuit questioned the *Torncello* plurality's change of circumstances test, characterizing it as "*dicta*." The panel cited the subsequent enactment of the Competition in Contracting Act (CICA) in 1984[102] (post-dating *Torncello* in 1982), as grounds to reject the test as "inapplicable to the present regime of contract administration," reasoning that the court would "avoid a finding of abused discretion when the facts support a reasonable inference that the contracting officer terminated for convenience in furtherance of statutory requirements for full and open competition."[103] In place of that test, the panel announced a new, narrower test, aligned with Chief Judge Friedman's concurring opinion, restating *Salsbury* and *Caldwell*: "*Torncello* applies only when the Government enters a contract with no intention of fulfilling its promises."[104] Again, this reading of *Torncello* is problematic because the notion that the government intended from the outset to terminate the pest control for convenience appears unsupported by the record.[105]

When a government contractor urged that *Salsbury*, *Caldwell*, and *Krygoski* misinterpreted *Torncello*, the Federal Circuit disagreed. In *T&M Distributors*, the Navy awarded T&M a contract for automotive and related vehicle parts and accessories to support the agency's public works center on the island of Guam.[106] After award, the contractor visited Guam and learned that some of the information provided in the solicitation was inaccurate and raised the issue to the contracting officer. When the contracting officer investigated, he discovered historical usage data indicating that the estimated requirements were grossly understated. The new data suggested that the estimated amount should have been approximately $5 million, whereas the contract, including all options, was valued at approximately $1 million. Based on this substantial increase, the contracting officer terminated T&M's contract for convenience and reissued a new solicitation reflecting the increased order of magnitude. Another contractor, which had not bid on the original contract, won the recompete.

T&M filed a claim alleging that the convenience termination was a breach of contract and seeking $1,325,000 in anticipated profits. The Court of Federal Claims granted the government's motion for summary judgment. Citing *Krygoski* for the proposition that "[i]n the absence of bad faith or a clear abuse of discretion, the contracting officer's decision to terminate a contract for the convenience of the government is conclusive," the trial court concluded that a cardinal change had occurred and that the contracting officer therefore had not abused his discretion.[107]

On appeal to the Federal Circuit, T&M's principal argument was that *Krygoski* required a cardinal change to support a termination for convenience. T&M reasoned that the increase in the Navy's estimated requirements could not constitute a cardinal change on a requirements contract because the contractor's obligation was to "satisfy all the government's requirements, regardless of any previous estimate." The Federal Circuit explained that while *Krygoski* involved a cardinal change, the decision did not hold that a cardinal change was required to support a convenience termination. The court affirmed on the ground that the contracting officer had not abused his discretion but instead had terminated the contract to further the statutory requirements for full and open competition under CICA.

T&M also argued that *Krygoski*, *Caldwell*, and *Salsbury* improperly narrowed *Torncello* and that the panel should apply the "changed circumstances" rule and conclude that no such change had occurred. The contractor's brief specifically argued that Chief Judge Friedman's concurring opinion—on which the earlier panel decisions relied—assumed that the government intended from the outset to terminate the contract for convenience even though no such finding appeared in the record.[108] The T&M panel rejected the argument, reiterating that the "change in circumstances" rule was dicta and stating: "Our cases have properly read *Torncello*."[109]

Finally, T&M requested en banc consideration for its appeal, asserting that there were "at least three legal tests with some support in the case law" and that "both the Government and contractors would benefit from greater certainty."[110] The Federal Circuit did not grant the request.

Limits on Convenience Termination Post-*Krygoski*: No Intention of Fulfilling Promises and No Termination Simply to Get a Better Price

Krygoski has largely eliminated breach of contract actions challenging convenience terminations absent bad faith or abuse of discretion. Two special circumstances remain—both acknowledged by the *Krygoski* panel as improper[111]—that may support a convenience termination challenge: (1) when the government enters into a contract without intending to honor it and (2) when the government terminates simply to get a better price. Courts and boards typically treat these scenarios as forms of bad faith or abuse of discretion, subject to breach damages including lost profits.

Termination of a contract that the government entered into with no intention of honoring it is the *Krygoski* interpretation of the *Torncello* holding, which aligns with Chief Judge Friedman's concurring opinion—the narrowest reading. Again, neither *Krygoski* nor *Torncello* itself (nor *Colonial Metals*, which *Torncello* overruled) involved such a scenario: There were no factual findings in any of the cases that the government planned

to terminate either contract at the outset. Cases alleging intent to dishonor contract promises from the outset, which arose both before and after *Krygoski*, continue to be viable.

For example, *Tamp Corp.* (predating *Krygoski*) involved a contract for mess attendant services at a dining hall. Tamp was the incumbent on the predecessor contract. During competition for the contract, questions arose regarding the financial capability of the lowest bidder. The contracting officer negotiated a one-month extension with Tamp. When a pre-award survey still had not been completed and a Certificate of Competency had not been issued for the lowest bidder, further delaying the new contract, the contracting officer attempted to negotiate another one-month extension. Tamp's president wanted a three-month extension and said they would charge a higher unit price for a one-month extension. The contracting officer finally settled on a two-month extension, at a lower price. In agreeing to a two-month extension, however, the contracting officer had in mind that he could terminate the contract for convenience if the issues resolved after one month and made no mention of this to Tamp. Relying on *Torncello*, the ASBCA held that "[t]he Government may not use the Termination for Convenience clause to 'dishonor, with impunity, its contractual obligations.'" The Board held that the convenience termination was an abuse of discretion and constituted a breach of contract: "The contracting officer had the intention of terminating appellant's contract—as soon as he could award the new contract to [the lowest bidder]—when the two month extension was agreed on with appellant. That undisclosed intention made a mockery of his ostensibly reluctant assent to a two month, rather than a one month, extension."[112]

The other recognized exception—the prohibition on using convenience termination to obtain a better bargain—also derives from *Torncello*. At least when the government knew at the time of contract formation that it could obtain a better price from a third party, an *en banc* majority agreed that subsequent termination of the contract for convenience to get a better bargain was improper.[113] Multiple courts and boards have interpreted the fractured *Torncello* decision, and the subsequent decision in *Krygoski*, to prohibit termination to obtain a lower price even if the government only learns of that lower price after award.

In *Sigal Constr. Corp.*, the Civilian Board of Contract Appeals (CBCA) held that the government breached a unit price construction contract by constructively terminating a portion of the work in bad faith. There, the General Services Administration (GSA) had indefinitely suspended a portion of the work under the contract after a GSA construction manager obtained a proposal from another contractor during performance of the contract. The project manager then internally forwarded the proposal with the message: "Please review cost proposal and let's meet to develop strategy to deal with Sigal contract and schedule. . . ." About a month later, the construction manager suspended that portion of the contract indefinitely. The contracting officer then denied the contractor's claim for damages. The Board held that GSA was liable for breach of contract based on a constructive termination for convenience undertaken in bad faith, explaining that "[o]ne of the few limitations on the Government's right to terminate for convenience is that the Government may not terminate simply to get a better price for performing needed work."[114]

In *Davidson Oil Co. v. City of Albuquerque*, the U.S. Court of Appeals for the Tenth Circuit applied Federal Circuit law (followed by New Mexico courts) to hold that the City of Albuquerque breached its requirements contract with Davidson Oil Company by terminating the agreement to secure a better bargain from a competing supplier.[115] After Albuquerque signed a contract with Davidson to buy all its diesel and gasoline at fixed prices for a calendar year, fuel market prices declined precipitously because of the COVID-19 pandemic. The city asked Davidson to reduce its prices based on the drop in the market price, but the company could not do so without losing money because it had entered into hedge contracts with third parties. So, the city terminated the contract for convenience. The Tenth Circuit held that the city had breached the contract by terminating it in bad faith because it had terminated the contract solely to obtain a better bargain.

Other courts and boards have applied the rule prohibiting termination to obtain a better bargain without imposing a pre-contract knowledge requirement but have concluded that the terminations at issue did not violate that rule.

- *Northrop Grumman*. Contractor was one of four prime contractors chosen by the National Aeronautics and Space Administration (NASA) to construct a space station.[116] After award, NASA became increasingly fearful "that the entire project would be lost if the contractors' management structure and contractual relationships were not adjusted," and proposed that one of the four primes should be retained and the others novated as subcontractors.[117] NASA selected Boeing as the prime, and the contractor was left with "substantially less work under the new scaled-down program by Boeing than it had hoped and expected."[118] When NASA terminated its contract for convenience to effectuate the change in approach, the contractor brought a claim alleging bad faith termination "simply to acquire a better bargain from another source."[119] The Court of Federal Claims found that "[t]he Government did not terminate this contract for convenience 'simply' to acquire a better bargain from another source, even if that may have been the result."[120] Rather, "NASA wanted to save the Space Station," which was "in serious jeopardy politically," and "[e]veryone knew that a reorganization was

needed."[121] The termination occurred as "[t]he entire Program was being scaled down."[122]

- *NVS Technologies*. NVS asserted that the government breached its research and development contract by terminating the contract for convenience to obtain a better bargain, citing *Krygoski*.[123] NVS alleged that *after award* the government sought lower prices from other sources to perform research involving the same technology. The CBCA held that the contracting officer had not acted in bad faith or abused his discretion because, as a factual matter, the government had not terminated to obtain a better bargain: "Appellant alleges that a BAA [broad agency announcement] issued thereafter by the DOI was for the same technology. Respondent offered affidavit testimony that the technology sought by the BAA was different from that in the NVS contract. Two contracts were awarded in response to the BAA, but there was no persuasive evidence that the requirements sought by the BAA were the same or even similar to those of the NVS contract or that the agency was seeking a 'better bargain.'"[124]
- *Corners and Edges*. C&E challenged the government's termination of its courier services contract under *Krygoski*, alleging that the government acted to obtain a better bargain from others.[125] The CBCA disagreed, finding that the government observed and tracked the services C&E was providing after award and decided to in-source and primarily self-perform: "[T]he contracting officer made a reasoned determination that respondent no longer needed to contract-out courier services; instead, she decided that the [agency's] in-house shipping and receiving unit could meet respondent's needs for courier service. Appellant sees this as respondent's terminating appellant's contract and turning the work over to a contractor favored by respondent. The record does not support appellant's view of the facts. Appellant does not appreciate the subtle, but real, distinction between re-procuring the requirement and switching the requirement to an in-house operation partially staffed by contract employees."[126]
- *Montana Refining*. Montana challenged the government's termination for convenience of its indefinite-quantity fuel supply contract before the government purchased the contract's minimum guaranteed quantity.[127] The contractor argued that permitting a termination for convenience under these circumstances would render the contract illusory; that the government acted in bad faith because it never intended to be bound by the guaranteed minimum quantity; and that the government was already in breach when it terminated the contract because its fuel purchases were so minimal that, even if the government purchased the monthly maximum thereafter, it could not satisfy the minimum by the end of the contract period. The ASBCA rejected all three arguments. Precedent permitted the government to terminate an indefinite-quantity contract for convenience before purchasing the minimum without rendering the contract illusory. The government's admission that it "believed at the time of contract award that it could avoid breach of contract liability for failing to order the guaranteed minimum quantity through the exercise of its rights under the Termination for Convenience clause" merely amounted to recognition of its contract rights, not a bad faith intention not to honor the guaranteed minimum quantity.[128] Finally, the government was not yet in breach for failing to meet the mandatory minimum because it could satisfy the minimum by ordering quantities in excess of the default maximums, provided that Montana agreed to fill those orders—something the contractor had done in the past. In any case, breach for failure to order would only entitle the contractor to damages available under the convenience termination clause. As part of its analysis, the board identified termination undertaken solely to obtain a better bargain as a category of bad-faith termination prohibited by *Krygoski*, but concluded that "those circumstances do not exist here."[129] The board made no mention of any pre-award knowledge.[130]

The prohibition on terminating a contract for convenience "simply to acquire a better bargain from another source" is important not only to ensure that government contracts are supported by consideration, but also to promote fairness. As the *Torncello* plurality observed, such terminations, like the one that occurred in *Colonial Metals*, "put contractors 'in the untenable position of being subject to termination and loss of the benefit of the sale when the market falls but being saddled with a loss when the reverse occurs.'"[131] The Tenth Circuit emphasized the same point in *Davidson Oil Co.*:

> A buyer who signs a fixed-price requirements contract knows the market price for the commodity will fluctuate but the buyer's obligation will remain the same. If the market price rises, the fixed price will insulate the buyer from the market fluctuation. But if the commodity's market price falls, the buyer must honor its contract—even though the buyer could attain a better bargain elsewhere.[132]

Convenience Termination Challenges in Practice

Various alleged termination for convenience scenarios that have been anecdotally reported or speculated about through 2025 may be susceptible to challenge under the standards described in this article.

- **Mass terminations.** Terminations accomplished *en masse* could be subject to challenge as an abuse of discretion based on the failure to make individual determinations specific to each contract.
- **Directed terminations.** To the extent that other

government officials direct the contracting officer to terminate one or more contracts, if the applicable termination clause specifically calls for the contracting officer to make the termination decision, the failure to exercise independent judgment may present grounds for a successful challenge.

- **Mistaken terminations based on keyword searches.** By some accounts, certain contracts were allegedly terminated because their descriptions or performance work statements contain terms perceived as contrary to an administration's policy positions (e.g., references to "equity"), even when the actual contract work had nothing to do with the targeted subject matter (e.g., "diversity, equity, and inclusion"). Such terminations might be subject to challenge as arbitrary and capricious, and thus an abuse of discretion.
- **Termination for policy reasons unrelated to the contract.** If the government terminated a contract for convenience based on the contractor's policy positions—independent of the contract itself and the specific contract requirement—that could potentially be challenged as an abuse of discretion. Such a challenge would be analogous to default terminations overturned because they are pretextual, based on irrelevant reasons, rather than the facts of the case.
- **Terminations involving specific targeting.** If a contract were terminated based on grievances against the contractor unrelated to the contract's performance of scope, such action could, in some circumstances, rise to the level of bad faith, if supported by clear and convincing evidence.
- **Termination based on contractor's unwillingness to reduce previously agreed-upon pricing.** If an agency attempts unsuccessfully to renegotiate contract prices and then terminates the contract for convenience when the contractor refuses, or declines to reduce its price as much as desired, that termination could be subject to challenge if it could be shown to be motivated by a desire to get a better price.[133]
- **Renegotiation under threat of convenience termination.** If an agency attempts to renegotiate pricing under threat of termination, a contractor might argue that the threat constituted anticipatory repudiation. Anticipatory repudiation is a statement by one of the parties to a contract indicating that they will commit a breach that would, of itself, give the other party a claim for damages for total breach, or a voluntary affirmative act that renders the obligor unable or apparently unable to perform without such a breach.[134] Demanding new or different contract terms as a condition of continuing contract performance may constitute anticipatory repudiation if the threat to cease performance is sufficiently definite.[135] An aggrieved party can recover damages for anticipatory repudiation if it treats the repudiation as a total breach.[136] It is risky for the contractor to treat repudiation as a total breach and stop performing, however, as the agency would likely respond by terminating the contract for default.

For any of these scenarios, the viability of a legal challenge will depend in large part on the specific facts and circumstances of each case, as well as the available evidence.

Conclusion

When the government enters into contracts, its "rights and duties therein are governed generally by the law applicable to contracts between private individuals."[137] Thus, the Supreme Court has observed:

> The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.[138]

To be sure, the U.S. government's right to terminate contracts for convenience implicates sovereign and national security interests, but it must be subject to meaningful limits. Unchecked, convenience termination is nothing more than a sanctioned right of repudiation, which makes for an unstable foundation for government contracting. By contrast, assuring industry that the government will not unfairly renege on its promises allows government contractors to price government work more like that of commercial customers instead of including substantial risk premiums. Reasonable limits on the government convenience termination right thus benefit the government and the taxpayer in addition to contractors.

A recent policy development—compounded by the increasing volume of terminations—may set the stage for a review of the minimum limits on terminations for convenience. As part of the Revolutionary FAR Overhaul, the class deviation for FAR Part 12 eliminates the policy that convenience terminations of commercial contracts must be in the government's "best interest" and declines to expressly impose any other constraint on the government's termination rights in relation to commercial contracts.[139] More than 40 years after *Torncello*, the amended convenience termination policy for commercial government contracts may renew questions about whether such ntracts are supported by consideration.[140] PL

Endnotes

1. Krygoski Constr. Co. v. United States, 94 F.3d 1537, 1540 (Fed. Cir. 1996) (citing United States v. Speed, 75 U.S. (8 Wall.) 77, 78 (1868)) (tracing the government's use of termination for convenience clauses as far back as 1863); *see* 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, 338 (1997) ("The notion that the federal government needs extraordinary flexibility in its contractual obligations, including the ability to end them without incurring breach damages, is an old one. Although its precise origins are unclear, the termination

for convenience concept appears to date to the Civil War in connection with the need to bring a quick end to wartime production.").

2. *See, e.g.*, FAR 52.249-1, Termination for Convenience of the Government (Fixed-Price) (Short Form); 52.249-2, Termination for Convenience of the Government (Fixed-Price); 52.249-3, Termination for Convenience of the Government (Dismantling, Demolition, or Removal of Improvements); 52.249-4, Termination for Convenience of the Government (Services) (Short Form); 52.249-5, Termination for Convenience of the Government (Educational and Other Nonprofit Institutions); 52.249-6, Termination (Cost-Reimbursement); 52.249-7, Termination (Fixed-Price Architect-Engineer); 52.249-12, Termination (Personal Services); FAR 52.212-4(l), Termination for the Government's convenience (commercial products and services). As of this writing, pursuant to Executive Order 14275, Restoring Common Sense to Federal Procurement, the FAR Council has published model class deviations making widespread changes to all 53 Parts of the FAR, which have been adopted by most federal government agencies with varying effective dates. *See* Exec. Order 14,275, Restoring Common Sense to Federal Procurement, 90 Fed. Reg. 16,447 (Apr. 18, 2025); *see also FAR Parts and Agency Deviations*, Acquisition.gov, https://www.acquisition.gov/far-overhaul/far-part-deviation-guide (last visited Jan. 6, 2026). This initiative has been termed the "Revolutionary FAR Overhaul" or "RFO." The FAR Council posted the RFO model deviation text in its entirety at Gen. Serv. Admin. et al., Revolutionary Federal Acquisition Regulation Overhaul, https://www.acquisition.gov/sites/default/files/page_file_uploads/RFO.pdf (last visited Jan. 6, 2026). RFO Phase 1 does not propose any changes to the FAR termination clauses.

3. *See* G. L. Christian & Assocs. v. United States, 312 F.2d 418, 426 (Ct. Cl. 1963) (reading a convenience termination clause into a government contract by operation of law on the basis that the clause was mandatory and the convenience termination right is "a deeply ingrained strand of public procurement policy"). *But see* Advanced Team Concepts, Inc. v. United States, 68 Fed. Cl. 147, 152 (2005), *opinion clarified*, 77 Fed. Cl. 111 (2007) (holding that "the *Christian* Doctrine does not apply" when the government terminates an implied-in-fact contract in bad faith and refusing to read a termination for convenience clause into the contract by operation of law). The so-called *Christian* Doctrine has also been used to substitute a termination for convenience clause that is more favorable to the contractor when the contracting officer had no reasonable basis for including a less favorable clause. *See DWS, Inc.*, ASBCA No. 29742, 90-2 BCA ¶ 22,696 (inclusion of short-form termination for convenience clause was an abuse of discretion); *see generally* Mid-Atl. Sec. Servs., Inc., ENGBCA No. 6302, 97-2 BCA ¶ 29,012 (collecting cases).

4. *See, e.g.*, FAR 52.249-2(a) ("The Government may terminate performance of work under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the Government's interest."); *see also* FAR 49.101(b) ("The contracting officer shall terminate contracts … only when it is in the Government's interest."). The RFO made no change to FAR 52.249-2(a) and amended FAR 49.101(b) only by replacing "shall" with "must."

5. Joseph L. DeClerk & Assocs., Inc. v. United States, 26 Cl. Ct. 35, 45 (1992).

6. JKB Sols. & Servs., LLC v. United States, 18 F.4th 704, 709 (Fed. Cir. 2021) (citing Caldwell & Santmyer, Inc. v. Glickman, 55 F.3d 1578, 1581 (Fed. Cir. 1995)) ("We presume that the government acts in good faith when contracting. To overcome that presumption, a contractor must show through 'well-nigh irrefragable proof' that the government had a specific intent to injure it."). One court has indicated that the presumption that government officials acted in good faith, which must be rebutted by clear and convincing evidence, only applies when a government official is accused of fraud or quasi-criminal wrongdoing in performance of official duties and not in ordinary circumstances performing official acts that require discretion. *See* Tecom, Inc. v. United States, 66 Fed. Cl. 736, 769 (2005) (explaining this limitation on the presumption of good faith and, more broadly, analyzing in detail the presumptions of regularity and good faith).

7. *See Savings*, Dep't of Gov't Efficiency, https://doge.gov/savings ("Wall of Receipts" for contracts lists individual contract terminations with a summary count and estimated value) (last visited Jan. 6, 2026). "Total value" is defined as "[t]he potential expenditure including options," suggesting the value of terminated contracts may include unexercised options.

8. 543 F.2d 1298 (Ct. Cl. 1976).

9. 681 F.2d 756 (Ct. Cl. 1982) (plurality).

10. *Id.* at 766.

11. Krygoski Constr. Co. v. United States, 94 F.3d 1537, 1545 (1996) (citations omitted).

12. *Id.* at 1541.

13. *See* Restatement (Second) of Contracts § 77 (Illusory and Alternative Promises) ("A promise or apparent promise is not consideration if by its terms the promisor or purported promisor reserves a choice of alternative performances unless … each of the alternative performances would have been consideration if it alone had been bargained for…."). *But see* Montana Refining Co., ASBCA No. 50515, 00-1 BCA ¶ 30,694 (holding, in relation to a challenge to the convenience termination of an IDIQ contract before the government ordered the mandatory minimum, that "the compensation available under the termination for convenience clause provide[d] adequate consideration to the contractor").

14. T & M Distribs., Inc. v. United States, 185 F.3d 1279, 1285 (Fed. Cir. 1999) (quoting Kalvar Corp. v. United States, 543 F.2d 1298, 1301–02 (Ct. Cl. 1976)) (explaining that "government officials are presumed to act in good faith" and that "it requires 'well-nigh irrefragable proof' to induce the court to abandon the presumption of good faith dealing").

15. *Id.* at 1285 (quoting *Kalvar Corp.*, 543 F.2d at 1302); *see also* Apex Int'l Mgmt. Servs. Inc., ASBCA No. 38087, 94-2 BCA ¶ 26,842.

16. Am-Pro Protective Agency, Inc. v. United States, 281 F.3d 1234, 1239 (Fed. Cir. 2002) ("While our court and its predecessor have often used the 'well-nigh irrefragable' language to describe the quality of evidence required to overcome the good faith presumption, several cases instead use the phrase 'clear evidence.' … Courts generally recognize three standards of proof: 'preponderance of the evidence,' 'clear and convincing,' and 'beyond a reasonable doubt.' Of the three, we believe that 'clear and convincing' most appropriately describes the burden of proof applicable to the presumption of the government's good faith.") (internal citations omitted).

17. *See* John Cibinic Jr. et al., Administration of Government Contracts 1209–10 (6th ed. 2025) (and cases cited).

18. ASBCA No. 38087, 94-2 BCA ¶ 26,842.

19. *Id.*

20. *Id.*

21. Libertatia Assocs., Inc. v. United States, 46 Fed. Cl. 702 (2000). The contractor had originally sought money damages for breach of contract, but the parties subsequently stipulated dismissal of the breach claim. *Id.* at 712 n.1. Therefore, based on the finding of bad faith, the court converted the default termination to a termination for convenience. *Id.* at 712.

22. *Id.* at 710.

23. *Id.* at 708.

24. *Id.*

25. *Id.* at 711.

26. *Id.* Among other evidence unhelpful to the government's defense, the contracting officer acknowledged on cross-examination that she had told the COR to "stop referring to [himself] as Jesus Christ in connection [with his] duties as a COR." *Id.* at 710. For another example of bad faith termination for default, constituting a breach, see *Keeter Trading Co. v. United States*, 85 Fed. Cl. 613, 633 (holding that administrative and contracting officials acted in bad faith in administering a Postal Service contract, interfering with contract performance with the specific intent to interfere with the contractor's contractual rights, and attempting to get rid of the contractor after it resisted a change that was not authorized by the contract).

27. *Libertatia Assocs.*, 46 Fed. Cl. at 709–10 (citing Struck Constr. Co. v. United States, 96 Ct. Cl. 186, 221 (1942)).

28. 68 Fed. Cl. 147 (2005), *opinion clarified*, 77 Fed. Cl. 111 (2007).

29. *Id.*, 68 Fed. Cl. at 152.

30. *See* Teresa A. McVicker, P.C., ASBCA No. 57487, 12-2 BCA ¶ 35,127.

31. *Id.* (quoting Precision Pine & Timber, Inc. v. United States, 596 F.3d 817, 829 (Fed. Cir. 2010)).

32. Kalvar Corp. v. United States, 211 Ct. Cl. 192 (1976).

33. *Id.* at 199–201.

34. *Id.* at 200.

35. 62 Fed. Cl. 608 (2004).

36. *Id.* at 623–24.

37. *Id.* at 622.

38. *Id.* at 625.

39. *Id.* at 631–32.

40. Krygoski Constr. Co. v. United States, 94 F.3d 1537, 1541 (Fed. Cir. 1996) ("When tainted by bad faith *or an abuse of contracting discretion*, a termination for convenience causes a contract breach.") (emphasis added).

41. *See, e.g.*, Kalvar Corp. v. United States, 543 F.2d 1298, 1301 (Ct. Cl. 1976) ("Kalvar makes no conceptual distinction between 'bad faith' and 'abuse of discretion' and, for the purposes of this decision, we accept Kalvar's equation of the two concepts."). The *Kalvar* court also observed that "many of our prior decisions seem implicitly to accept the equivalence of bad faith, abuse of discretion, and gross error." *Id.* at 1301 n.1.

42. *See, e.g.*, McDonnell Douglas Corp. v. United States, 182 F.3d 1319 (Fed. Cir. 1999); Darwin Constr. Co., v. United States, 811 F.2d 593 (Fed. Cir. 1987); Schlesinger v. United States, 390 F.2d 702 (Ct. Cl. 1968); John A. Johnson Contracting Corp. v. United States, 132 F. Supp. 698 (Ct. Cl. 1955).

43. *See* US Fid. & Guar. Co. v. United States, 676 F.2d 622, 630 (Ct. Cl. 1982).

44. TigerSwan, Inc. v. United States, 118 Fed. Cl. 447, 451 (2014) (citing Keco Indus., Inc. v. United States, 492 F.2d 1200, 1203–04 (Ct. Cl. 1974), and England v. Sys. Mgmt. Am. Corp., 38 F. App'x 567, 571 (Fed. Cir. 2002)).

45. *Keco Indus., Inc.*, 492 F.2d at 1203–04.

46. *See, e.g.*, Securiforce Int'l Am., LLC v. United States, 125 Fed. Cl. 749, 783 (2016), *aff'd in part, vacated in part, remanded*, 879 F.3d 1354 (Fed. Cir. 2018) (citation omitted) ("The applicable burden of proof under the abuse of discretion standard is clear and convincing evidence."). *But see* Am-Pro Protective Agency, Inc. v. United States, 281 F.3d 1234, 1239 (Fed. Cir. 2002) (citing Addington v. Texas, 441 U.S. 418 (1979)) (explaining that clear and convincing evidence is required to overcome the presumption of regularity "only in the situation where a government official allegedly engaged in 'fraud or in some other quasi-criminal wrongdoing'"); Tecom, Inc. v. United States, 66 Fed. Cl. 736, 769 (2005) (citing *Am-Pro Protective Agency, Inc.*, 281 F.3d 1234) (declining to extend the requirement for clear and convincing evidence to claims that the government breached the duty of good faith and fair dealing, reasoning that "[w]hen a government official acts under a duty to employ discretion, granted formally by law, regulation, or contract, and a lack of good faith is alleged that does not sink to the level of fraud or quasi-criminal wrongdoing, clear and convincing evidence is not needed to rebut the presumption. Instead, this may be inferred from a lack of substantial evidence, gross error, or the like.").

47. *See* FAR 52.249-2, 52.249-6; *see also* FAR 49.101(b).

48. FAR 12.403(b) (emphasis added).

49. Salsbury Indus. v. United States, 905 F.2d 1518, 1521 (Fed. Cir. 1990) (quoting John Reiner & Co. v. United States, 325 F.2d 438, 442 (Ct. Cl. 1963)).

50. McDonnell Douglas Corp. v. United States, 182 F.3d 1319, 1326 (Fed. Cir. 1999) (citing U.S. Fid. & Guar. Co. v. United States, 676 F.2d 622, 630 (Ct. Cl. 1982)).

51. *Id.* (emphasis added).

52. *See id.*

53. John A. Johnson Contracting Corp. v. United States, 132 F. Supp. 698, 705–06 (Ct. Cl. 1955).

54. *See* FAR 52.249-2(a) ("The Government may terminate performance of work under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the Government's interest"), 52.249-6 ("The Government may terminate performance of work under this contract in whole or, from time to time, in part, if … [t]he Contracting Officer determines that a termination is in the Government's interest. …"); *see also* FAR 49.101(b) ("The contracting officer shall terminate contracts, whether for default or convenience, only when it is in the Government's interest.").

55. *See* FAR 52.212-4(l) ("The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience.").

56. FAR 12.403(b) (emphasis added).

57. Penner Installation Corp. v. United States, 89 F. Supp. 545 (Ct. Cl. 1950), *aff'd per curiam by an equally divided court*, 340 U.S. 898 (1950).

58. N. Star Alaska Hous. Corp. v. United States, 76 Fed. Cl. 158, 209 (quoting FAR 1.602-2(b)). The RFO relocates this language to FAR 1.402-2(c) and modifies it slightly to prescribe fairness for "offerors" as well: "Ensuring offerors and contractors receive impartial, fair, and equitable treatment."

59. Pac. Architects & Eng'rs, Inc. v. United States, 491 F.2d 734, 744 (Ct. Cl. 1974).

60. Atkins N. Am., Inc. v. United States, 106 Fed. Cl. 491, 500 (2012) (quoting N.Y. Shipbuilding Corp. v. United States, 385 F.2d 427, 435 (Ct. Cl. 1967)).

61. Fairfield Sci. Corp. v. United States, 611 F.2d 854, 862 (Ct. Cl. 1979).

62. TigerSwan, Inc. v. United States, 118 Fed. Cl. 447 (2014).

63. *See* Gulf Grp. Gen. Enters. Co. W.L.L. v. United States, 114 Fed. Cl. 258, 362 (2013).

64. *Id.* (citing Darwin Constr. Co. v. United States, 811 F.2d 593, 598 (Fed. Cir.1987) and quoting Schlesinger v. United States, 390 F.2d 702, 709 (Ct. Cl. 1968)).

65. *Securiforce Int'l Am., LLC v. United States*, 879 F.3d 1354 (Fed. Cir. 2018).

66. *Securiforce Int'l Am., LLC v. United States*, 125 Fed. Cl. 749, 785–86 (2016).

67. *Securiforce Int'l Am.*, 879 F.3d at 1364; *see* FAR 52.212-4(l) ("The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience.").

68. *Securiforce Int'l Am.*, 879 F.3d at 1364.

69. Petition for Writ of Certiorari, Securiforce Int'l Am. v. United States, 2018 WL 3361036 (No. 18-37).

70. *Id.*

71. *Id.* Specifically, Securiforce's petition cited FAR 12.403(b) ("The *contracting officer* should exercise the government's right to terminate a contact for commercial items either for convenience or for cause only when such a termination would be in the best

interests of the Government") and 12.403(d)(1) ("When the contracting officer terminates …"). The contractor also noted that "the FAR provides that terminations are to be effected by contract modifications," at FAR 43.101, and that "*[o]nly contracting officers* acting within the scope of their authority are empowered to execute [them] on behalf of the Government." FAR 43.102(a).

72. Burton Coal Co. v. United States, 60 Ct. Cl. 294, 313 (1925), *aff'd*, 273 U.S. 337 (1927).

73. Securiforce Int'l Am., LLC v. United States, 586 U.S. 997 (2018) (mem.).

74. Torncello v. United States, 681 F.2d 756 (Ct. Cl. 1982).

75. Soledad Enters., Inc., ASBCA Nos. 20376, 20423 to 20426, 77-2 BCA ¶ 12,552.

76. *Torncello*, 681 F.2d at 770.

77. *Id.* at 771.

78. *Id.* at 772. The plurality explained that this test allows for convenience termination as a risk allocation mechanism but limits termination for exculpation to avoid rendering the contract illusory. *Id.* at 766, 770–72.

79. *Id.*

80. *Id.* at 772; Colonial Metals Co. v. United States, 494 F.2d 1355 (Ct. Cl. 1974).

81. *Colonial Metals Co.*, 494 F.2d at 328–31.

82. *Torncello*, 681 F.2d at 772.

83. *Id.* at 773 (Davis, J., concurring).

84. *Id.*

85. *Id.* at 774.

86. Petrillo & Conner, *supra* note 1, at 346–47 (highlighting Judge Davis's explanation that, contrary to the plurality, the emergence of a better price after award can properly support a termination for convenience because "a better price appearing [after contract execution] appears to be … a change in significant conditions," and concluding that "a faithful reading of *Torncello* finds a majority of four of the six judges in favor of requiring *some* change in circumstances before approving a termination for convenience"). *See also Torncello*, 681 F.2d at 774 (Davis, J., concurring) ("As Judge Bennett recognizes [in the plurality opinion], the prime purpose of the [convenience termination] clause is to take account of changed conditions occurring after the agreement is consummated").

87. *Torncello*, 681 F.2d at 774 (Nichols, J., concurring).

88. *Id.*

89. *Id.*

90. *Id.* at 773 (Friedman, C.J., concurring). This brief passage is the entirety of the chief judge's concurring opinion.

91. Petrillo & Conner, *supra* note 1, at 348 (citing John Cibinic & Ralph Nash, *Convenience Terminations: What Are the Limits?*, 10 Nash & Cibinic Report ¶ 52 (Oct. 1996)).

92. Mun. Leasing Corp. v. United States, 7 Cl. Ct. 43, 47 (1984).

93. Maxima Corp. v. United States, 847 F.2d 1549, 1553 (1988).

94. Caldwell & Santmyer, Inc. v. Glickman, 55 F.3d 1578 (Fed. Cir. 1995) (quoting Salsbury Indus. v. United States, 905 F.2d 1518, 1521 (Fed. Cir. 1990)).

95. *See* Robert Bosch, LLC v. Pylon Mfg. Corp., 719 F.3d 1305, 1316 (Fed. Cir. 2013) ("[O]pinions of the court … may only be changed by the court sitting en banc."). Decisions of the former Court of Claims are precedential for the Federal Circuit and are of equal standing with decisions of the Federal Circuit itself. *See* South Corp. v. United States, 690 F.2d 1368 (Fed. Cir. 1982) (en banc); Gevyn Constr. Corp. v. United States, 827 F.2d 752, 754 n.2 (Fed. Cir. 1987) (citing *South Corp.*, 690 F.2d 1368 (en banc)) (recognizing that "decisions of the Court of Claims … cannot be overruled except by the full court sitting in banc").

96. Vec-Tor, Inc., ASBCA Nos. 25807, 26128, 85-1 BCA ¶ 17,755, *aff'd*, 785 F.2d 320 (Fed. Cir. 1985).

97. Operational Serv. Corp., ASBCA No. 37059 *et al.*, 93-3 BCA ¶ 26,190 ("The Government was aware—at the time of contract formation—that once the A-76 study was completed either a CA contractor or the Government would perform lawn maintenance. We have found that the Government intended at that time to terminate appellant's contract for convenience when either a CA contractor or the Government took over this work. . . . Under these circumstances, as in *Torncello*, the termination for convenience was an abuse of discretion and a breach of contract.").

98. Fiesta Leasing and Sales, Inc., ASBCA No. 29311, 86-3 BCA ¶ 19,045.

99. *See* Colonial Metals v. United States, 204 Ct. Cl. 320 (1974); Torncello v. United States, 681 F.2d 756, 767 (Ct. Cl. 1982) ("*Colonial Metals* dealt with a supply contract for a definite quantity of copper").

100. S & W Tire Serv., Inc., GSBCA No. 6376, 82-2 BCA ¶ 16,048 (1982).

101. *See* Krygoski Constr. Co. v. United States, 94 F.3d 1537, 1545 (Fed. Cir. 1996).

102. Competition in Contracting Act, Pub. L. No. 98-369, 98 Stat. 1175 (July 18, 1984).

103. *Krygoski Constr. Co.*, 94 F.3d at 1542, 1544 (citations omitted); *see also, e.g.*, Caldwell & Santmyer, Inc. v. Glickman, 55 F.3d 1578, 1581 (Fed. Cir. 1995) (upholding termination for convenience of a laboratory construction contract based on an ambiguity in the solicitation that the contracting officer concluded could have impeded full and open competition). Noncompliance with CICA has also been grounds for holding that the government improperly terminated a contract. *See* OAO Corp., GSBCA No. 10186-P, 90-1 BCA ¶ 22,332 (quoting 41 U.S.C. § 253b(d)(4) (Supp. V 1987), recodified as 10 U.S.C. § 3303(c)) (holding that the government improperly terminated an awardee's contract for convenience "to avoid the hazards of litigation" in a protest with an offeror who had been excluded from the competitive range, reasoning that "[w]here an agency terminates a contract with no more justification than a desire to avoid litigation, and the contract was awarded in the absence of prejudicial violations of law, the action taken pursuant to settlement is inconsistent [with CICA]"); *accord* Fairfield Sci. Corp. v. United States, 611 F.2d 854, 862 (Ct. Cl. 1979) ("If the contracting officer was improperly influenced by plaintiff's competitor or by anyone else to terminate the contract for default rather than to exercise his own independent judgment in the light of the factors set out in the regulations, it would represent an abdication rather than an exercise of his discretion.").

104. *Krygoski Const. Co.*, 94 F.3d at 1545 (citation omitted).

105. *See* Cibinic & Nash, *supra* note 91 ("The phrase 'and intending to do so' does not have support in any of the other opinions. Neither the plurality opinion nor the concurring opinions of Judges Davis and Nichols conditioned the finding of breach of contract on a finding that the Government entered into the contract with no intention of performing. There is no suggestion in any of those opinions that the Government had any such intention. The Findings of Fact in the ASBCA decision contained no such conclusion. The most that can be said is that such an intention might be inferred from the Government's argument that it had entered into an indefinite quantity contract rather than a requirements contract. However, that is a long way from saying that the plurality opinion and the other concurring opinions were based upon such an inference. Further, *Torncello* overruled *Colonial Metals Co.*, a case that upheld a termination for convenience where the Government knew or should have known at the time the contract was awarded that it could have obtained the items for lower prices. However, nowhere in *Colonial Metals* was it suggested that the Government entered into the contract with the intention of not performing, nor was its overrule based upon the assumption that such was the Government's intention

at the time of award.") (internal citations omitted).

106. T&M Distribs., Inc. v. United States, 185 F.3d 1279 (Fed. Cir. 1999).

107. T&M Distribs., Inc. v. United States, No. 97-148C, 1998 WL 118077 (Fed. Cl. Mar. 17, 1998).

108. Brief for Plaintiff-Appellant, T&M Distribs., Inc. v. United States, No. 98-5106, 1998 WL 34082057, at 43–44 (Fed. Cir. 1998).

109. *T&M Distribs.*, 185 F.3d at 1285 n.4.

110. Plaintiff-Appellant Br., 1998 WL 34082057, at 48.

111. Krygoski Constr. Co. v. United States, 94 F.3d 1537, 1541–42 (Fed. Cir. 19966) (citing *Torncello* for the proposition that "[a] contracting officer may not terminate for convenience in bad faith, for example, simply to acquire a better bargain from another source," and referencing that the Court of Claims' earlier decision in *Colonial Metals Co. v. United States*, 494 F.2d 1355 (Ct. Cl. 1974), was inconsistent with the *Kalvar* bad faith limitations on terminations for convenience because "[a]t the time of award, the Navy knew of a better price that it later terminated the contract to obtain"). The Federal Circuit continues to acknowledge in recent decisions that a convenience termination "simply to acquire a better bargain from another source" constitutes bad faith. JKB Sols. & Servs., LLC v. United States, 18 F.4th 704, 709 (2021) (citing *Krygoski* and *Torncello*).

112. Tamp Corp., ASBCA No. 25692, 84-2 BCA ¶ 17,460; *see also* Operational Serv. Corp., ASBCA No. 37059 *et al.*, 93-3 BCA ¶ 26,190; S & W Tire Servs., Inc., GSBCA No. 6376, 82-2 BCA ¶ 16,048.

113. Torncello v. United States, 681 F.2d 756, 773 (Ct. Cl. 1982) (Davis, J., concurring) ("I fully concur with the end-result of Judge Bennett's opinion—that a convenience termination clause could not be properly used to end this requirements contract where the Government knew, at the time it entered into the agreement, that it could obtain a better price from another person").

114. Sigal Constr. Corp., CBCA No. 508, 10-1 BCA ¶ 34,442 (citing *Krygoski Constr. Co.*, 94 F.3d at 1541).

115. 108 F.4th 1226 (10th Cir. 2024).

116. Northrop Grumman Corp. v. United States, 46 Fed. Cl. 622 (2000).

117. *Id.* at 623.

118. *Id.*

119. *Id.* at 627.

120. *Id.*

121. *Id.*

122. *Id.* at 628.

123. NVS Tech., Inc. v. Dep't of Homeland Sec., CBCA No. 4775 et al., 20-1 BCA ¶ 37,541.

124. *Id.*

125. Corners & Edges, Inc. v. Dep't of Health & Hum. Servs., CBCA No. 762 et al., 08-2 BCA ¶ 33,961.

126. *Id.*

127. Montana Refining Co., ASBCA No. 50515, 00-1 BCA ¶ 30,694.

128. *Id.*

129. *Id.*

130. *But see* C.F.S. Air Cargo, Inc., ASBCA Nos. 36113, 36126, 91-1 BCA ¶ 23,583 (describing *Torncello* as "a much-cited case which held that the Government may not use the convenience termination clause to end a *requirements* contract solely to obtain a better price from a different source, *a source of which the Government had knowledge at the time it entered into the contract*," and concluding that no abuse of discretion or bad faith occurred where there was "absolutely no evidence that the Government knew of better prices or had contemplated changing the methods of obtaining the services at the time of award") (emphasis added).

131. Torncello v. United States, 681 F.2d 756, 767 (Ct. Cl. 1982) (quoting Matthew S. Perlman & William W. Goodrich Jr., *Termination for Convenience Settlements—The Government's Limited Payment for Cancellation of Contracts*, 10 Pub. Cont. L.J. 1, 6 (1978)).

132. Davidson Oil Co. v. City of Albuquerque, 108 F.4th 1226, 1229–30 (10th Cir. 2024).

133. A desire to get a better price might not warrant breach damages if that is an incidental or less than a central motivation. *Compare*, *with* Northrop Grumman Corp. v. United States, 46 Fed. Cl. 622 (2000). But the implication if termination follows failed negotiations is that the government's central or primary motivation is to get a better price.

134. Restatement (Second) of Contract § 250 (When a Statement or an Act Is a Repudiation).

135. *See* Exch. Listing, LLC v. Inspira Techs., Ltd., 661 F. Supp. 3d 134 (S.D.N.Y. 2023) (allegation that a party to a contract that issued an ultimatum requiring the other party to accept a proposed amendment to the contract to avoid termination was sufficient to state a claim for anticipatory repudiation).

136. *See, e.g.*, Ind. Mich. Power Co. v. United States, 422 F.3d 1369, 1374 (Fed. Cir. 2005) (quoting Restatement (Second) of Contracts § 236 (Claims for Damages for Total and for Partial Breach)).

137. Lynch v. United States, 292 U.S. 571, 579 (1934).

138. Union Pac. R.R. Co. v. United States, 99 U.S. 700, 719 (1878).

139. *See* RFO Class Deviation, FAR 12.304, Terminations. Note that FAR Part 49—including the "Government's interest" requirement at FAR 49.101(b)—does not apply to terminations of contracts for commercial products and commercial services. *See* FAR 49.002(a)(2).

140. As the plurality in *Torncello* emphasized: "It is hornbook law … that a route of complete escape vitiates any other consideration furnished and is incompatible with the existence of a contract." Torncello v. United States, 681 F.2d 756, 769 (Ct. Cl. 1982). *See also* 1 Williston on Contracts § 105, at 418 (W.H.E. Jaeger ed., 3d ed. 1957 & Supp. 1979) ("An agreement wherein one party reserves the right to cancel at his pleasure cannot create a contract").