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United States government contract: the unilateral act of government contracting

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I. INTRODUCTION

In the private sector, parties have freedom to contract. Their bargains are the social and legal machinery appropriate to arranging affairs in an economy which relies on exchange rather than tradition or authority. Subject to the anti-discrimination laws precluding discrimination on the grounds of race, sex, religion and national origin in housing, public accommodations and employment, private parties are free to contract or not to contract as they desire. For example, Mr. X can make an agreement with Mr. Y and Mr. X has the freedom not to make contract with Mrs. Z, if he does not want to do so. Besides, if he determines not to contract with her for a period of time, Mr. X can do so. Apart from issue of prohibited discrimination, there is no need for development of rules or procedures to establish when Mr. X can debar others from doing business with him. Moreover, the parties have a broad freedom to agree on the clauses in the contract. But once the private parties agree to the contract, their mutual consent is typically required to modify or terminate the relationship. The contract will not typically empower

one party to end the relationship based on that party's unilateral act for that party's convenience.

In contrast to the private sector, the government contract has its own character for it deals with the sovereign and is strongly affected by the public interest. Government contracts are created against the backdrop of an elaborate regulatory scheme including provisions under which the Government can debar or suspend parties from entering into the contracting process. The Government through these procedures can act unilaterally to prevent a party from gaining government business even before the contract is awarded. Government contracts usually have some clauses or conditions that are not typically included in private contracts between commercial parties. The contractual clause which establishes a unilateral right to terminate the contract for the convenience of the government, for example, will not typically have an analog in the private contracts. Furthermore, the contracting officers are authorized by the regulations, i.e., the Federal Acquisition Regulations, to assert these clauses in Government contracts. Thus, the Government is empowered to terminate the relationship based on its unilateral act without the consent of the contractor. This unilateral act occurs after the award.

The debarment, suspension and termination of the Government contract can cause the sudden financial ruin

or bankruptcy of the contractor. Consequently, the question of whether the Government's debarment, suspension and termination is proper can be of vital importance. This thesis, in consequence, will focus on two major problem areas of the unilateral act of government in contracting with the contractor. The first problem area is whether the debarment and suspension meets the requirement of due process of law. The second problem area is whether or not the government's right to terminate the contract is proper or legal in specific circumstances. These problems will be classified in two categories: (1) pre-award and (2) post-award.

II. THE PRE-AWARD STAGE: DEBARMENT AND SUSPENSION

1. General Description of Present Procedures

Section 9.402(a) of the Federal Acquisition Regulation, hereinafter in this thesis cited as FAR, states that the debarment and the suspension are discretionary actions.[1] A debarment is an act of the government that the contractor cannot enter into a contract with the government for a reasonable, specified period. Generally, debarment should not exceed three years, except that debarment for violation of the provisions of the Drug-Free Workplace Act of 1988 may be for a period not to exceed five years. The debarment will occur when the contractor commits a fraudulent act such as bid rigging or violates a statute or lacks of business integrity. From the Government's point of view, it must seek the best quality of goods and services at the lowest price. The reliable and responsible contractor, therefore, is essential. As it is stated in FAR, the responsible prospective contractor must meet the standards of having adequate financial resources, being able to comply with the contract schedule, having a

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[1] 48 C.F.R. § 9.402(a) (1990).

satisfactory performance record and etc.[2] A suspension, in contrast, is an interim action which the government will perform because of the suspicions of fraud or criminal conducted by a prospective contractor. According to the definition under section 9.403 of the FAR, suspension means action taken by a suspending official under section 9.402 to disqualify a contractor or subcontractor temporarily from Government contracting pending an investigation or legal proceeding. In contrast to the debarment which may run up to three or even five years, the suspension will not normally exceed 18 months.[3]

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[2]48 C.F.R. § 9.101 (1990): "'Responsible prospective contractor' means a contractor that meets the standards in 9.104." And 48 C.F.R. § 9.104-1: "To be determined responsible, a prospective contractor must -- (a) Have adequate financial resources to perform the contract, or the ability to obtain them (see 9.104-3(b)); (b) Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments; (c) Have a satisfactory performance record (see 9.104-3(c)); (d) Have a satisfactory record of integrity and business ethics; (e) Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them (including, as appropriate, such elements as production control procedures, property control systems, and quality assurance measures applicable to materials to be produced or services to be performed by the prospective contractor and subcontractors) (see 9.104-3(b)); (f) Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them (see 9.104-3(b)); and (g) Be otherwise qualified and eligible to receive an award under applicable laws and regulations."

[3]48 C.F.R. § 9.407-4 (1990): "[A] suspension shall be for a temporary period pending the completion of investigation and any ensuing legal proceedings, unless

the Act.[6] That Act was followed by the Davis-Bacon Act[7] and the Walsh-Healey Act,[8] respectively. The latter statute authorized debarment from procurement if the contractor violated these enactments. The significant statutes in post-World War II, i.e., the Armed Services Procurement Act of 1942[9] and the Federal Property and Administrative Services Act of 1949,[10] authorized the government agencies to contract with responsible contractors. The question, consequently, arises as to when and how the contractor should be debarred. Included within this question is whether the contractor is entitled in a hearing. Therefore, the Administrative Conference of the United States was held in 1962[11] to study the problem of debarment and suspension process.

2.2 The 1962 ACUS Report

The Administrative Conference of the United States, hereinafter refer to ACUS, was established by the

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[6]41 U.S.C. §§ 10a-10d (1933).

[7]40 U.S.C. § 276 (1935).

[8]41 U.S.C. §§ 35-44 (1936).

[9]10 U.S.C. § 2301.

[10]41 U.S.C. § 251 et seq.

[11]Exec. Order No. 10934 (April 13, 1961).

Executive Order 10934 of April 13, 1961.[12] It was directed to make a final report by the end of 1962. The Conference was composed of a council, named by the President, and 77 other members.[13] The Council consisted of a chairman, three members from federal agencies, four lawyers, two law professors and one professor of political science. The other 77 members consisted of forty-six designated federal officials and thirty-one members appointed by the council.[14] The ACUS report had 30 recommendations dealing with subjects such as jurisdiction and procedure for review orders of the Interstate Commerce Commission, the rules and procedures of the Board of Contract Appeal, right to counsel, rulemaking procedure, the debarment of contractors and discovery in administrative proceeding.[15]

The recommendation on debarment was divided into three parts: 1) procedural fairness in the debarment of contractor, 2) grounds and scope of debarment and 3) the

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[12]The permanent body of the same name was established by Public Law 89-554 of September 6, 1966. It consists of not more than 91 nor less than 75 appointed members. See also 80 Stat. 389, 5 U.S.C. §§ 571-26 (1970).

[13]Fuchs, The Administrative Conference of the United States, 15 Admin. L. Rev. 6 (1963).

[14]Id. at 7.

[15]The full recommendations were published in Fuchs, supra note 13, at 23-65.

debarment period. These recommendations may be summarized as follows:

1. Procedural Fairness in the Debarment of Contractors

a) Debarment: It is recommended that the debarment should be proceeded by notice of proposed debarment and opportunity to have a trial-type hearing before an impartial agency, board or hearing examiner. The debarment can be applied without opportunity for an adversary hearing only after notice and opportunity to the parties concerned. Notice of proposed debarment should be supported by reasons and no agency should exclude or remove the contractor from any list of qualified persons eligible for government contracts on grounds of lack of responsibility (See Appendix A: Recommendation No. 29-1).

b) Suspension: In case of fraud or showing a substantial lack of present responsibility of the contractor, the notice of proposed debarment may also provide for the temporary suspension from further contracting with the Government agency while the administrative determination of the debarment issue is pending. The suspension should not exceed a reasonable time. If the contractor is suspended because of the accusations of fraud or lack of integrity and is sued within one year of the notice issued the suspension may continue for the duration of the trial. If there is no

trial within one year, the suspension should terminate. However, if the Attorney General thinks it appropriate, he can continue the debarment or suspension for a period not to exceed 18 months from the notice. Furthermore, if the notice of suspension and proposed debarment is issued for the reasons other than lack of integrity or honesty, the suspension should not exceed 90 days. Thus, the suspension without notice and opportunity for a trial-type hearing should be discontinued. For contractors engaged in bidding, the Government should explain in writing of the charge of suspension and should give the contractor the opportunity to reply. (See Appendix A: Recommendation No. 29-2, 29-3 & 29-4).

c) Publication: The agency rules of procedure and practice in all types of debarments should be published, should be uniform and should provide for a fair and speedy determination. In case of debarment following a trial-type hearing, all debarment decisions should be published except for confidential documents of the Government. (See Appendix A: Recommendation No. 29-5 & 29-6).

2. Ground and Scope of Debarment

All grounds for debarment should be set explicitly in the published regulations and should be uniform to the extent practicable and desirable. The regulations should define business affiliates of the debarred contractor and should specify when fraud or criminal conduct of

shareholders or employees will be imputed to a business and when termination of those persons will avoid the debarment. In addition, the ground for debarment should include fraud or other conduct showing a serious and present lack of business integrity or business honest. A finding of such improper conduct should be based on the substantial evidence. (See Appendix A: Recommendation No. 29-7).

3. Debarment Periods

The Government procurement regulations, at that time, should be amended to provide that the debarment should be for a reasonable period of time but not exceed three years. The regulation should expressly provide for removal of debarment within the debarment period upon the showing of contractor's responsibility to perform contracts. Accordingly, Congress should be requested to amend the Buy American[16] and Davis-Bacon Acts[17] by removing the absolute debarment penalties from these

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[16]In present, section 10b(b) of the Buy American Act provides that if the head of the agency finds that there has been a failure to comply with the contracts, he shall make public his findings and the name of the contractor which no contract shall be awarded to the contractor and his affiliates within a period of three years after such finding is made public. 41 U.S.C. § 10b (1987).

[17]Section 276a-2(a) of the Davis-Bacon Act provides presently that no contract shall be awarded to persons or firms who disregarded their obligations to employees and subcontractors until three years have elapsed from the date of publication of the list containing the names of such persons or firms. 40 U.S.C. § 276a-2 (1987).

acts.[18] (See Appendix A: Recommendations No. 29-8 & 29-9).

The 1962 ACUS Report contemplated a comprehensive protective scheme for contractors under which there would be notice and an opportunity for a trial-type hearing before debarment or suspension occurred. But government agencies have historically resisted such comprehensive protection because of its costs and potential for interfering with the government's right to control its own operations. The pressure for more protection for the contractor has come from the courts. In 1975, the GSA, however, promulgated the regulations authorized the government officer to suspend a suspected contractor on charge of fraud or criminal offense.[19] And the suspension must be for a temporary period, if no prosecution is initiated by the Department of Justice within twelve months from the date of a notice of suspension, the suspension must be terminated unless an Assistant Attorney General requests to extend the period, not exceeding six additional months.[20] The GSA confirmed that its regulations followed the Horne case (see topic 2.4 infra). Thus, the regulations conformed only the period of time of the procedural suspension they

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[18]It is noted that the provisions of these acts remain unchanged since the conference.

[19]41 C.F.R. § 1-1.605-1 (1975).

[20]41 C.F.R. § 1-1.605-2 (1975).

did not comport with the procedural due process requirements.

2.3 Condemnation of Arbitrary Action: The Gonzales Case

The first landmark case concerning the authority to debar was Gonzales v. Freeman.[21] Thomas P. Gonzales Corporation, which had a record of contractual relations with the Commodity Credit Corporation for many years, received notice by telegram in January 1960 that the Gonzales Corporation and its officers as well as its affiliates were temporarily debarred from doing business with Commodity Credit pending investigation into possible misuse of official inspection certificates. In October 1960, Commodity Credit sent a letter advising Gonzales that the suspension would be continued until conclusion of an investigation by the Department of Justice. Later, the Commodity Credit informed Gonzales on May 24, 1962, that it was suspended for five years from January 13, 1960, stating no reasons on grounds for this final debarment action.[22] Gonzales, personally, was indicted on felony charges for alleged misuse of the official inspection certificates but the indictment was dismissed. Gonzales tried to seek review by the Secretary of Agriculture but review was denied. He, consequently, asked for the declaratory and injunctive relief against

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[21] 334 F.2d 570 (D.C. Cir. 1964).

[22] Id. at 572.

the Secretary of Agriculture, contending that the debarment was invalid for four reasons:

> "1. Debarment is not authorized by statute or by regulation;
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> 2. Debarment was imposed without rules or regulations specifying grounds for debarment and establishing a procedure for debarment;
>
> 3. Debarment was imposed without notice of charges relied upon and without a meaningful opportunity to meet and refute charges; and
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> 4. Debarment of appellants was a denial of due process."[23]

Gonzales argued that "final action of debarment imposes such serious economic injury on a contractor that debarment can be imposed only by a procedure which comports with constitutional standards of due process" and he insisted that before he was listed to be an ineligible contractor to the government, the notice of charges, opportunity to be heard, and opportunity to cross-examine advance witnesses were required.

According to Commodity Credit, the grounds for debarment were the shipment of the beans by Gonzales Corporation to Brazil under cover of misused sanitary certificates which had 'caused great damage to the prestige of the United States agricultural trade' and lingered 'as an adverse trade factor in relations' between the United States and Brazil. Gonzales alleged that "had opportunity been afforded they could have

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[23] Id. at 573.

disproved this claim and shown affirmatively absence of fault on their part."[24] In addition, the Commodity Credit contended that doing business with it was not a legally protected right, suspension of eligibility for five years gave rise to no justiciable controversy and Congress has expressly precluded judicial review of Commodity Credit action.

The court restated the issues which emerge from the opposing contentions as follows:[25]

> "1. Does debarment of a government contractor from eligibility for purchase of surplus commodities give rise to a justiciable controversy if it is alleged that debarment was imposed without due process?
>
> 2. Did Congress provide for judicial review of the debarment process conducted by Commodity Credit?
>
> 3. May debarment of a government contractor be imposed without express statutory authority?
>
> 4. If Commodity Credit has legal authority to debar, can appellants be debarred:
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> (a) in the absence of regulations establishing standards and procedures, and
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> (b) in the absence of written notice of charges, evidentiary hearing and findings on charges of misconduct?"

Although the court specified that the "Commodity Credit Corporation has inherent power to terminate business relations with irresponsible, defaulting or dishonest contractors as necessarily incidental to

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[24] Id. footnote 4 at 573.

[25] Id. at 573-574.

effective administration of statutory scheme," the Court of Appeal, Judge Berger, held that "absent procedural regulations authorizing or governing debarment from participation in contracts with Commodity Credit Corporation for misuse of official inspection certificates relating to commodities exported to Brazil, promulgated in accordance with Administrative Procedure Act, and absent notice, hearing and findings, debarment was invalid."[26] The government cannot act arbitrarily, either substantially or procedurally against a person.[27] The grounds of the invalidity recognized by Gonzales were not clear. The court conceded that there was no right to do business with the government. But at the same time concluded that there is no constitutional requirement of a full trial-type hearing.[28]

2.4 Suspension Without Hearing: The Horne Case

The Court's decision in Gonzales made the concept of debarment procedure flower. However, in 1972, the Court of Appeals rendered a contrasting opinion about the due process requirements in a suspension proceeding in Horne Brothers, Inc. v. Laird.[29]

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[26] Id. at 570-571.

[27] Id. at 574.

[28] Id. at 580.

[29] 463 F.2d 1268 (D.C. Cir. 1972).

Horne Brothers, Inc., a contractor was suspended as a bidder on Department of Defense because the government had substantial reason to believe that the Horne Brothers, Inc. had given the gratuities to the naval personnel for many years.[30] It alleged that "the Secretaries of Defense and Navy had acted in violation of law by issuing the suspension and by refusing to award the contractor a repair contract on naval vessel."[31] The trial court in the District Court of Columbia issued a preliminary injunction directing the Navy to order the cessation of performance by another of work on the contract. The Secretaries of Defense and Navy appealed. The Court of Appeals held that "the action of the Navy in turning down the bid was not improper, even though no opportunity had at that time been accorded the contractor to rebut the "adequate evidence" against it."[32] The Appellate Court, however, agreed with the District Court that "there are serious and fundamental questions regarding the fairness of procedures utilized by the Government in suspending contractors." But the Appellate Court cited the Armed Services Procurement Regulations which provided that "the Secretaries of Defense may suspend a bidder, upon a finding of adequate evidence of

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[30] 342 F. Supp. 703, 705 (D.D.C. 1972).

[31] 463 F.2d, supra note 29, at 1268.

[32] 463 F.2d, supra note 29, at 1269.

improper or unlawful activities, from participating in Government contract award."[33] The Appellate Court further stated that "[t]his procedure does not require that the suspended contractor be offered an opportunity to confront his accursors and to rebut the "adequate evidence" against him."[34] The Appellate Court argued that "[t]he Government's regulations draw a distinction between "debarment," which is concededly governed by Gonzales, and "suspension." The debarment procedure provides for "a notice to the contractor affording him an opportunity to be heard and invokes temporary debarment pending that hearing; a favorable decision lifts the temporary debarment."[35] The Appellate Court, however, noted that "no contractor may be suspended under the regulations unless there is adequate evidence of a dereliction."[36] In this case the Court held that "the continuance of the suspension beyond a thirty-day period is more fairly likened to a preliminary injunction after notice, maintainable only on the showing of adequate evidence that is not self-determined."[37] Finally, the Appellate Court reasoned that during the interim period,

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[33]463 F.2d, supra note 29, at 1269-1270.

[34]463 F.2d, supra note 29, at 1270.

[35]463 F.2d, supra note 29, at 1271.

[36]463 F.2d, supra note 29, at 1272.

[37]463 F.2d, supra note 29, at 1268, 1272.

not to exceed one month, the Government could make arrangements for its proceeding. Since Horne's bid was turned down by the Navy within a month of its suspension, the Court found no error in that action even though no opportunity had been accorded Horne at that time.

Gonzales underlays the concept of debarment to conform with due process of law. First, the debarring agency must have the legal authority to do so. Secondly, debarment must meet due process requirement, that is the contractor should have a notice and be entitled to a hearing before his right to contract is taken away. Without statutes, rules or regulations, notice, hearing and findings, debarment was invalid. As to Horne the court admitted the doctrine of debarment from Gonzales but narrowed the suspension procedure by limiting it to what the regulation provided. The limit may danger the contractor's right which he derives from constitutional due process. For the constitutional due process is flexible and the private's right in due process should not be restricted by the secondary authority like rules or regulations.

2.5 Supreme Court Elaboration of Due Process Theory

Under the fifth and fourteenth amendments of the Constitution, the due process requires that federal and state governments must provide a notice and a hearing

before deprivation of a person of liberty or property.[38]

The "liberty" and "property" interest which will be protected by due process were described by the United States Supreme Court in Board of Regents of State Colleges v. Roth[39] that they are broad and majestic. The Court has articulated that "the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money"[40] as well as entitlement such as legally protected employment relationship or benefits under government welfare programs,[41] and that liberty "denotes not

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[38]U.S. Const. Amend. 5, Art. v. (1987).

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." See also U.S. Const. Amend. 14 sec. 1 (1987):

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[39]408 U.S. 564 (1972).

[40]Id. at 571-572.

[41]Id. at 576-578.

merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy these privileges long recognized -- as essential to the orderly pursuit of happiness by free man."[42]

The property or liberty interest will trigger a notice or a hearing required by due process when there is a direct deprivation of such interest.[43] Consequently,

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[42] Id. at 572. According to the case, the respondent was a non-tenured teacher hired for a fixed term of one academic year to teach at a state university. The contract would be renewable year by year. The university rules, however, provided that after four years, a teacher could achieve permanent employment during efficiency and good behavior with procedural protection against separation. The respondent was informed without explanation that he would not be rehired that year; he, consequently, brought the action claiming deprivation of his fourteenth amendment rights alleging infringement of his free speech right and his procedural due process right. The District Court granted summary judgment for the respondent on the procedural issue and the Court of Appeals affirmed. The Supreme Court held that "[t]he fourteenth amendment does not require opportunity for a hearing prior to the nonrenewal of nontenured state teacher's contract, unless he can show that the nonrenewal deprived him of an interest in "liberty" or that he had a "property" interest in continued employment, despite the lack of tenure or a formal contract."

[43] O'Bannon v. Town Court Nursing Center, 447 U.S. 773 (1980). A nursing home was disqualified by the government and its patients asked for participation in a hearing related to the disqualification. The court held that the patients had no right to participate because the harm to them was indirect rather than direct.

prior to the deprivation of the property or liberty interest, there must be a hearing. The United States Supreme Court set forth the balancing test when the deprivation of property and liberty right will trigger due process in the Mathews, Secretary of Health, Education, and Welfare v. Eldridge.[44] The test is comprised of three factors: "first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[45] Thus the specific requirements of due process which will be determined on a case-by-case basis.

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[44]424 U.S. 319 (1975). Eldridge was awarded the benefits in June 1968 under the disability insurance benefit program according to the Social Security Act. In March 1972, he received a questionnaire from the state agency asking of his medical condition. After the state agency obtained the report from his physician and a psychiatric consultant which informed that his disability had ceased in May 1972, his benefits were terminated. The state agency, however, informed Eldridge that he had a right to seek reconsideration within six months. Instead of asking for the reconsideration, Eldridge brought the action to the court challenging the constitutional validity of the administrative procedures established by the Secretary for assessing whether there existed a continuing disability.

[45]424 U.S., supra note 44, at 335.

2.6 De Facto Debarment: The Art-Metal Case

In 1978 there was a major campaign to clean up the General Services Administration, hereinafter cited as GSA, because of its alleged abuses, improprieties and scandals.[46] Art Metal was the government's largest supplier of metal office furniture which contracted with the GSA at that time. Simultaneously the Washington Post and the Washington Star carried the stories on Art Metal reporting its alleged failure to meet GSA specifications, production of inferior products and possible abuses in contract dealings with GSA. On August 24, 1978 Art Metal was awarded the contract worth approximately $9.4 million and also was the lowest bidder by $5 million on next year's contract, but on the same day Art Metal received a telegram with no explanation other than "for the convenience of the government" terminated the contract in its entirety. Art Metal's bidding for four additional contracts was held in obeyance.[47] Art Metal filed the complaint alleging that the termination of the contract implemented an unlawful debarment without prior notice or hearing, in violation of the Constitution, the Administrative Procedure Act and GSA's regulations. It requested a preliminary injunction against the

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[46]Art-Metal-USA, Inc. v. Solomon, 473 F. Supp. 1, 3, footnote 1, (D.D.C. 1978).

[47]Id. at 3.

Government's actions.[48] The court held that "(1) plaintiff had made requisite showing and irreparable injury by showing that the vast majority of its business for more than twenty years had been to supply office furniture to the GSA and that absent an injunction it would be put out of business; (2) due process requires that before a government contractor may be blacklisted, whether by debarment or suspension, he must be afforded specific procedural safeguards including notice of charges against him, opportunity to rebut those charges, and --- a hearing; (3) suspension of contracts with plaintiff while plaintiff was "being investigated" was tantamount to suspension; (4) suspension constituted blacklisting in violation of law and the GSA's own regulation; (5) public interest did not weigh against granting preliminary injunction; and, (6) thus, plaintiff was entitled to a preliminary injunction."[49] The court also stated that "[w]here decision to terminate contract 'for the convenience of the government' was result of agency's conclusion that no valid grounds for debarment could be found, the court would not allow government to hide behind the cloak of conclusory terms such as

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[48] Id.

[49] Id. at 1.

'convenient' and 'responsibility' to justify its actions."[50]

Art-Metal illustrates de facto debarment. The court reacted against the government's act because the government did not have the reasons behind the debarment. The GSA ordered the debarment with its own intention to eliminate the intra-agency's corruptions but its act did harm to the contractor. The court, therefore, has considered it to be arbitrary and capricious act of government. The court certified that the contractor had constitutional liberty right. Therefore, when the government deprived the contractor's right, it should act reasonably. The court, consequently, gave the judgment in favor of the contractor. Actually, in the Art-Metal, the court did not use the balancing test in Mathews to weigh whether or not the due process will be triggered. But, the court certified the contractor's constitutional liberty right instead.

2.7 The Right to Notice of Charges: Old Dominion & Transco Security

The Court of Appeals, however, fully articulated the liberty interest in Old Dominion Dairy Products, Inc. v. Secretary of Defense.[51] The Old Dominion Dairy Products, Inc. was a small business and manufactured dairy products in various countries throughout the world.

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[50] Id. at 2.

[51] 631 F.2d 933 (D.C. Cir. 1980).

In 1970, Old Dominion performed contracts on the government in Taiwan, Cuba, Spain, Okinawa, Korea and Puerto Rico, having the gross sale of over thirty million dollars.[52] There was no claim or determination had been made before challenging Old Dominion's responsibility or integrity. But in 1979, Old Dominion was denied a substantial government contract which it was the low bidder with the alleging that "Old Dominion was not dealing honestly with the government and was fraudulently receiving undue profits under the current contract."[53] At approximately the same time, Old Dominion's bid was also rejected with the contracting officer's conclusion that Old Dominion "had" knowingly and substantially overbilled the government "in past dealings with the agency."[54] Finding that it had lost its business, Old Dominion sought for declaratory injunctive relief which the District Court of Columbia gave the judgment in favor of the government.

Old Dominion appealed that "the agency's contracting officers had no rational basis for determining that it lacked integrity" and denied its due process of law in determining that it lacked integrity without prior notice

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[52] Id. at 956.

[53] Id. at 957.

[54] Id. at 955.

which violated the fifth amendment.[55] The government objected that "a corporation may not possess a due process liberty right, ... if such a right may exist, appellant's allegations fall far short of demonstrating any injury to a cognizable liberty interest in this case, ... and, ... if a due process liberty right does apply to Old Dominion in this situation, the suspension regulations provide sufficient due process protection."[56] As to the government's assertation that a corporation may not possess a due process liberty right, the Supreme Court had given the judgment in the earlier time that the liberty referred to in the fourteenth amendment is the liberty of a natural person not an artificial one.[57] The United States Supreme Court, however, additional clarified in Grosjean v. American Press Co.[58] that even though a corporation was not a citizen under the privileges and immunities clause, "a corporation is a 'person' within the meaning of the equal protection and due process of law clause."[59] Besides, the Supreme Court in First National Bank of

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[55]Id. at 953, 955.

[56]Id. at 961.

[57]Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925). See also Northwestern Nat'l Life Ins. Co. v. Riggs, 203 U.S. 243, 255 (1906).

[58]297 U.S. 233 (1936).

[59]Id. at 244.

Boston v. Belloti[60] rejected the argument that "the liberty guaranteed by the fourteenth amendment against deprivation without due process of law is the liberty of natural not of artificial persons."[61] The Court of Appeals in the Old Dominion, consequently, held that Old Dominion was entitled to challenge the government's actions in this case on due process grounds, notwithstanding the fact that Old Dominion had no "property" interest in the contract awards.[62]

Tracing back to the question whether or not the government had rational basis in ordering suspension and whether the governmental action violated due process, the court took the decisions of the Supreme Court in Board of Regents v. Roth[63] concerning the standing and the stigma of a person into account. And the court used the balancing test from the Mathews which considers the nature of the private interest affected, the risk to that interest posed by the present procedure, the likelihood that a proposed procedure would better protect the interest and the government's burden to answer the

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[60]435 U.S. 765 (1977).

[61]See also 631 F.2d, supra note 51, at 962 n.19.

[62]631 F.2d, supra note 51, at 962.

[63]408 U.S., supra note 39, at 573-576. The court also relied on the judgment relating to a stigma of a person and deprivation of the property interest in Park v. Davis, 424 U.S. 693 (1976).

question of what process is due.[64] The court, consequently, held that "when a determination is made that a contractor lacks integrity and the government has not acted to invoke formal suspension or disbarment procedures, notice of the charges must be given to the contractor as soon as possible so that the contractor may utilize whatever opportunities are available to present its side of the story before adverse action is taken."[65] In the court's opinion, this is the minimum requirement which will not burden the government and is in the interest of both parties. The court, therefore, decided that the government violated supplier's due process liberty right and the supplier had a right to receive notice of the charges against its integrity before its bid and contract was denied.

The necessity of the meaningful notice and the opportunity to be heard is well demonstrated in Transco Security, Inc. of Ohio v. Freeman.[66] The plaintiff disagreed with the regulations when it was suspended from bidding on GSA contracts. Transco Security, Inc. of Ohio and Fred Gaviglia, its president, were notified by letter from the GSA that they were engaged in the commission of fraud; therefore, they were temporarily suspended from

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[64]424 U.S., supra note 44, at 335.

[65]631 F.2d, supra note 51, at 968

[66]639 F.2d 318 (6th Cir. 1981).

doing business throughout the General Services Administration.[67] The GSA advised them by the letter that the evidence of fraud concerned billing irregularities and misrepresentations regarding its eligibility for public contracts which they requested a hearing regarding their suspension. The GSA, however, awarded the contract to another company even though Transco-Ohio was the low bidder. The Transco-Ohio and Mr. Gaviglia brought the action to the court asserting that "the regulations of the General Services Administration[68] relating to suspension of contractors are violative of due process, since under the circumstances of this case appellants can be prohibited from bidding and being awarded GSA contracts for up to eighteen months, without a hearing." They also charged that "the notices of the reasons for suspension are so deficient that they amount to no notice at all."[69]

The Court of Appeals considered that "what process is due requires a balancing between the government's interest and the private interest,"[70] and recognized the government's right to protect the secrecy of its ongoing criminal investigation by not disclosing its

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[67] Id. at 320.

[68] 41 C.F.R. § 1-1.605-1 (1975).

[69] 639 F.2d, supra note 66, at 320.

[70] 639 F.2d, supra note 66.

evidence at the stage of the proceedings. The court did not believe it is unreasonable that the government should have a period of twelve months in which to prepare its case and decide whether to indict.[71] The court stated:

> (1) "[w]hile deprivation of rights to bid on government contracts is not property interest, bidder's liberty interest is affected when denial is based on charges of fraud and dishonesty, and, therefore, minimum requirement of due process are notice and opportunity for having appropriate to nature of case." (2) "[d]ue process requires notice reasonably calculated, under all circumstances, to apprise interested parties of pendency of action and afford them opportunity to present their objections."[72]

According to the court's opinion, although nothing guaranteed that if Transco-Ohio was the low bidder, it would be awarded the contract; but the appellants did have a right to receive adequate notice of the charges against them so they could have a meaningful opportunity to answer those charges.[73] Consequently, the court held that "[t]he general notice given to the contractor pursuant to the General Services Administration regulations authorizing suspension of contractors suspected of fraud was deficient, because it did not permit adequate preparation for participation in any forthcoming hearing or equivalent proceedings when the contractors were suspended for "billing irregularities"

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[71]639 F.2d, supra note 66, at 324.

[72]639 F.2d, supra note 66, at 318.

[73]639 F.2d, supra note 66, at 325.

. . ."[74] The Court of Appeal reversed and remanded the denial to grant relief of the District Court for the appellants did not receive the minimum requirements of due process which are meaningful notice and opportunity to be heard.

2.8 Findings of Non-Responsibility: Kiewit & Carlo & Shermco

The Court of Appeals in the Art-Metal case prohibited de facto debarment and held that due process requires that the contractor must be afforded specific procedural safeguards including notice and opportunity to rebut the charge against him before he was blacklisted by the government. The Art-Metal case demonstrates the unilateral act of government in debarring, indicating that the debarment should have stronger reason than the reason for the convenience of the government. Accordingly, the Court of Appeals in Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers conceded that de facto debarment of contractor from bidding on government contracts was illegal.[75] The Peter Kiewit Sons' Co., a large construction company, was indicted with fifteen other firms for conspiring to rig bids on Corps contracts. Kiewit was also convicted of a Sherman Act violation following a plea of nolo contendere which it had to pay $100,000 criminal fine and $300,000 in civil

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[74] 639 F.2d, supra note 66, at 324.

[75] 714 F.2d 163 (D.C. Cir. 1983).

penalties.[76] When the last Bertucci defendants, one of the other indicted firms, had been sentenced, the Corps felt reluctant to continue contracting with these firms. The Corps, therefore, issued instructions to hold in obeyance any contracts on which Bertucci and Kiewit were the low bidder but Kiewit was not given notice of this action. The district court held that the directive was an illegal de facto debarment of Kiewit.[77] District court decided that the contract should be awarded to Kiewit, the congressional interference tainted the debarment that it was void ab initio and Kiewits were not to be debarred.[78] However, the Court of Appeals held that the district court erred in blocking the administrative debarment hearing. The Court of Appeals cited the United States Supreme Court's decision in Myers v. Bethlehem Shipbuilding Corp[79] that "[i]t is a long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted"[80] as the reason behind its decision in Kiewit case. The Army informed Kiewit of the

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[76] Id. at 164-165.

[77] Id. at 165.

[78] Id. at 167, 171.

[79] 303 U.S. 41 (1938).

[80] 714 F.2d, supra note 75, at 167.

availability of an administrative remedy and gave Kiewit the opportunity to present information in opposition to the proposed debarment but Kiewit bypassed the administrative proceeding capable of granting the desired relief. The Court of Appeals, therefore, judged that "Kiewit has failed to demonstrate clear interference with its due process rights."[81] Thus, the fact of illegal de facto debarment for Kiewit was not challenged on appeal. Kiewit creates the risk of de facto debarment occurring under the guise of a determination of nonresponsibility in a way that cannot be corrected judicially. The Court in John Carlo, Inc. v. Corps of Engineers of the United States Army, Fort Worth Division has increased this risk by holding that "[a]bsent a showing of an actual or de facto debarment, contracting government agency is under no statutory, regulatory or constitutional obligation to notify bidder of adverse findings of a preaward survey and provide him an opportunity to respond."[82]

John Carlo, Inc. was the low bidder on the Lakeview Lake Embankment project and Servidone Construction Corporation was the second low bidder. After the contracting officer had scrutinized whether or not John Carlo was a responsible contractor according to the DAR

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[81] 714 F.2d, supra note 75, at 169.

[82] 539 F.Supp. 1076 (N.D. Tx. 1982).

1-904.1 (1976 ed.), he found Carlo had associated with a company which prevented the corps from awarding the contract to Carlo. The contract then was awarded to the second low bidder. The contracting officer should have made the affirmative determination required by the DAR 1-902[83] concerning Carlo's integrity but he did not. For this reason that Carlo's association with the company which lack of business integrity should be imputed to Carlo. Carlo attacked the contracting officer's determination of nonresponsibilty on three grounds: 1) "the contracting officer's actions violated constitutional due process; 2) the evidence in the record is insufficient to sustain any finding of an association between Carlo and Bosco . . .; 3) the contracting officer's actions violated accepted agency practice."[84] In the court's opinion there was no claim the Corps' actions constituted an actual debarment and the issue before it was whether or not the Corps action can be characterized as a de facto debarment. As to this issue, the court stated that "a finding of nonresponsibility does not constitute a de facto debarment unless the contracting officer's decision was effectively used to bar Carlo from any further government contract work." In answering the question, the court looked at these

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[83] Id. at 1077.

[84] Id. at 1080.

factors: 1) "were other persons or governmental agencies apprised of the contracting officer's finding of nonresponsibility; 2) was the information circulated for the purpose of preventing Carlo from securing future contracts with the government; 3) did circulation of the information in fact stigmatize Carlo; and 4) has Carlo suffered any losses in government business attributable to the contracting officer's determination of nonresponsibility in the Lake View project."[85] However, the evidence in this case was clear that Carlo had the imputed company behind it. The court, therefore, found no errors on Government official's action and rendered its judgment that Government's act did not violate due process.

Shermco Industries v. Secretary of the Air Force[86] is a similar case. Shermco was a small business and offered a bid to obtain government contracts for the repair of certain Air Force equipment. The Small Business Administration had determined Shermco possessed the necessary capacity and credit but the Air Force was concerned about Shermco's responsibility. Shermco was

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[85] Id.

[86] 584 F.Supp. 76 (N.D.Tx.1984). The court's decision has 30 legal pages and is divided into four parts: 1) Part one involves Shermco's claims of illegally suspension and the denying of Shermco's due process right; 2) Part two involves de facto suspension; 3) Part three addresses whether Air Force followed its regulations; and 4) Part four concerns the relief awarded.

charged with a violation of Title 18 U.S.C. § 287 (false, fictitious, or fraudulent claims). As a result of the indictment, the Air Force suspended Shermco from doing business with the Air Force specifically and the Department of Defense in general. Shermco argued that the Air Force's act of suspension was not conducted in compliance with applicable regulations and against due process. The court said that "[i]n order to determine what process was due Shermco, a balance must be struck between the government's interests in suspending Shermco and Shermco's liberty interest in having an opportunity to bid on and receive government contracts, free from a cloud of fraud," and "[i]n deciding what process was due Shermco, it must be remembered that due process consist of 1) notice and 2) an opportunity for hearing appropriate to the nature of the case."[87] The court stated that although the Sixth Circuit in Transco case discussed whether the notice was constitutionally deficient, the Sixth Circuit gave no indication that notice, to be constitutionally sufficient, had to be given before suspension.[88] Shermco was indicted on December 16, 1977 but formal suspension proceedings against Shermco commenced on December 28, 1977. Suspension was ordered on February 7, 1978. The court

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[87]584 F.Supp., supra note 86, at 87-88.

[88]584 F.Supp., supra note 86, at 88.

argued that the indictment was adequate to support a suspension and Shermco's right to a hearing was not violated because suspension was terminated after 31 days which is the grace period sanctioned by Horne Brothers and Old Dominion. The court consequently held that Shermco's constitutional right was not denied.[89] As to de facto suspension, the contractor was not suspended until seven and one-half months after the bid and almost five months after the contracting officer's nonresponsibility determination. The court conceded the period was far beyond the grace period of one month during which the contractor was without the procedural

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[89]The holdings in this case are 1) "Congress, in amending Small Business ADministration Act's 'certificate of competency' provision, did not eliminate procuring agency's power to suspend a contractor who is under a criminal indictment relating to past performances on government contracts; 2) Contractor's due process rights to notice and hearing were not violated by its suspension; 3) assuming that contractor had a protected liberty interest and a corresponding right to monetary damage for invasion of that interest, it could not prevail on the issue because it failed to establish, by preponderance of the evidence, that it was stigmatized by the actions of procurement officials; 4) contractor established no violation of its right to privacy, because preponderance of evidence failed to show that report of official of Defense Supply Agency was ever disclosed to anyone outside the Air Force or the Small Business Administration; and 5) although contractor was de facto suspended without having an opportunity for rebuttal required by due process, and nonresponsibility determination did not comply with procurement regulations, contracts which were awarded to other contractors would not be cancelled and awarded to plaintiff contractor, since Air Force had adequate evidence for its suspension of contractor." 584 F.Supp., supra note 86, at 76-77.

protection.[90] In consideration to this issue, the court relied heavily on the Old Dominion court which relied on the Horne Brothers and the Gonzales. It is notable that in Horne Brothers, the contractor had been formally suspended; and in Gonzales, the contractor had been formally debarred. Thus, the Old Dominion court held that the Government violated the supplier's due process liberty right when it rejected the bid based on the contracting officer's determination without giving any notice of the integrity issue. The supplier had a right to receive notice of charges against it.

Although they concede that the contractors have constitutional due process right, both of the John Carlo court and the Shermco court have widened the gap between the findings of nonresponsibility and formal debarment/suspension proceedings. They overlooked the Art Metal's decision prohibiting de facto debarment. The two courts relied on the regulations which appear to provide inadequate protection for the contractor's constitutional liberty interest. For example, the Shermco court considered that the de facto suspension within Air Force and Defense Ministry during the prolonged period between finding of nonresponsibility and the formal suspension did not stigmatize the contractor because it was not made in public. But the suspension of

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[90]584 F.Supp., supra note 86, at 94.

the right of Shermco in contracting had been made throughout the agencies in Air Force and Defense Ministry.[91]

2.9 Administrative Adjustments

Under pressure from judicial rulings federal agencies have gradually agreed to provide more protection to contractors. The 1974 amendments provided that the period of debarment should be for a reasonable, definitely stated period of time commensurate with the seriousness of the offense and the failure of performance. It provided "[a]s a general rule, a period of debarment shall not exceed three years."[92] As to the suspension, it also would be held for a period of time within twelve months from the date of notice.[93] The 1974 amendments did not establish a general right to a hearing but did . . . . If an opportunity for a hearing was prescribed by agency regulations and one agency imposed debarment upon a contractor, a second agency could also impose a similar debarment for a concurrent period without according an opportunity for a hearing.[94] If the contractor was suspended, he could

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[91] See e.g. Goldberg v. Kelly, 397 U.S. 254 (1970).

[92] 41 C.F.R. § 1.-1.604 (1975).

[93] 41 C.F.R. § 1.-1.605-2 (1975).

[94] 41 C.F.R. § 1-.604-1(b) (1975).

request for a hearing but it could be denied.[95] Furthermore, there would be no hearing in case of indictment.[96]

2.10 The Commission on Government Procurement

The Commission on Government Procurement was established by Public Law No. 91-129 of November 26, 1969, to study and recommend to Congress the methods to promote the economy, efficiency and effectiveness of government procurement.[97] The report of the Commission on Government Procurement contains 149 recommendations one of which concerned abandonment. It stated:

> "A-46: Revise current debarment policies to provide for uniform treatment for comparable violations of the various social and economic requirements and to establish a broader range of sanctions for such violations."[98]

On opportunity for comment on the contractor debarment policies of this report, the General Services Administration established an inter-agency task group. The task group reported that both the Federal Procurement Regulations and the Armed Service Procurement Regulations at that time (1974) had added language concerning due

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[95] 41 C.F.R. § 1-1.605-4 (1975).

[96] Id.

[97] Note, "Graylisting" of Federal Contractor: Transco Security, Inc. of Ohio v. Freeman and Procedural Due Process under Suspension Procedure, 31 Cath.U. L. Rev. 731 (1982).

[98] 40 Fed. Reg. 22319 (1975). This recommendation was delegated to the General Services Administration by Executive Order 11717 on May 9, 1973.

process in a contractor suspension situation and the provisions adequately handles this issue, including a guarantee for a hearing.[99] Furthermore, the task group strongly proposed an idea of consolidation of all debarred/suspended lists to insure that a contractor debarred would be debarred/suspended by all government agencies. However, the Department of Transportation member dissented on the debarment procedure. He believed the debarment procedure should be the same as Labor Department procedures calling for the full due process consideration before a administrative can judge. For current regulations, at that time, the administrative debarments here heard before agency personnel.[100] The administrative agencies were under pressure to do more because of the developing case law.

The Congress found that "economy, efficiency, and effectiveness in the procurement of property and services by the executive agencies will be improved by establishing an office to exercise responsibility for procurement policies, regulations, procedures, and forms."[101] The Office of Federal Procurement Policy,

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[99] See also footnotes 92-95, supra.

[100] 40 Fed. Reg. 22319 supra note 98.

[101] 41 U.S.C. § 402(a) (1983). Congress declares its policies as follows: (1) promoting the use of full and open competition in the procurement of products and services; (2) establishing policies, procedures, and practices which will require the Government to acquire property and services of the requisite quality and within

therefore, is established in the Office of Management and Budget to provide overall direction of procurement policies, regulations, procedures, and forms of executive agencies.[102] The Office of Federal Procurement Policy, hereinafter cited as OFPP, proposed a policy letter by mid-1982 to standardize debarment procedures and effects throughout the federal government.[103] The Policy Letter was in effective on September 1,

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the time needed at the lowest reasonable cost; (3) improving the quality, efficiency, economy, and performance of Government procurement organizations and personnel, and eliminating fraud and waste in the procurement process; (4) avoiding or eliminating unnecessary overlapping or duplication of procurement and related activities; (5) avoiding or eliminating unnecessary or redundant requirements placed on contractor and Federal procurement officials; (6) identifying gaps, omissions, or inconsistencies in procurement laws, regulations, and directives and in other laws, regulations, and directives, relating to or affecting procurement; (7) achieving greater uniformity and simplicity, whenever appropriate, in procurement procedures; (8) otherwise promoting economy, efficiency, and effectiveness in Government procurement organizations and operation; (9) coordinating procurement policies and programs of the several departments and agencies; (10) minimizing possible disruptive effects of Government procurement on particular industries, areas, or occupations; (11) improving understanding of Government procurement laws and policies within the Government and by organizations and individuals doing business with the Government; and (12) promoting fair dealing and equitable relationships among the parties in Government contracting.

[102]Pub. L. 93-400, § 3, Aug. 30, 1974, 88 Stat. 796 (1974).

[103]The Administrator of the Office of Federal Procurement Policy is authorized to promulgate a uniform Federal Procurement regulation. See also 41 U.S.C. 405(a) (1987).

1982.[104] It contains the concept of government-wide debarment and suspension that a non-responsible contractor who cannot do business with one agency can also not do business with the other agency.[105] The concept was adopted in the Defense Acquisition Regulations and also in the Federal Acquisition Regulations in 1984.[106] There were many reactions from many directions both prior to and after the effectiveness of the regulation. The American Bar Association (ABA), for example, published a Report and Recommendations on Debarment and Suspension.[107] The report specified that the suspension procedure did not give the respondent the level of due process protections such as the flexibility of the federal regulatory scheme, the periods of suspension, the insufficient notice of the ground reasons for suspension, the limited opportunity to how cross-examine witnesses and the suspension prior to a hearing.[108] The ABA also recommended that there should be a creation of an independent board to separate

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[104] 47 Fed. Reg. 28854 (1982).

[105] Id. at 28855.

[106] R. Danzig & D. Hazelton, Suspension and Debarment: The End of the Line, 24 Pub. Con. Newsletter 3 (Spring 1989).

[107] J. Graham, Suspension of Contractors and Ongoing Criminal Investigation for Contract Fraud: Looking for Fairness from a Tightrope of Competing Interests, 14 Pub. Cont. L.J. 216 (1984).

[108] Id. at 236-237.

the prosecutorial and judicial functions and there should be no suspension without a hearing and suspension will only be preliminary to debarment with proceeding within six months as well as cannot remain in effect for a period of more than ninety days.[109]

The regulations concerning debarment and suspension procedure promulgated in 1984 can be summarized as follows:

1. The government-wide debarment and suspension: The regulations determined that a contractor's debarment and suspension shall be effective throughout the executive branch of the Government.[110]

2. The decision-making process: The agencies shall establish procedures governing the debarment and suspension decisionmaking process that are as informal as in practicable, consistent with principles of fundamental fairness.[111]

3. Notice of proposal to debar or suspend: The contractor is given the period of 30 days after the receipt of the notice to submit information and arguments

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[109] Id. at 237.

[110] 48 C.F.R. §§ 9.406-1(c) & 9.407-1(c) (1984). See also 48 C.F.R. §§ 406-1 & 9.407-1(c),(d) (1990).

[111] 48 C.F.R. §§ 9.406-3(b) & 9.407-3(b) (1984). See also 48 C.F.R. §§ 9.406-3 & 9.407-3(b) (1990).

in opposition to the proposed debarment or suspension in person, in writing or through a representative.[112]

4. Period of debarment: A debarment should not exceed three years and a suspension should not exceed 12-18 months; the debarring official may reduce or expand the period of debarment and the suspending official may modify or terminate the suspension period.[113]

These principles remain the same as those promulgated in the Federal Acquisition Regulations of 1990. The regulations inform us that the Government requires responsible contractors. Thus, the Government should be fair to the contractor since its debarment and suspension is administrative, which means that it bases on regulations not statutes. The unilateral act of Government on debarment and suspension should comport with constitutional due process.

3. The Current Regulations: Do They Satisfy Due Process?

3.1 Ground for Debarment and Suspension

Debarment is an action more serious than suspension. Ordinarily, when a contractor is suspended and the government can prove his guilt, he will be debarred afterwards. Debarment is based on the violation of a statute or regulation. It is provided for by both of

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[112] 48 C.F.R. §§ 9.406-3(c) & 9.407-3(c) (1984). See also 48 C.F.R. §§ 9.406-3(c) & 9.407-3(c) (1990).

[113] 48 C.F.R. §§ 9-406-4(a)(b)(c) & 9.407-4 (1984). See also 48 C.F.R. § 9.407-4 (1990).

statute and regulation which is different from suspension which will be provided for by regulation.[114]

1. Ground for Debarment

The ineligible contractor will be debarred by the debarring official when he (1) commits of fraud or a criminal offense in order to obtain a government contract or subcontract, (2) violates of federal or state antitrust statutes to submit the offers, (3) commits of embezzlement, theft, forgery, bribery, etc. and (4) lacks of business integrity or business honesty that seriously and directly affects the responsibility of a government contract performance.[115] The debarment will base upon a preponderance of the evidence which the debarring official may debar a contractor for the seriously violation of the terms of a contract such as willful failure to perform or having a history of failure to perform.[116] Moreover, the present FAR has a sweeping clause for the debarring official to debar the contractor for "any other cause of so serious or compelling a nature that it affects the present responsibility of a government contractor or subcontractor."[117] The

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[114]W. Noel Keyes, Government Contracts under the Federal Acquisition Regulation, at 117 (1986).

[115]48 C.F.R. § 9.406-2(a) (1990).

[116]48 C.F.R. § 9.406-2 (b) (1990).

[117]48 C.F.R. § 9.406-2(c) (1990). See also 48 C.F.R. § 9.406-2(c) (1984).

period of debarment will depend on the seriousness of the cause or causes for debarment but generally not exceed three years. Thus, the contractor who violates the provisions of the Drug-Free Workplace Act of 1988 may be debarred for a period not to exceed five years.[118] The debarring official, however, is authorized to extend the debarment for an additional period if he determines that it is necessary to protect the government's interest.[119] Conversely, he is also authorized to reduce the period of debarment upon the contractor's request which is supported by some documentation.[120]

2. Ground for Suspension

The causes for suspension are vaguer than the causes for debarment. The suspending official may suspend a contractor upon adequate evidence on the ground of (1) commission of fraud or a criminal offense in order to obtain a public contract or subcontract; (2) violation of Federal or State antitrust; (3) commission of embezzlement, theft, forgery, bribery, etc.; (4) violations of the Drug-Free Workplace Act of 1988; and (5) lacking of business integrity or business honest that seriously and directly affects the responsibility of a

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[118] 48 C.F.R. § 9.406-4(a) (1990).

[119] 48 C.F.R. § 9.406-4(b) (1990). See also 48 C.F.R. § 9.406-4(b) (1984).

[120] 48 C.F.R. § 9.406-4(c) (1990). See also 48 C.F.R. § 9.406-4(c) (1984).

government contractor or subcontractor.[121] The indictment of any causes can also constitute adequate evidence for suspension.[122] The suspending official is also authorized by a catch-all provision to suspend a contractor for "any other cause of so serious or compelling a nature that it affects the present responsibility of a government contractor or subcontract."[123] The period of suspension will be for a temporary period. If the legal proceedings are not initiated within twelve months, the suspension will be terminated.[124] Nevertheless, the suspension may be extended for an additional six months but not exceed 18 months, unless legal proceedings have been initiated within that period.[125]

3.2 The Procedural Safeguard

The current regulations move closer to the protection in the COGP and ACUS report, and satisfy at least some of the requirements of the cases. According to the section 9.406-3 of the FAR, the contractor is afforded an opportunity to be heard and, is issued a

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[121] 48 C.F.R. § 9.407-2(a) (1990).

[122] 48 C.F.R. § 9.407-2(b) (1990).

[123] 48 C.F.R. § 9.407-3(c) (1990).

[124] 48 C.F.R. § 9.407-4(b) (1990).

[125] Id.

notice of proposal to debar.[126] Under section 9.407-3, suspension procedures, the contractor is afforded a opportunity to appear with counsel and is issued the notice of suspension.[127] However all these things will be performed before the debarring official or suspending official who is not the administrative law judge. Additionally, the procedures of decision-making

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[126]48 C.F.R. § 9.406-3(b)(2)-(c) (1990). "(2) in actions not based upon a conviction or civil judgment, if it is found that the contractor's submission in opposition raises a genuine dispute over facts material to the proposed debarment, agencies shall also --

(i) Afford the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents; and

(ii) Make a transcribed record of the proceedings and make it available at cost to the contractor upon request, unless the contractor and the agency, by mutual agreement, waive the requirement for a transcript.

(c) Notice of proposal to debar. A notice of proposed debarment shall be issued by the debarring official advising the contractor and any specifically named affiliates, by certified mail, return receipt requested --

(1) That debarment is being considered;

(2) Of the reasons for the proposed debarment in terms sufficient to put the contractor on notice of the conduct or transaction(s) upon which it is based;

(3) Of the cause(s) relied upon under 9.406-2 for proposing debarment;

(4) That, within 30 days after receipt of the notice, the contractor may submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment, including any additional specific information that raises a genuine dispute over the material facts;

(5) Of the agency's procedures governing debarment decisionmaking;

(6) of the effect of the issuance of the notice of proposed debarment; and

(7) Of the potential effect of an actual debarment."

[127]48 C.F.R. § 9.407-3(b)(2) (1990).

process are as informal as is practicable.[128] In fact, if the actions based on a civil judgment in debarment or based on the indictment in suspension, the contractor is not entitled to these sections. The debarment and the suspension provided by the current regulations are not consistent with the constitution procedural safeguard in this aspect. To satisfy the constitution safeguard, the case should be presented to the neutral party not the administrative person in the agency. When the contractor is debarred or suspended means that he is deprived of a liberty right to contract with the Government. The contractor should be treated fairly either the action is based on a civil judgment or the action is based on an indictment. He should be afforded the information of the charge against him and should be afforded the opportunity to rebut the charges. For his freedom for contracting is limited. The common law court held that even though de facto debarment is illegal, the gap between the findings of nonresponsibility and the formal debarment/suspension is still left unattended. This can cause the contractor injury or can cause him to bankrupt. Moreover, as the result from the task group's proposal in 1975, the FAR was amended. That is, the provisions of the Government wide debarment and suspension are added in the FAR. It

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[128] 48 C.F.R. §§ 9.406-3(b)(1) & 9.407-3(b)(1) (1990).

is stigma of an individual and, hence, violate the constitutional due process. The contractor will be blacklisted all over the agencies which can do harm to his business not only in Government contract career but also the private career. His business will be dead and could not be born again because of the widespread imputation done by the Government. Summarily, the current regulations does not adequately provide the due process's procedural safeguard. Gaps remain in the procedural protection that should be afforded to the contractor.

III. THE POST-AWARD STAGE: THE RIGHT OF TERMINATION

Termination for default can be clearly understood for it is common in private contracts. However, another major difference between private and government contract is that the Government contract has the termination for convenience clause. The clause gives the Government the broad right to terminate the contract for its convenience without cause. It also limits the contractor's rights to costs incurred and his profit on work done. The contractor cannot recover for anticipated profits as an aggrieved contractor selling goods or services may typically do in a private contracting setting.

1. The Evolution of Termination for Convenience

1.1 Termination Cannot Be Used to Avoid All Responsibility: The Speed Case

The United States Supreme Court first considered the settlement authorities or government's right to terminate for convenience in United States v. Speed.[129] J. Smith Speed and Robert Floyd agreed at a fixed price to slaughter and pack fifty thousand hogs for the government at Louisville. The contract was written and signed by Speed and Floyd and by the Commissary of Subsistence on

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[129] 75 U.S. (8 Wall.) 77, 19 L.Ed. 449 (1869).

behalf of the United States. The government was to deliver the live hogs, the cooperage, salt and other necessary materials to Speed and Floyd and they were to do the work of slaughtering and packing. The government furnished 17,132 hogs but failed to furnish any more. The suit was brought to recover damages for that failure and the Court of Claims gave the judgement in favor of Speed for $19,720.80 and in favor of Floyd for $20,293.80.[130] On appeal, the Government contended that the contract did not bind the Government because the contract contained no provision for the termination of the contract, at such time as the Commissary General may direct. At that time (1863), Rule 1179 of the Army Regulations provided that "Contracts for subsistence stores shall expressly provide for their termination at such time as the Commissary-General may direct."[131] The Supreme Court upheld the Court of Claims stating "[i]t would be a fraud for the government, by its authorized officers, to pigeon-hole the contract, then treat it as being in full operation, derive all the benefits desired under it, and, when it became convenient to rid itself of liability, to allege its own breach of duty as a ground for annulling it."[132] Floyd seems to

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[130] Id. at 449, 451.

[131] See also Cibinic & Nash, Administration of Government Contracts (2d ed. 2d printing 1986), at 818.

[132] 19 L.Ed., supra note 129, at 451.

be the earliest case discussing the convenience-termination of the government. It established that the Government does not have right to unilaterally terminate and avoid all liability for refusing to perform.

1.2 Right to Settle the Contract: The Corliss Case

The unilateral right to terminate for convenience traces back to United States v. Corliss Steam-Engine Company[133] where the Supreme Court found that the government has right to terminate or suspend the contract when the contractual goods were no longer required. The Corliss Steam-Engine Company was awarded a contract from Navy during the Civil War. There was no question of the validity of the contract and no complaint about the work in which it was done. However, the Navy Department, upon the recommendation of a Board of Officers of the Navy, suspended the further progress of the work under the contracts in 1869 because of the termination of the war. The contractor offered two alternatives to Navy, either to complete all the machinery and received $150,000 or to delivery it in its incomplete condition for $259,068. The Navy accepted the latter. There was no allegation of fraud, concealment or misrepresentation. Every fact was known to both parties. The Court considered the procurement power of the Secretary of the Navy under the

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[133]91 U.S. (23 Wall.) 321, 23 L. Ed. 397 (1875).

Act of April 30, 1798 which create the Navy Department and stated that

> "(t)he power of the President in such case is, of course, limited by the legislation of Congress. That legislation existing, the discharge of the duty devolving upon the Secretary necessarily requires him to enter into numerous contracts for the public service; and the power to suspend work contracted for, whether in the construction, armament or equipment of vessels of war, when from any cause the public interest requires such suspension, must necessarily rest with him."[134]

The Court, consequently, held that the Secretary of the Navy was authorized to settle the contract and could suspend the work when from any cause the public interest might require its suspension. However the court reaffirmed that the contract remained binding on the Government and the contractor.[135] The court stated as follows:

> "When a settlement in such a case is made upon a full knowledge of all the facts, without concealment, misrepresentation or fraud, it must be equally binding upon the Government as upon the contractor; at least, such a settlement cannot be disregarded by the Government without restoring to the contractor the property surrendered as a condition of its execution."[136]

In the court's opinion, when the completion of work becomes unnecessary, the Secretary of Navy consequently was authorized to agree with the contractor upon the compensation for the partial performance and this

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[134] Id. at 322.

[135] Id. at 323.

[136] Id. at 398.

settlement bound upon the Government.[137] The Government, therefore, could not, after suspending, exculpate itself and avoided all responsibility under the contract.

The Corliss case is the first case which articulated the idea of termination for convenience and provided the basic law and policy that the procuring agencies must have the power to settle contracts that had been subject to the great changes in expectation.[138] It upheld the Speed case by clearly indicating that the government officials were authorized to settle termination claims. The Corliss doctrine was relied on in several cases of government contract disputes during the World War I,[139] and also embodied in a mandatory termination clause for fixed-price supply contract in the government procurement regulations during the World War II.[140]

1.3 War-Related Legislative Development

The President was given significant right to terminate the contract for government's convenience by

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[137] Id.

[138] See e.g. Torncello v. United States, 681 F. 2d 756, 764 (Cl. Ct. 1982).

[139] Torncello v. United States, 681 F.2d 756, 764 (Cl. Ct.1982).

[140] Id. at 765. See also 10 C.F.R. § 81.324 (Cum. Supp. 1938-43): "Termination for convenience of the government.(9) The Government may, at any time, terminate this contract, in whole or in part, by a notice in writing from the Contracting Officer to the Contractor that the contract is terminated under this Article."

the Congress, in 1917, under the Emergency Shipping Fund as follows:

> " The President is hereby authorized and empowered, with the limits of the amounts herein authorized -
> (b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material."[141]

In 1919, Congress enacted an act, which was known as Dent Act, to provide relief in cases of contracts connected with the prosecution of World War I.[142] Under the Act, the Secretary of War was authorized to adjust, pay, or discharge any agreement, express or implied, upon a fair and equitable basis that had been entered into, in good faith during the emergency time. The Act also provided that "no settlement of any claim arising under any such agreement shall bar the United States Government through any of its duly authorized agencies, or any committee of Congress hereafter duly appointed, from the right of review of such settlement, nor the right of recovery of any money paid by the Government to any party under any settlement entered into, or payment made under the provisions of this Act."[143] After this act, Congress enacted the Contract Settlement Act of 1944,

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[141] 40 Stat. 182 (1917).

[142] 40 Stat. 1272 (1919).

[143] Id. at 1273.

July 1, 1944, Public Law 395[144]. Among the declarations of the objectives of the Act are to assure the contractor and equitable final settlement of claims and to use all practicable methods compatible with the foregoing objectives to prevent improper payments and to defect and prosecute fraud. Besides, the main objectives of settlement procedures are "to facilitate maximum war production during the war, and to expedite reconversion from war production to civilian production as war conditions permit."[145] Section 3(d) of the Contract Settlement Act defined the term of termination as follows:

> "(d) the terms "termination", "terminate" and "terminated" refer to the termination or cancellation, in whole or in part, of work under a prime contract for the convenience or at the option of the Government (except for default of the prime contractor) or of work under a subcontract for any reason except the default of the contractor."[146]

No legislative guidelines were provided to define when the contract could be terminated for government's convenience. The judicial response was to read section 3(d) of the Contract Settlement Act of 1944 as allowing the "termination or cancellation in whole or in part of work under principle contract for convenience of

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[144]58 Stat. 649 (July 1, 1944), 41 U.S.C. §§ 101-25 (1988).

[145]Id.

[146]Id. at 650.

government, ... providing that because it was advantageous and in best interests of United States to modify contract to terminate production activities under contract ..."[147] However, the Armed Services Procurement Regulation first contained the mandatory clause of termination for convenience, in 1950, to be used in the majority of the military contracts over $1,000. The first edition of the Federal Procurement Regulations (1964) contained the optional clause of termination for convenience to be used whenever an agency considered it necessary or desirable to do.[148] The optional clause of termination for convenience in FPR was later revised to be a mandatory clause in fixed price supply contract over $2,500 and fixed price construction contracts over $100,000.[149] The broad authority to terminate for convenience of the Government during the war-time emergency is carried forward in the present regulations. Consequently, the government can terminate the contract for its convenience when in its opinion, at

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[147]Houdaille Industries, Inc. v. United States, 151 F. Supp. 298, 310-11 (Cl. Ct. 1957).

[148]Cibinic & Nash, Administration of Government Contracts (2d ed. printing 1986), at 818. Accord. DAR 8-701-705 (1950) & FPR 1-8.700-2.

[149]32 Fed. Reg. 9683 (1967). Accord. 48 C.F.R. 49.502 (1990). The types of the contracts are changed to be a fixed-price contracts of $100,000 or less and a fixed-price contracts over $100,000.

the time of termination, it is in the best interest of the United States.

1.4 The Christian Doctrine: Incorporation of Regulation

One of the most significant termination cases is G. L. Christian & Assoc. v. United States[150] which established the "Christian Doctrine." In the Christian case, there was no mandatory clause in the contract between G. L. Christian & Associates and the Army to terminate the housing contract. Section 8.703 of the Armed Services Procurement Regulations,[151] however, provided that "the performance of work under this contract may be terminated by the government in accordance with this clause in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interest of the Government." The court pointed out that "(a)s the Armed Services Procurement Regulations were issued under statutory authority, those regulations, including Section 8.703, had the force and effect of law."[152] Consequently, the court held that the termination article required by the regulations would be read into the contract. That is, although the contract has contained

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[150] 312 F. 2d 418 (Ct. Cl. 1963), reh'g denied, 320 F. 2d. 345 (Ct. Cl. 1963), cert. denied, 375 U.S. 954 (1963).

[151] 32 CFR § 8.703 (1954).

[152] 312 F. 2d 418, supra note 150, at 424.

no mandatory clause of termination and the termination is provided in the procurement regulations, the government can unilaterally terminate such contract for its convenience since the regulations can be read into the contract.

1.5 Governmental Discretion Controls

a. The Decision to Terminate: Commercial Cable Company

The act of convenience-termination is established as the unilateral act of the government in the Commercial Cable Company v. the United States.[153] The Commercial Cable Company sued to recover damages for breach of contract to construct a coaxial submarine cable between the United States and England through intermediate points under the jurisdiction of other countries. According to the contract, the U.S. government was to assist the contractor in securing foreign cable landing sites and other facilities as necessary. The Air Force was to provide the assistance. When the need for the cable appeared doubtful, the contractor was informed that the government would no longer support the project and the contractor should incur no further contract expense. The contractor also received a letter dated March 10, 1960 from the Assistant Secretary of the Air Force for

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[153] 170 Ct. Cl. 813 (1965). See also Schlesinger v. United States, 390 F. 2d 702, 707, 182 Ct. Cl. 571, 581 (1968).

Material (who was not the contracting officer)[154] that the Government still needed the cable and that the contract would not be terminated for convenience. The contractor, then, alleged to the court that 1) the failure of the Government to render the assistance promised in the contract made its performance impossible, and 2) the failure of the Government to terminate the contract for the convenience of the Government once its needs had changed. The contractor argued that denial of contractor's request for termination for convenience was controlled by the "Disputes" article of the contract and was final and binding. According to the contract, "the disputes clause of the contract required submission of all the disputed questions of fact arising under the contract for administrative determination by the contracting officer.[155] Clause 7(a) of the contract also provided: "[t]his contract may be terminated by the Government whenever the Contracting Officer shall determine that such termination is in the best interests of the Government."[156] The court held that "the issue of termination for convenience of the Government is not one which arises under the 'Disputes' article of the

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[154]The name of one David D. Carter is affixed to the contracts as the contracting officer under the paragraph 21(b) of the contract's definition of contracting officer.

[155]170 Ct. Cl., supra note 153, at 820.

[156]170 Ct. Cl., supra note 153, at 817.

contract, since that decision is one left to the discretion of the contracting agency and is not appealable."[157] The case demonstrates that only the government may terminate the contract for its convenience when it would like to do so. The desires of the contractor are not controlling.

b. The Reiner Rule: Constructive Termination

The Court of Claims in John Reiner & Co. v. United States[158] laid down the principle that any Government's action which prevented the contractor from performance would be adjusted under the clause of termination for convenience. In May 1956, the Army advertised for bids on 3,567 generator sets. The delivery schedule was ranged from September 30, 1956 to August 31, 1957 but the bid invitation provided that any bidder could set forth its proposed delivery schedule if he could not meet the foregoing schedule. John Reiner & Company submitted the lowest price of the thirteen bidders. It submitted a bid with its own delivery schedule specifying dates more than 60 days after those listed in the invitation.[159] The company received a written notice of award on July 2, 1956 and the formal

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[157] 170 Ct. Cl., supra note 153, at 814.

[158] 325 F.2d 438, 163 Ct. Cl. 381 (1963).

[159] The other bidders also specified their own delivery dates, some specified 60 days and some specified more than 60 days beyond the invitation time.

contract cam shortly thereafter. By that time, Reiner was ready to perform. However, it received word from the Army on August 3, 1956 to suspend all operations under the contract. An unsuccessful bidder prevailed upon the General Accounting Officer to rule that the award to Reiner was improper and the contract should be cancelled. The John Reiner & Company did not know about this fact and the Accounting Officer felt that the invitation did not adequately inform all the bidders about how they should bid with respect to the delivery dates. On September 21, 1956, the contract was cancelled. The John Reiner & Co. argued that the Comptroller General's decision did not bind the Army and the cancellation was a breach of contract which it could seek recovery for full damage.[160] After considering the section 152 of the Armed Services Procurement Act of 1947 and the invitation, the Federal Court thought there was no ambiguity with the respect of the delivery schedule and the award to the John Reiner & Co. must be deemed lawful. As to the cancellation of the contract, the court stated that "the Government has the right to terminate at will"[161] and "in absence of bad faith or clear abuse

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[160] 41 U.S.C. § 152 (a)(b)(c) (1952).

[161] 325 F.2d, supra note 158, at 442. Accord. Davis Sewing Mach. Co. v. United Stats, 60 Ct. Cl. 201, 217 (1925), aff'd, 273 U.S. 324, 47 S.Ct. 352, 71 L.Ed. 662 (1927); Librach v. United states, 147 Ct. Cl. 605, 611 (1959).

of discretion the contracting officer's election to terminate is conclusive."[162]

The Federal Court specified that the Army had a valid ground to terminate and the Armed Services Procurement Regulations was "ineffective to broaden plaintiff's rights of recovery."[163] The Federal Court stated that a departure from the statutory or regulatory requirements "does not convert a termination into a common-law breach subjecting the United States to liability for unearned anticipated profits any more than would a deviation from the procedures set forth in a statutory provision for termination."[164] Consequently, the Federal Court agreed with the Court of Claim's holding:

> "While award was not, as claimed by government, a nullity, because of presence of termination-for-convenience article in contract, damages were subject to limitations of that clause, and cancellation did not result in a common-law breach entitling contractor to anticipated profit."[165]

Under the Reiner decision the contractor cannot recover for the anticipated profit. However, Judge Whitaker

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[162] 325 F.2d, supra note 158, at 442. Accord. Line Constr. Co. v. United States, 109 Ct. Cl. 156, 187 (1947).

[163] 325 F.2d, supra note 158, at 444.

[164] 325 F.2d, supra note 158, at 444. The court laid the condition unless the contractor could prove he had been injured by the failure to pursue the ASPR procedures.

[165] 325 F.2d, supra note 158, at 438.

disagreed with the opinion in the case. He argued that the Goldwasser v. United States which the majority was relied on was termination for default case. Judge Whitaker stated that

> "[n]or in the case at bar did defendant take advantage of the termination-for-convenience-of-the-Government clause; it cancelled the contract because, acting upon the opinion of the Comptroller General, it held that it had been awarded without compliance with the statute and was, therefore, a nullity. It is a contradiction to say that it terminated a contract that in law it asserted had never existed. Whether it had a right to do so or not is immaterial, because it did not fact do so. The possession of a right means nothing unless that right is exercised,"[166]

c. The Use of Termination for Convenience: Post-Reiner

Termination for convenience was used during the period of the major Wars in order to help the government to get out of the onerous obligations due to the contract when the goods were no longer needed after the war was over. Nevertheless, it has been adopted and used broadly in the present government contract which allocates the risk to contractor when circumstances change. Though the broad use of termination for convenience would seem to make the contracts illusory, the courts and the Board of Contract Appeal has always upheld it.

-- The Conversion of Invalid Termination for Default into Termination for Convenience

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[166] 325 F.2d, supra note 158, at 446.

In Schlesinger v. United States,[167] the plaintiff submitted his bid on February 26, 1955 to the Navy for furnishing 50,000 blue service caps. The bid invitation required delivery by July 31, 1955 and his bid required acceptance within 20 days, or by March 17. The plaintiff was the second lowest bidder. The Navy requested to extend the period of acceptance to April 23, 1955 and it was granted by plaintiff. On April 14, 1955, plaintiff was told by a Government employee that he had been awarded the contract, dated April 14, and he was also given the contract number as well as was told to provide the bond. In order to meet the delivery date, the plaintiff had to order the essential materials before he received the formal contract on May 3. The contract award was backdated to April and the Government unilaterally revised the delivery date by postponing each delivery for one month. The plaintiff failed to make the first delivery of 15,000 caps on May 31, which was due by the revised delivery schedule. The plaintiff received the letter, dated June 14, from the contracting officer warning him that the deliveries were delinquent and the satisfactory pre-production samples and components had not yet been approved. Plaintiff did not respond until June 28. Plaintiff said that he came across the contracting officer on the plane en route to Washington

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[167] 390 F.2d 702 (Ct. Cl.1968).

where he had to attend the public hearing because he was the prime suspect in connection with the irregular textile procurement in the military. The contracting officer was told by a naval officer in Washington on June 28 that the chairman of the subcommittee had sent the letter asking about the contract status and implying that the contract should be cancelled.[168] The naval officer told the contracting officer that the contracting officer should terminate the contract for default if there was no urgent need for the caps. At that time, the Navy could procure the caps from the other manufacturer within ten days while the plaintiff had no completed caps. On June 30, the contracting officer told the Bureau of Supplies and Accounts in Washington that he intended to terminate the contract for default. On the same day he received a telegram from the Bureau instructing him to terminate the contract immediately for default. Meanwhile, the plaintiff replied to the warning letter dated June 14. He alleged the government's delay in acceptance of his bid and an insufficient delivery time. The letter reached the contracting officer on June 30 but after the instructing telegram from the Bureau. On July 1, the contracting officer telegraphed to plaintiff, telling him that the contract for caps was

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[168] Id. at 705. A Naval officer was the Assistant to the Assistant Chief of the Navy's Bureau of Supplies and Accounts for Purchasing.

terminated for default. Plaintiff appealed to the Secretary of the Navy and then to the Board of Contract Appeals. The Board found that there was the bare existence of the default. The court, however, found it difficult to agree. In the court's opinion, the default article, which the Board relied on, did not require the Government to terminate on finding a bare default but merely gave the procuring agency the discretion to do.[169]

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[169] Id. at 707. The default article is as follows:
"(a) the Government may, subject to the provisions of paragraph (b) below, by written Notice of Default to the Contractor terminate the whole or any part of this contract in any one of the following circumstances:
"(i) if the Contractor fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof; or
"(b) the Contractor shall not be liable for any excess costs if any failure to perform the contract arises out of causes beyond he control and without the fault or negligence of the Contractor. Such causes include, but are not restricted to, acts of God or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, and defaults of subcontractors due to any of such causes unless the Contracting Officer shall determine that the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the required delivery schedule.
"(c) In the event the Government terminates this contract in whole or in part as provided in paragraph (a) of this clause, the Government may procure, upon such terms and in such manner as the Contracting Officer may deem appropriate, supplies or services similar to those so terminated, and the Contractor shall be liable to the Government for any excess costs for such similar supplies or services, provided, that the contractor shall continue the performance of this contract to the extent not terminated under the provisions of this clause.
"(e) If, after notice of termination of this contract under the provisions of paragraph (a) of this clause, it is determined that the failure to perform this contract is due to causes beyond the control and without

The Court stated: "there is no reason to read the default article, contrary to its literal terms and the accepted practice, as compelling termination."[170] The holding in the Commercial Cable: "a decision to terminate for convenience is rooted in discretion" was recognized by the court. The Navy which has the procuring agency never exercised its right to make the discretion but simply surrendered its power and let the Bureau of Supplies and Accounts act on its own. The court considered there was no concern for the contractor or whether a default would be excusable, no consideration of a possible waiver or any extension and no weighing of a convenience-termination instead of a default-termination. After finding out that the caps were no longer needed, the Bureau considered only how to legally terminate the contract for default. The court agreed with the Board of Contract Appeal that Navy's letter did not constitute an effective notice under the contractual term which would

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the fault or negligence of the Contractor pursuant to the provisions of paragraph (b) of this clause, such Notice of Default shall be deemed to have been issued pursuant to the clause of this contract entitled "Termination for Convenience of the Government," and the rights and obligations of the parties hereto shall in such event be governed by such clause.

"(f) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract." (390 F.2d, supra note 167, at 707 n.5.)

[170] 390 F.2d, supra note 167, at 708.

result in termination for default of the contractor.[171] The court realized the teaching of the John Reiner where "the contract was cancelled on an unsound ground and in an illegal manner -- the termination must be treated, not as a breach of contract, but as a termination for convenience since the contract contained a 'convenience' clause which could have been used to end performance."[172] In the court's view, the Navy's refusal to exercise its discretion constituted a failure which was a cause beyond the contractor's control and without his fault or negligence. The court finally held the termination for default must be treated as one for convenience.[173] This case demonstrates where a contractor declared to be in default when he is not in fact in default, the contract will be terminated for convenience instead of for default.

-- The Broader Use of Termination for Convenience

Even though the defects of the contract are because of the Government's fault, the Government may terminate it for convenience. This broader use of termination for convenience is demonstrated in Nolan Brothers, Inc. v. United States.[174] Nolan Brothers, Inc. entered into a

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[171] 390 F.2d, supra note 166, at 704, 709.

[172] 390 F.2d, supra note 166, at 709-710.

[173] 390 F.2d, supra note 166, at 710.

[174] 405 F.2d 1250 (Ct. Cl. 1969).

contract with the Corps of Engineers to construct two rock jetties out into the Gulf of Mexico form Matagorda Peninsula in Texas. The contract price was about nine million dollars. When one-third of the work was done, the Corps terminated the contract for Government's convenience. There were unsuccessful efforts to settle the demands by negotiation. However, the contracting office unilaterally determined the cost for the plaintiff as $5,386,183 out of the $8,153,902 sought. Plaintiff appealed to the Corps of Engineers Board of Contract Appeals which granted only $101,315 more. Plaintiff alleged that the Government breached the contract by furnishing an inadequate design and defective specifications for the jetties. The design and specifications were suitable for a land-based operation. At the Matagorda Peninsula, the currents were very strong which made it impossible to place the jetty material by land-based equipment. The court thought that no trial, either judicial or administrative, needed to be held on the assertions of inadequate design because all the plaintiff was entitled to was a proper award under the convenience-termination article. The claim covered by the second cause of action and the separate claim of the kind set forth in the first clause of action no longer existed for the plaintiff.[175] The court stated that

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[175] Id. at 1252-1253.

the defendant had a full right to take the action of convenience-termination under the contract which lodged in the contracting officer the fullest of discretion to end the work in the best interest of the Government.[176] The Government's realization that its plans and specifications were faulty would not be improper or an abuse of discretion and "the mere existence of a default by the Government would not bar convenience-termination."[177] The court said that "the contractor's protection on a convenience-termination is that he gets full reimbursement of his costs, together with a measure of profit" and "[t]he only substantial difference between the sum calculated under that standard and the amount recoverable in a common law action for contract breach is the non-inclusion in the former of anticipated but unearned profits."[178] The plaintiff argued that the Government could not escape the normal common law consequences of its wrongful action by terminating the contract for its own convenience where it had breached the contract. The court's answer was "the

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[176] Id. at 1253. Accord. John Reiner & Co. v. United States, 325 F.2d 438, 163 Ct. Cl. 381, 390 (1963), cert. denied, 372 U.S. 931, 12 L.Ed.2d 295 (1964); Commercial Cable Co. v. United States, 170 Ct. Cl. 813, 821 1965), Schlesinger v. United States, 390 F.2d 702, 707, 182 Ct. Cl. 571, 581 (1968).

[177] 405 F.2d, supra note 174, at 1253.

[178] 405 F.2d, supra note 174, at 1253. Accord. G.L. Christian and Associates v. United States, 312 F.2d 418, 423, 160 Ct. Cl. (1963).

convenience article was precisely intended to allow the Government to avoid the consequence that it pay unearned profits."[179] In the court's view, if the Government had terminated the contract for default and the default was found excusable, the termination would be converted (under the default clause) into a convenience-termination, and the recovery of the unearned profits would be barred. Although the Government had not asked to dismiss the first cause of action, the court reversed the trial commissioner's order directing: de novo trial on the first cause of action. The case was returned to the trial commissioner for proceedings on the second cause of action.

-- Termination for Convenience as an Exculpating Clause

The court in Colonial Metals Co. v. United States[180] had created the new reading of termination for convenience. It was read as an exculpating clause. Colonial Metals Company was awarded a sale contract on which it was the only bidder to sell copper ingot to the Navy. The contractor was the secondary dealer in copper, it bought the copper from Aaron Ferer and Sons Co. for $.7225 per pound and sold to the Government for $.7838 per pound. The prices of the copper were common knowledge, regularly published. The Government

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[179] 405 F.2d, supra note 174, at 1254.

[180] 494 F.2d 1355 (Ct. Cl. 1974).

terminated the contract on January 20, 1970 for its convenience and declined to make a contract for the set aside quantity. It bought the copper later from the primary sources at $.55-.56 per pound between January 27 and March 12. The purpose of termination was to obtain the price which was lower than the contract price of the Colonial Metals Company. The issues were whether the contract included the additional 440,000 pounds of ingot set aside quantity, whether the termination for convenience was a breach and whether the board wrongly failed to award the profit on the contract and losses on the Ferer contract. The set-aside ingot was proposed to plaintiff through the phone by an officer who was not a contracting officer with authority to contract but a procurement officer, subordinate to the contracting officer. The plaintiff maintained it was a binding contract. The court stated that the "[c]ontract implied in fact is a doctrine applicable to a meeting of the minds, inferred without explicit words from the conduct of the parties as showing their tacit understanding" and "[i]t can have no application where the explicit words actually used express the thought that agreement is conditional."[181] The officer was an officer with apparent authority and the contract was not made in writing. The court, consequently, decided the issue of

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[181] Id. at 1359.

the set-aside ingot contract against the plaintiff. The issue of the termination for convenience as a breach of contract and entitling plaintiff to common law breach damages was also denied by the court. It gave the reason that the termination for convenience clause in the contract was designed to provide a mechanism whereby the Government might end its obligation on a contract and limit its liability to the contractor's costs and profits on the preparations made and work done.[182] The court also stated that the termination to buy elsewhere at a cheaper price is essential and the contracting officer's knowledge of the price at the time the contract was awarded did not narrow the right to terminate. Consequently, no breach took place by the termination and plaintiff was entitled to the costs and profits allowed under the termination for convenience clause. The Board did not err in disallowing both the contractor lost profit on the contract with the Government and the loss on the settlement of the Ferer contract.

The Colonial Metals ruling extends termination for convenience beyond its original circumstances. It has

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[182] Id. at 1360. The termination clause provided: "(a) The performance of work under this contract may be terminated by the Government in accordance with this clause in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interest of the Government." The court said it was incorporated by reference to section 7.103.21(c) of the Armed Service Procurement Regulations (32 C.F.R. § 7.103.21(c) (1970)). 494 F.2d, supra note 180, at 1360 n.4.

created the new reading of termination for convenience, i.e., termination for convenience for exculpation. In the view of the Colonial Metals court, the definition of termination for convenience is broad and allocates the risk of a change in the circumstances in the contract the parties agreed upon. Although termination for convenience evolved to solve war-time procurement problems, it is now used in peace time to allow the Government to end contracts which turn out to be economically burdensome to it.

2. The Difference between Termination for Default and Termination for Convenience

Basic Government procurement is under the Armed Services Procurement Act[183] and the Federal Property and Administration Services Act.[184] The Defense Acquisition Regulation which covers the military procurement is promulgated under the former and the Federal Acquisition Regulation which cover the civilian procurement is promulgated under the latter. Presently, most of the government agencies will procure and make contract pursuant to the FAR's procedure.

2.1 Ground for Default Termination

Apart from the common law, the Government presently has the right to terminate the contract for default under the FAR, section 49.402-1 as follows:

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[183] 10 U.S.C. §§ 2301-2323 (1982).

[184] 41 U.S.C. §§ 251-261 (1982).

"Under contracts containing the Default clause at 52.249-8, the Government has the right, subject to the notice requirements of the clause, to terminate the contract completely or partially for default if the contractor fails to (a) make delivery of the supplies or perform the services within the time specified in the contract, (b) perform any other provision of the contract, or (c) make progress and that failure endangers performance of the contract."[185]

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[185]**Section 52.249-8 Default (Fixed-Price Supply and Service).**

As prescribed in 49.504(a)(1), insert the following clause in solicitations and contracts when a fixed-price contract is contemplated and the contract amount is expected to exceed the small purchase limitation. The clause may also be used when the contract amount is not expected to exceed the small purchase limitation, if appropriate (e.g., if the acquisition involves items with a history of unsatisfactory quality).

DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984)

(a)(1) The Government may, subject to paragraphs (c) and (d) below, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contract fails to-

(i) Deliver the supplies or to perform the services within the time specified in this contract or any extension;

(ii) Make progress, so as to endanger performance of this contract (but see subparagraph (a)(2) below); or

(iii) Perform any of the other provisions of this contract (but see subparagraph (a)(2) below).

(2) The Government's right to terminate this contract under subdivisions (1)(ii) and (1)(iii) above, may be exercised if the Contractor does not cure such failure within 10 days (or more if authorized in writing by the Contracting Officer) after receipt of the notice from the Contracting Officer specifying the failure.

(b) If the Government terminates this contract in whole or in part, it may acquire, under the terms and in the manner the Contracting Officer considers appropriate, supplies or services similar to those terminated, and the Contractor will be liable to the Government for any excess costs for those supplies or services. However, the Contractor shall continue the work not terminated.

(c) Except for defaults of subcontractors at any tier, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes

If the Government properly terminates the Contract for

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include (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance the failure to perform must be beyond the control and without the fault or negligence of the Contractor.

(d) If the failure to perform is caused by the default of a subcontractor at any time, and if the cause of the default is beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either, the Contractor shall not be liable for any excess costs for failure to perform, unless the subcontracted supplies or services were obtainable from other sources in sufficient time for the Contractor to meet the required delivery schedule.

(e) If the contract is terminated for default, the Government may require the Contractor to transfer title and deliver to the Government, as directed by the Contracting Officer, any (1) completed supplies, and (2) partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (collectively referred to as "manufacturing materials" in this clause) that the Contractor has specifically produced or acquired for the terminated portion of this contract. Upon direction of the Contracting Officer, the Contractor shall also protect and preserve property in its possession in which the Government has an interest.

(f) The Government shall pay contract price for completed supplies delivered and accepted. The Contractor and Contracting Officer shall agree on the amount of payment for manufacturing materials delivered and accepted and for the protection and preservation of the property. Failure to agree will be a dispute under the Disputes clause. The Government may withhold from these amounts any sum the Contracting Officer determines to be necessary to protect the Government against loss because of outstanding liens or claims of former lien holders.

(g) If, after termination, it is determined that the Contractor was not in default, or that the default was excusable, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the Government.

(h) The rights and remedies of the Government in this clause are in addition to any other rights and remedies provided by law or under this contract.

default, it does not have to pay for the unaccepted work. Besides, it may recover the advance payment and may take possession of the contractor's material, as well as may assess the excess costs of re-procurement or completion.[186]

a. Failure to Make Progress: The Fiber Glass Case

The test for failure to make progress which constitutes termination for default is set forth in Universal Fiber Glass Corporation v. United States.[187] In this case the contractor's lack of production, inadequate financial condition, failure to employ an adequate labor force and failure to manufacture any product under new specifications justified Government's termination of contract for failure to make progress.[188] The Universal Fiber Glass Corporation was awarded to contract to purchase 12,716 mailsters from the Government. The representatives of the General Services Administration were reluctant to award the contract to Fiber Glass because of the concerns about that contractor's inability to perform. After the contract was awarded, the Government repeatedly warned the contractor that failure to meet the delivery schedule

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[186]Cibinic, Jr. & Nash, Jr., Administration of Government Contracts (2d ed. 2d printing 1986), at 794-797, 813-814.

[187]537 F.2d 393 (1976).

[188]Id.

would be grounds for termination. The contractor had to have a pilot model available for inspection not later than June 27, 1956 and had to achieve a production rate of about seven units per day by July 27, 1965. However, the plaintiff was unable to delivery any vehicles by July 27, 1965 or even by December 1965 because of lack of the parts. Its suppliers refused to deliver parts because of the poor financial condition of Fiber Glass. The Government extended the deliver date from July 27, 1965 to November 29, 1956, 90 days further. The Fiber Glass Corporation proposed in its delivery schedule to send the products on December 26, 1956, January 7, 1966 and January 21, 1966. The Government approved this schedule but the contractor still failed to deliver. There were two additional adjustments of delivery schedule agreed by both parties, but the contractor still failed to perform. On August 9, 1966, Amendment No. 4 was executed which changed the product's specifications. The new delivery date was no later than October 1, 1966. The contractor was concluded to be insolvent by an audit made by a Government accountant. It was unable to furnish anything by October 1. The Government again asked the Fiber Glass Corporation to submit immediately on October 12th. On November 1, the plaintiff answered the Commissioner of the Federal Supply Service's letter dated November 1. The contractor claimed that the Government was responsible for its increased costs and that the contract

might be impossible to perform. On November 30, 1966, the Government issued a Preliminary Notice of Default which gave the Fiber Glass Corporation 10 days to cure all of its defaults. The plaintiff waived its rights to the full ten-day period by letter dated December 1, 1966. On December 2, 1966, the contract was terminated for default because of 1) failure to deliver, 2) failure to make progress, 3) failure to comply with the provisions of the Progress Payments Clause, and 4) failure to comply with the Warranty Clause. Plaintiff appealed to the General Service Administration Board on the issue of whether the right to terminate for failure to deliver had been waived. The Board found that the Government had waived the delivery schedule up to October 12, 1966 by its conduct.[189] The plaintiff, therefore, moved the Board to set aside the default termination. After the hearings on whether the Government waited a reasonable time for delivery under the revised specifications, the Board found the Contracting Officer was justified in declaring it in default. The Contracting Officer determined that the contractor failed to make progress when it failed to honor warranties and when it submitted the improper progress payment vouchers. The court agreed with the trial judge that these matters should not be construed to be a failure to make progress. Although the

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[189] Id. at 396.

contracting officer's letter dated October 12 constituted the waiver of the contractor's failure to deliver, the federal court agreed with the trial judge that "[t]he test of progress is production, and the criterion is existing delivery requirements."[190] When the contractor failed to make progress, and had no production, the contract could be terminated for default. The federal court considered that plaintiff made no progress at all, had never manufactured a vehicle under the new agreed specifications, did not have the necessary parts and could not obtain them and had allowed its labor force to wither away, all constituting the failure to make progress. The federal court, consequently, held that the contract was properly terminated for default.[191] This case, demonstrates the difference between failure to deliver and failure to make progress. Both failure to deliver and failure to make progress constitutes termination for default. But in this case, the contracting officer had waived the right to terminate for failure to deliver. The court specified that the contract could nevertheless be terminated for failure to make progress because the contractor had no production at all and also had no ability to produce anything the contract called for.

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[190] Id. at 397.

[191] Id. at 400.

b. Failure to Timely Perform

The Government cannot terminate for default when the goods are delivered on a timely basis and substantially comply with the contract. The court in Radiation Technology, Inc. v. United States[192] announced the doctrine of substantial completion. The contract between the United States and the Radiation Technology Incorporate called for the delivery of eight instruments on April 3, 1962. The contractor could not timely perform on that date; therefore, it attempted to seek revision of the delivery schedule and the delivery date was extended. The shipment of goods was made in accord with the revised schedule. After the test of performance and inspection of the goods, the inspector found out that the instruments were not in compliance with the requirements of the contract. Their systems were found out to be defective in a number of respects. The contracting officer, therefore, wrote the Radiation Technology that because of its failure to deliver the instrument in accordance with the specification, its right to proceed was terminated. He also added that it would be charged with the excess costs of reprocurement and that the Government had an urgent need of the equipment.

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[192] 366 F.2d 1003 (Ct. Cl. 1966).

The contractor objected that the Government had terminated the contract without giving any opportunity to the Contractor to cure any defect. The government asserted that its termination was proper under the contract clause (a)(i)[193] and the term of "delivery" under this paragraph is in accord with the definition of delivery set forth in the Uniform Commercial Code and the Uniform Sales Act. The contractor argued that it had made a timely delivery and was entitled to the 10-day extension available under the contract clause (a)(ii).[194] The court said that while there was merit to both positions, it must be conceded that both were extreme. The court confronted with the difficulty of a contractor escaping an automatic termination through the simple expedient of timely shipment, notwithstanding the distinct possibility that the shipment might be

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[193] Id. at 1004.

"(a) The Government may, * * * by written notice of default to the Contractor, terminate the whole or any part of this contract in any one of the following circumstances:

(i) if the Contractor fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof; or

.."

[194] 366 F.2d, supra note 192, at 1004-5.

".. (ii) if the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure.

substantially defective. The court, therefore, rejected position of both parties and defined the term delivery as the equivalent of a shipment which is in substantial compliance with contract specifications.[195] The court stated that "even when time is of the essence, i.e., where performance must occur by a given date, this factor does not demand that performance be measured in terms of strict conformity." However, the court concluded that "absent a shipment meeting the standard of substantial compliance, the fact that shipment was timely cannot operate to grant a contractor an automatic 10-day extension."[196] The contractor's motion for summary judgement, consequently, was denied and the judgement is entered was favor of the government.

2.2 Ground for Termination for Convenience

a. In General

Under the FAR, the types of termination for convenience can be distinguished into 1) short form and 2) long form clause.

1. Short Form Clause

Section 49.502(a)(1) of FAR provides that the clause in section 52.249-1, termination for convenience of the Government, must be inserted in the fixed-price contract where the contract amount is expected to be $100,000 or

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[195] 366 F.2d, supra note 192, at 1005.

[196] 366 F.2d, supra note 192, at 1006.

less. Exceptions are made for the service contracts, contracts for research and development, contracts for architect-engineer services and personal services contracts. The clause provides as follows:

> "The Contracting Officer, by written notice, may terminate this contract, in whole or in part, when it is in the Government's interest. If this contract is terminated, the rights, duties, and obligations of the parties, including compensation to the Contractor, shall be in accordance with part 49 of the Federal Acquisition Regulation in effect on the date of this contract."[197]

The clause above is known as termination for convenience (short form clause).

2. Long Form Clause

Under section 49.502(b)(1)(i), the contracting officer has to insert the clause at 52.249-2, termination for convenience of the Government, in a fixed price contract where the contract amount is over $100,000. Exceptions are made for the contracts for dismantling and demolition, for research and development work on a non-profit basis, for architect-engineer services and for personal services. The long form clause contains detailed procedures and instructions which govern the termination process as specified in section 52.249-2 of FAR. (Please see Appendix B). Those principles are 1) that the government may terminate the contract in whole or in part from time to time within the government's interest, 2) that the contractor has certain obligations

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[197] 48 C.F.R. § 52-249-1 (1990).

after receipt of the notice, 3) that the parties must follow the termination procedures, 4) that the contracting officer should make a unilateral final determination of the total settlement and the contractor can appeal that decision under the dispute clause, 5) that the contractor can request an equitable adjustment within 90 days for the work which is not terminated, and 6) that the contractor can obtain partial payment and the costs while the settlement determination is pending. If the contractor and the contracting officer fail to agree on the amount to be paid to the contractor, the contracting officer has to pay the contractor as follows:

> "(1) The contract price for completed supplies or services accepted by the Government (or sold or acquired under subparagraph (b)(9) above) not previously paid for, adjusted for any saving of freight and other charges.
>
> (2) The Total of --
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> (i) The costs incurred in the performance of the work terminated, including initial costs and preparatory expense allocable thereto, but excluding any costs attributable to supplies or services paid or to be paid under subparagraph (f)(1) above;
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> (ii) The cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the contract if not included in subdivision (i) above; and
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> (iii) A sum, as profit on subdivision (i) above, determined by the Contracting Officer under 49.202 of the Federal Acquisition Regulation, in effect on the date of the contract, to be fair and reasonable; however if it appears that the Contractor would have sustained a loss on the entire contract had it been completed, the Contracting Officer shall allow no profit under this subdivisions (iii) and shall reduce the settlement to reflect the indicate rate of loss.
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> (3) The reasonable costs of settlement of the work terminated, including --

> (i) Accounting, legal clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;
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> (ii) The termination and settlement of subcontracts (excluding the amounts of such settlements); and
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> (iii) Storage, transportation, and other costs incurred, reasonably necessary for the preservation, protection, or disposition of the termination inventory.
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> (g) Except for normal spoilage, and except to the extent that the Government expressly assumed the risk of loss, the Contracting Officer shall exclude from the amounts payable to the Contractor under paragraph (f) above, the fair value, as determined by the Contracting Officer, of property that is destroyed, lost, stolen, or damaged so as to become undeliverable to the Government or to a buyer."[198]

These regulations can prevent the contracts from being an illusory one.

b. Limitation of the Use of Termination for Convenience: The Torncello Case

According to its history, termination for convenience would be used by the Government in allocating the risk of changed circumstances and later was read as an exculpatory clause in the contract as appeared in Colonial Metals.[199] However, the Federal Court in Torncello v. United States[200] tried to limit the use

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[198] 48 C.F.R. § 52 .249-2(f)(g) (1990). See also Appendix B.

[199] See also United States v. Corliss Steam-Engine Company, 91 U.S. (23 Wall.) 321, 23 L.Ed. 397 (1875), supra note 133; Houdaille Industries, Inc. v United States, 151 F. Supp. 298 (1957), supra note 147; Schlesinger v. United States, 390 F. 2d 702 (1968), supra note 167; and Colonial Metals Company v. United States, 494 F. 2d. 1355 (1974), supra note 180.

[200] 681 F.2d 756 (Cl.Ct. 1982).

of termination for convenience. Ronald A. Torncello was the president of Soledad Enterprise, Inc. (Soledad), a bankrupt corporation. He brought a claim against Navy for breach of pest control requirements contract. Soledad was awarded the contract of pest control from Navy on June 6, 1973. The contract term was one year, running from July 1, and was extended in June of the next year for another year. Soledad agreed to render service at a Navy family housing project by charging $500 per call. The work covered the control of agricultural pests, including rodents, weed control and plant diseases. The Navy, however, needed only gopher control at the housing project and it could call for the service from the Department of Navy Public Works at much cheaper price. This was the reason why Navy never called Soledad, but called the Public Works instead. After Soledad discovered the reason, it then offered to do special work of gopher control at $35 per call. Despite of its contract with Soledad, Navy still called the Public Works whose price was cheaper than Soledad's. Soledad, therefore, revoked its offer of $35 per call. The issue is whether the government had diverted the business away from a party, with whom it had executed a requirements contract, to a competing bidder on the original solicitation. The government defended that "this diversion was justified by the constructive application to its actions of the standard 'termination

for the convenience of the government' clause in federal procurement."[201] Soledad lost its claim before the Armed Services Board of Contract Appeals which allowed the government to be completely exculpated from the contract.

The court held that the termination for convenience clause did not apply in this case and found the government in breach.[202] The court noted that "a party may not reserve to itself a method of unlimited exculpation without rendering its promise illusory and the contract void."[203] The court classified the contract between Soledad and Navy to be a requirements contract which is one of the three types of supply contracts.[204] For requirements contracts also lack a promise from the buyer to order a specific amount, but consideration is furnished by the buyer's promise to turn to the seller for all requirements.[205] The court cited the holding in Lynch v. United States[206] as follows: "When the United States enters into contract

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[201] Id. at 758.

[202] Id. at 757.

[203] Id. at 760.

[204] The other two types are the definite quantity contract and indefinite quantity contract. 681 F.2d, supra note 200, at 761.

[205] 681 F.2d, supra note 200, at 761.

[206] 292 U.S. 571, 579, 54 S.Ct. 840, 843, 78 L.Ed. 1434 (1934).

relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."[207] Besides, the court conceded that the government has the power to abrogate common-law contract doctrines by specific legislation but in the court's opinion the general rule must be that the doctrines limit the government's power to contract just as they limit the power of any private person; and the government may not reserve to itself a right of non-performance without destroying the contract.[208]

According to Colonial Metals opinion, termination for convenience is as available for contracts improvident in their origin as well as for contracts which are onerous or unprofitable for the government.[209] The court, Judge Bennett in Torncello, took its holding into consideration and ruled that the Colonial Metals was overruled because termination for convenience was allowed to be used as an exculpatory clause, available at the unlimited discretion of the contracting officer, without regard to situations and legal theory of risk allocation derived from Corliss.[210] Judge Bennett also clarified the concept of abuse of discretion. In his view that

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[207] 681 F.2d, supra note 200, at 762.

[208] 681 F.2d, supra note 200, at 762-763.

[209] 681 F.2d, supra note 200.

[210] 681 F.2d, supra note 200, at 767. There are no authorities cited in the Colonial Metals.

concept requires the existence of other limits. Abuse of discretion is a valuable doctrine to enable otherwise legal actions to be overturned if there seems some clear wrong, but it is not applicable to the actions which simply are not legal at all. Under the Torncello opinion, the government may not use the standard clause of termination for convenience to dishonor its contractual obligations with impunity.

Chief Judge Friedman joined in Judge Bennett's opinion but Judge Davis and Judge Nichols concurred with the result. Judge Davis did not agree with Judge Bennett's suggestion that the scope of the convenience-termination clause is presently narrower than it was during the World War II. In Judge Davis's opinion, the type of emergency procurement conditions during the War can be present in the post-war-period which means that the termination for convenience can be used in this era as it used to be. Judge Davis also disagree that an abuse of discretion is an inadequate general standard for gauging the contracting officer's use of the termination clause. For the contract clause in the case called for the use of termination when it was in the best interest of the government which can be comparable to the public interest standard used to control administrative rulings in the regulatory field.[211] Judge Davis did not agree

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[211] 681 F.2d, supra note 200, at 773.

that "bad faith" is as narrow as Judge Bennett said it is and he considered it a mistake to intimate that the convenience termination clause cannot be used when a better price appears after the contract is made.[212]

Judge Nichols concurred with the result and thought the court took a needlessly circuitous route to a destination. In his opinion, a termination of a contract for convenience is valid only in the absence of bad faith or a clear abuse of discretion.[213]

Torncello created the new era of the use of termination for convenience. The Government cannot use it freely as before. The FAR at that time provided that the government can terminate the contract "at any time" within the best interest of the government. Presently, the FAR provides that the government can terminate the contract "from time to time" within the best interest of the government. It seems to be less strict but the meaning is still unchanged. Even though Torncello seems to be a leeway for the contractor and limits the broadly use of termination for convenience, fewer cases follow it directly. Thus, the courts afterwards put more strict consideration on the government unilateral act of convenience termination.

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[212] 681 F.2d, supra note 200, at 773-774.

[213] 681 F.2d, supra note 200, at 774.

c. Post-Torncello Cases

The later opinion in Maxima Corp. v. United States[214] recognized the rule from Torncello that whether termination for convenience is actual or constructive, it is not of unlimited availability to the Government and it is not an open license to dishonor contractual obligations.[215] The Maxima court reversed a decision of the Board of Contract Appeals of the Department of the Interior which directed Maxima Corporation to return money back to the Government after a termination for convenience. Maxima Corporation had entered into the contract to provide typing, photocopying, editing and related services to the Agency. The minimum amount of work had been set and the Agency agreed to pay the annual minimum. The contract term was one year with two one-year options (or renewal by the Agency). The initial contract period was from October 1, 1981 to September 30, 1982. However, Maxima noted a concern that its services were being under utilized on the contract. Thus, on the completion of the work in October 1982, the unused contract minimum was billed to the Government and it was paid in December 1982. Nevertheless, the Agency told Maxima on November 16, 1983 that the contract was terminated for convenience on

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[214] 847 F.2d 1549 (Cl. Ct. 1988).

[215] Id. at 1553.

October 31, 1982, based on the Agency's failure to have ordered the contractual minimum amount of services during the contract term.

The issue on appeal was "whether the termination clause of the contract can be asserted retroactively when guaranteed minimum quantities have not been ordered."[216] The court conceded the termination for convenience is one of the few exceptions to the common law requisite mutuality of contract. But the court recognized the history of the termination for convenience which appeared as a legal concept after the civil war to facilitate putting a speed end to war production and also cited the historic review in Torncello. The court consequently stated: "[n]o judicial authority has condoned use of the convenience clause to create a breach retroactively, where there was none, in order to change the government's obligations under a completed contract."[217] In this case, the contract was fully performed on both sides and it also was properly awarded. Both parties to the contract were charged with knowledge of its terms. In the court's opinion, neither the contractor nor the government can avoid its legal

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[216] Id. at 1551.

[217] Id. at 1553-1554.

responsibilities by asserting ignorance.[218] The government was ignoring the minimum obligations as negotiated and agreed by both sides and then asking the court to declare the valid contract invalid. But the court recognized a fundamental obligation to interpret contracts so as to preserve their validity.[219] The court therefore, held that termination for convenience clause of contract could not be asserted retroactively when guaranteed minimum quantities under contract had not been ordered. Judge Nies, dissented in this case. In his opinion, the voucher and the payment were erroneous because Maxima was entitled to payment under the contract term only for services actually ordered by the government, performed by maxima, and accepted by the government. He concurred with the Board who upheld the government's entitlement on its claim for return of the erroneous payment.

A second post-Torncello case is Salsbury Industries v. United States. Salsbury and four other bidders were awarded the contracts for the manufacture and installation of aluminum post office lockboxes. Salsbury had to delivery 2,900 lockboxes for $9.7 million and it could have additional ten percent incentive payment for

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[218] Id. at 1556. The Government argued that the contracting officer erred because he did not know of the termination for convenience clause.

[219] Id. at 1556.

lockboxes delivered ahead of the schedule. Prior to the termination of the contract, Salsbury had delivered almost half of the lockboxes called for in the contract. Another contractor Doninger Metal PRoducts Corporation, had been disqualified at the bidding time by the contracting officer on the grounds that it was an irresponsible offeror. Doninger brought the suit against the United States in the District Court of Columbia challenging the nonresponsibility determination. It asked for an injunction to terminate all the contracts awarded under the solicitation and either a award a contract to it or a re-solicitation.

The district court gave judgement in favor of Doninger and stated that it had been unlawfully prevented from receiving a contract. The Postal Service was ordered to suspend the contract which was awarded and awarded the contract to Doninger instead.[220]

The Postal Service did not appeal. The Postal Service informed Salsbury of the litigation but Salsbury did not seek to intervene with the case between Doninger and the Postal Service. Following the court's injunction, Salsbury was notified to stop work and was terminated for convenience a couple of weeks later.

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[220]Doninger Metal Products Corp. v. United States Postal Service, No. 83-2725 (D.D.C. Jan. 9, 1984). The district court held that the contracting officer's finding of nonresponsibility was the product of an unlawful de facto suspension of Doninger by the Postal Service.

Salsbury sued the United States Postal Service for breach of contract. It also contended that it did not seek to intervene in Doninger's suit because the contracting officer said the suit was frivolous and had no bearing on Salsbury's contract.[221] Salsbury attacked the validity of termination because: 1) the contracting officer never made a determination that termination of contract was in the best interest of the Postal Service and 2) the termination was invalid and did not satisfy the legal requirements for a termination for convenience articulated in Torncello v. United States.

The Court of Claims gave the judgment that when faced with the court's injunction, the contracting officer was deemed to terminate the contract in the best interest of the Postal Service and of the Government. The Court of Claims attempted to distinguish the Salsbury from Torncello. In Torncello, the Navy had known at the time the contract was made that it could get pest control services more cheaply elsewhere. Furthermore, the contractor in Torncello did not perform any duties and the government did not make any payments under the contract. Both Salsbury and the Postal Service had given substantial performance. Salsbury delivered substantial goods and the Postal Service made substantial payment. The Court of Claims stated: "[s]ince the Postal Service

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[221]Salsbury Industries v. United States, 17 Cl. Ct. 47, 49 n.2 (1989).

cannot be said to have breached any obligation it owed directly to plaintiff under the contract, the government should not be prevented from exercising its rights under the contract's termination for convenience clause."[222] Salsbury's motion for summary judgment was denied and the Postal Service's cross-motion was granted. Salsbury appealed.

The Federal Court of Appeals stated that the Doninger injunction was a proper and sufficient basis for the termination of Salsbury's contract. Salsbury's argument that it was the foreseeable victim of the Postal Service's illegal conduct was rejected. In Torncello, the government entered into an exclusive requirements contract knowing that it could get the same service at cheaper price elsewhere. The Torncello court, thereupon, had held that the government could not avoid the consequences of ignoring its promise by hiding behind the convenience-termination clause. In contrast, the Postal Service entered into a definite quantity contract with intention to honor it. Torncello, therefore, was not relevant to the Salsbury case.[223] Because the termination for convenience was valid, Salsbury was not

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[222] Id. at 59.

[223] 905 F.2d 1518, 1521 (Cl. Ct. 1990).

entitled to payment on its claims and the judgment of the Court of Claims was affirmed.[224]

Judge Brian Barnett Duff, however, dissented. In his opinion, the issue of whether the Postal Service acted properly or not was not for the court to consider. The issue should be whether the Postal Service and Salsbury Industries intended to allow the Postal Service to terminate its contract with Salsbury with impunity under the circumstances presented in the case.[225] He believed that the court failed to give full consideration to what the parties intended. He stated: "The termination for convenience clause emerged as a response to problems which the government faced as far back as 1876." He also cited Torncello where specified that "courts do not apply the clause as broadly as an untutored reading of words might suggest."[226] According to Torncello, Government may not invoke standard termination for convenience clause to excuse a circumstance which it recognized at the time of contracting. But the court in Salsbury claimed that the Torncello stood for a much narrower proposition.[227] Judge Brian Barnett thought that the contracting officer

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[224] Id. at 1521.

[225] Id. at 1552.

[226] Id. at 1523. Accord. Torncello v. United States, 681 F.2d 756, 766 (Cl. Ct. 1982).

[227] 905 F.2d, supra note 223, at 1523.

should foresee that Doninger could have filed the suit and the court would order a remedy for Doninger. Thus, the Postal Service disregarded the risk and entered into the contract with Salsbury. Therefore, the Postal Service should not be able to use a termination for convenience clause to shift the risk to Salsbury and Salsbury was entitled to all the damages which it claimed.[228]

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[228] 905 F.2d, supra note 223, at 1524.

IV. CONCLUSION AND RECOMMENDATIONS

A. Pre-Award Stage

Going back as far as 1921, debarment and suspension was possible when it was in the interest of the Government. Under pressure from judicial rulings, the Government gradually amended its rules and regulations to give some procedural advantages to contractors. The Commission on Government Procurement, for example, was established. The intention behind the promulgation was depicted in glowing terms. In contrast, the results of the procedures effect the contractors negatively. The full trial-type hearing, which should have been afforded, is still not afforded to the contractors before the deprivations of their constitutional right under the government contract. Further, the consolidated list or the government-wide debarment and suspension has been created and is effective throughout the executive branch of the Government. Moreover, the decision whether to debar or suspend a contractor is made by the debarring officer or suspending officer who is an administrator and not a non-partial party like the administrative law judge.

The current rules and regulations do not adequately provide the procedural safeguard under the constitution. In order to conform with the constitutional due process of law, it is recommended as follows:

1. Wherever the deprivation of liberty (or property) right occurs in contracting with the Government, there should be the full trial-type hearing before deprivation of the right. The full trial-type hearing should be provided for either debarment or suspension.

2. In order to narrow the gap between the prolonged findings of non-responsibility and formal debarment and suspension, findings of non-responsibility should be made within the specified time period, not to exceed 30 days from the day the contractor was given a notice. Moreover, suspensions should not exceed 90 days and no suspension without a hearing.

3. Since debarment constitutes a stigma on the reputation of individuals, names should be added to the consolidated government-wide list only in the case of clear fraud or after the contractor is formally debarred under procedural due process of law. The consolidated list should distinguish between the contractors whose integrity is not in question but who was debarred by other reasons, and the contractor who lacks integrity.

4. Whether a contractor should be debarred or suspended should be first considered by an impartial

party like administrative law judge, not the administrative intra-agency personnel. This procedure would satisfy the requirements of impartiality which prompted the ABA to suggest the need for independent board.

B. Post-Award Stage

Termination for convenience has been created since the major war period. In 1869 the United States Supreme Court first established that the Government had the authority to terminate or to settle contracts but could not avoid all liability for refusing to perform. After the Civil War, later decisions of the United States Supreme Court established that the Government had right to terminate or suspend the contract when the contractual goods were no longer required because of the end of the war. Similarly, during the World War I and World War II, the Congress gave the Government the power to terminate the contract for its convenience with regard to the emergency. Thus, when the wars were over, the termination for convenience was still a clause incorporated to the contract. The convenience termination clause is embedded in the government-procurement regulations, i.e., the Armed Service Procurement Regulations and the Federal Acquisition Regulations. The termination for convenience has been used broadly and without regard to its roots in emergency

war-time. It has been used in both military and civilian procurement system during the peace time.

At present, the Government uses the convenience termination clause to exculpate itself from performing the contract especially where it errs. The courts have approved this expansion of the procedure. When the Government errs in default termination or the default termination is invalid, the courts convert the government's error into convenience termination. But the most questionable use of the convenience termination clause is to allow termination for contracts that are unfavorable economic deals even where there is no emergency and the Government still has need for the product or services involved. It is recommended that the court should limit the Government's broad use of the clause. The courts should concentrate on its historic use during the emergency war-time emergencies. Allowing use of the clause where the Government has simply made a contracting mistake unfairly deprives the contractor of the full profit to which it should be entitled.

APPENDIX A

The 1962 Report of the Administrative Conference of the United States

"Recommendation No. 29"

PART I - Procedural Fairness in the Debarment of Contractors

It is Recommended that:

29-1. (a) Except as provided in subparagraph (b) below, government debarment of an individual or firm from the contracts or subcontracts of a government department or agency or from participating in any federally assisted construction work should be preceded by (i) notice of proposed debarment to the parties in question, including all affiliated firms sought to be debarred, and (ii) opportunity to such parties to have a trial-type hearing before an impartial agency board or hearing examiner in the event there are disputed questions of fact relevant to the debarment issue.

(b) Debarments from government contracts and subcontracts made in conformity with subparagraph (a) above may be applied by other government agencies to their contracting and subcontracting without opportunity for an adversary hearing, but only after notice and opportunity to the parties concerned, including all

affiliated firms sought to be debarred, to explain why the debarment should not be so extended in whole or in part.

(c) Notices of proposed debarment should be supported by reasons.

(d) No agency should exclude or remove on grounds of lack of responsibility any individual or firm from any list of qualified persons eligible for government contracts or subcontracts except in conformity with the principles set forth herein in Recommendation No. 29-2 and Recommendation No. 29-3.

(e) The provisions of this Recommendation No.29-1 shall not apply to the individual rejection of any bid or proposal, the procedures for which are set forth in Recommendation No. 29-4.

29-2. (a) In cases of criminal conviction or civil judgment affecting an individual's or firm's present responsibility as a government contractor or subcontractor, or upon probable cause for belief that an individual or firm has committed fraud or has engaged in other conduct showing a substantial lack of present responsibility as a government contractor or subcontractor as determined in writing by the agency head or his designee, notice of proposed debarment may also provide for the temporary suspension of the individual or firm from further contracting or subcontracting with the government agency concerned pending administrative

determination of the debarment issue. Such suspensions should not exceed a reasonable time, and in no event should they exceed the time limits set forth in subparagraph (b) below.

(b) Any suspension authorized in accordance with subparagraph (a) above, should be subject to the following limitations.

(1) If a notice of suspension and proposed debarment is based in whole or in part upon alleged fraud incident to obtaining or performing a government contract or subcontract or upon any other alleged conduct showing a present lack of integrity or honesty as a government contractor or subcontractor and if within one year of such notice of suspension and proposed debarment the individual or firm concerned as been or is criminally charged by Federal indictment or information or has become or becomes a party to a suit involving the United States or its officers and the subject matter of such indictment, information or suit includes the substance of the reasons set forth in such notice of suspension and proposed debarment, the suspension may continue for the duration of any trial in a Federal court of first instance of the issue covered by such notice of suspension and proposed debarment and for 120 days thereafter (during which period any debarment action should be completed). However, if such indictment, information or suit is not returned or instituted within

one year of such notice of suspension and proposed debarment, the suspension should thereupon terminate, but without prejudice to any right of debarment, unless the Attorney General or his designee (but not below the level of an Assistant General) should determine and notify the head of the department or agency that issued the notice of suspension and proposed debarment, that disclosure, for purposes of administrative debarment from government contracting, of the Government's evidence of fraud or of lack of honesty or integrity on the part of the individual or firm concerned would be substantially harmful to the Government's law enforcement activities or to the successful criminal or civil prosecution of such individual or firm. If the Attorney General or his designee makes such a determination, the suspension may continue for a period not to exceed 18 months from the notice of suspension and proposed debarment and may continue for the duration of any trial if an indictment, information or suit is returned or instituted within such 18-month period, as provided in the first sentence of this subparagraph (b)(1). If a suspension is made or continued on the basis of such a determination, a further notice of suspension should be furnished to the individual or firm concerned. Nothing in this subparagraph (b)(1) shall prevent the reimposition of a suspension in accordance with subparagraph (a), above, whenever such indictment, information or suit is returned

or instituted, in which event the suspension may continue for the duration of any trial as provided in the first sentence of this subparagraph (b)(1), and any administrative trial-type hearing previously begun for the purpose of determining the related debarment issue will thereupon terminate without determination.

(2) If a notice of suspension and proposed debarment is issued for reasons other than those covered by subparagraph (b)(1), above, the period of suspension should not exceed 90 days. Suspension for such other reasons beyond 90 days (but not to exceed an additional 90 days) should not be imposed except upon a written determination by an official of the rank of Assistant Secretary, or the equivalent, of the reasons and necessity therefore, any continuations of such 90-day periods should be accompanied by new determinations of the same kind. A copy of each such determination should be furnished to the suspended individual or firm. In no event should suspension under this subparagraph (b)(2) exceed one year or be in addition to any period of suspension under subparagraph (b)(1), above.

29-3. Except as provided in Recommendation 29-2 and subject to Recommendation 29-4, the practice of summary suspensions of individuals and firms from Government contracting without notice and opportunity for a trial-type hearing should be discontinued.

29-4. Any government rejection of an otherwise successful bid or offer incident to obtaining a government contract or subcontract solely or primarily on the ground that the proposed contractor or subcontractor is believed to be lacking in business integrity or business honesty should be preceded by written explanation to such proposed contractor or subcontractor by the contracting officer of the reasons for that belief and by the opportunity for such proposed contractor or subcontractor to reply to the contracting officer within a reasonable period of time consistent with the need for making a contract or subcontract award in a timely manner.

29-5. Agency rules of procedure and practice in all types of debarments should be published, should be uniform to the extent practicable, and should provide for a fair and speedy determination.

29-6. Government debarment of an individual or firm from the contracts or subcontracts of a government department or agency or firm participating in any federally assisted construction work should be evidenced by a decision in writing, which decision sets forth findings and conclusions as well as the reasons or basis therefore. Such decision should be furnished to the debarred individual or firm. In cases of debarment following a trial-type hearing, all debarment decisions (including decisions to extend debarments in accordance

with Recommendation 29-1 (b)) should be published or, in accordance with published rule, made available for public inspection, except those which are required to be held confidential for good cause found by the agency head or his designee and therefore may not be cited as precedents.

PART II - Grounds and Scope of Debarment

It is Recommended that:

29-7. (a) All grounds for debarment should be explicitly set forth in appropriate agency regulations, which regulations should be published, and, to the extent practicable and desirable, be uniform.

(b) Such regulations should to the extent feasible set forth standards and criteria for (i) determining business affiliates of debarred firms and individuals, (ii) extending debarment to such affiliates, (iii) determining when fraud or criminal conduct of an owner, stockholder, officer, director, or employee will be imputed to a business firm or when termination of such person's relationship to the firm will avoid or remove debarment of the firm, and (iv) determining the scope of administrative debarments in terms of their applicability to all agency contracts or subcontracts with the debarred firm or individual or to particular types of contracts or subcontracts, or to contracts or subcontracts for particular products or services.

APPENDIX B

Section 52.249-2 of FAR (1990)

(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. The Contracting Officer shall terminate by delivering to the Contractor a Notice of Termination specifying the extent of termination and the effective date.

(b) After receipt of a Notice of Termination, and except as directed by the Contracting Officer, the Contractor shall immediately proceed with the following obligations, regardless of any delay in determining or adjusting any amounts due under this clause:

(1) Stop work as specified in the notice.

(2) Place no further subcontracts or orders (referred to as subcontracts in this clause) for materials, services, or facilities, except as necessary to complete the continued portion of the contract.

(3) Terminate all subcontracts to the extent they relate to the work terminated.

(4) Assign to the Government, as directed by then Contracting Officer, all right, title, and interest of

the Contractor under the subcontracts terminated, in which case the Government shall have the right to settle or to pay any termination settlement proposal arising out of those terminations.

(5) With approval or ratification to the extent required by the Contracting Officer, settle all outstanding liabilities and termination settlement proposals arising from the termination of subcontracts; the approval or ratification will be final for purposes of this clause.

(6) As directed by the contracting Officer, transfer title and deliver to the Government (i) the fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced or acquired for the work terminated, and (ii) the completed or partially completed plans, drawings, information, and other property that, if the contract had been completed, would be required to be furnished to the Government.

(7) Complete performance of the work not terminated.

(8) Take any action that may be necessary, or that the Contracting Officer may direct, for the protection and preservation of the property related to this contract that is in the possession of the contractor and in which the Government has or may acquire an interest.

(9) Use its best efforts to sell, as directed or authorized by the contracting Officer, any property of the types referred to in subparagraph (6) above;

provided, however, that the Contractor (i) is not required to extend credit to any purchaser and (ii) may acquire the property under the conditions prescribed by, and at prices approved by, the Contracting Officer. The proceeds of any transfer or disposition will be applied to reduce any payments to be made by the Government under this contract, credited to the price or cost of the work, or paid in any other manner directed by the Contracting Officer.

(c) After expiration of the plant clearance period as defined in subpart 45.6 of the Federal Acquisition Regulation, the Contractor may submit to the Contracting Officer a list, certified as to quantity and quality, of termination inventory not previously disposed of, excluding items authorized for disposition of, excluding items authorized for disposition by the Contracting Officer. The Contractor may request the Government to remove those items or enter into an agreement for their storage. Within 15 days, the Government will accept title to those items and remove them or enter into a storage agreement. The Contracting Officer may verify the list upon removal of the items, or if stored, within 45 days from submission of the list, and shall correct the list, as necessary, before final settlement.

(d) After termination, the Contractor shall submit a final termination settlement proposal to the Contracting Officer in the form and with the certification prescribed

by the Contracting Officer. The Contractor shall submit the proposal promptly, but no later than 1 year from the effective date of termination, unless extended in writing by the Contracting Officer upon written request of the Contractor within this 1-year period. However, if the Contracting Officer determines that the facts justify it, a termination settlement proposal may be received and acted on after 1 year or any extension. If the Contractor fails to submit the proposal within the time allowed, the Contracting Officer may determine, on the basis of the information available, the amount, if any, due the Contractor because of the termination and shall pay the amount determined.

(e) Subject to paragraph (d) above, the Contractor and the Contracting Officer may agree upon the whole or any part of the amount to be paid because of the termination. The amount may include a reasonable allowance for profit on work done. However, the agreed amount, whether under this paragraph (e) or paragraph (f) below, exclusive of costs shown in subparagraph (f)(3) below, may not exceed the total contract price as reduced by (1) the amount of payments previously made and (2) the contract price of work not terminated. The contract shall be amended, and the Contractor paid the agreed amount. Paragraph (f) below shall not limit, restrict, or affect the amount that may be agreed upon to be paid under this paragraph.

(f) If the Contractor and the Contracting Officer fail to agree on the whole amount to be paid because of the termination of work, the Contracting Officer shall pay the Contractor the amounts determined by the Contracting Officer as follows, but without duplication of any amounts agreed on under paragraph (e) above.

(1) The contract price for completed supplies or services accepted by the Government (or sold or acquired under subparagraph (b)(9) above) not previously paid for, adjusted for any saving of freight and other charges.

(2) The total of-

(i) The costs incurred in the performance of the work terminated, including initial costs and preparatory expense allocable thereto, but excluding any costs attributable to supplies or services paid or to be paid under subparagraph (f)(1) above;

(ii) The cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the contract if not included in subdivision (i) above; and

(iii) A sum, as profit on subdivision (i) above, determined by the Contracting Officer under 49.202 of the Federal Acquisition Regulation, in effect on the date of this contract, to be fair and reasonable; however, if it appears that the Contractor would have sustained a loss on the entire contract had it been completed, the Contracting Officer shall allow no profit under this

subdivision (iii) and shall reduce the settlement to reflect the indicated rate of loss.

(3) The reasonable costs of settlement of the work terminated, including-

(i) Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;

(ii) The termination and settlement of subcontracts (excluding the amounts of such settlements); and

(iii) Storage, transportation, and other costs incurred, reasonably necessary for the preservation, protection, or disposition of the termination inventory.

(g) Except for normal spoilage, and except to the extent that the Government expressly assumed the risk of loss, the Contracting Officer shall exclude from the amounts payable to the Contractor under paragraph (f) above, the fair value, as determined by the Contracting Officer, of property that is destroyed, lost, stolen, or damaged so as to become undeliverable to the Government or to a buyer.

(h) The cost principles and procedures of part 31 of the Federal Acquisition Regulation, in effect on the date of this contract, shall govern all costs claimed, agreed to, or determined under this clause.

(i) The Contractor shall have the right of appeal, under the Disputes clause, from any determination made by the Contracting Officer under paragraph (d), (f), or (k),

except that if the Contractor failed to submit the termination settlement proposal within the time provided in paragraph (d) or (k), and failed to request a time extension, there is no right of appeal. If the Contracting Officer has made a determination of the amount due under paragraph (d), (f), or (k), the Government shall pay the Contractor (1) the amount determined by the Contracting Officer if there is no right of appeal or if no timely appeal has been taken, or (2) the amount finally determined on an appeal.

(j) In arriving at the amount due the Contractor under this clause, there shall be deducted-

(1) All unliquidated advance or other payments to the Contractor under the terminated portion of this contract;

(2) Any claim which the Government has against the Contractor under this contract; and

(3) The agreed price for, or the proceeds of sale of, materials, supplies, or other things acquired by the Contractor or sold under the provisions of this clause and not recovered by or credited to the Government.

(k) If the termination is partial, the Contractor may file a proposal with the Contracting Officer for an equitable adjustment of the price(s) of the continued portion of the contract. The Contracting Officer shall make any equitable adjustment under this clause shall be requested within 90 days from the effective date of

termination unless extended in writing by the Contracting Officer.

(l) (1) ...

(m) ...

UNITED STATES GOVERNMENT CONTRACT: THE UNILATERAL ACT OF GOVERNMENT CONTRACTING

by

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1991

UNITED STATES GOVERNMENT CONTRACT:

THE UNILATERAL ACT OF GOVERNMENT CONTRACTING

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