What's Your Exit Strategy? How Government Contractors in Afghanistan Can Prepare Now for the United States' Impending Withdrawal

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President Joe Biden recently announced that United States forces will withdraw from Afghanistan by September 11, 2021, roughly twenty years after the war in Afghanistan began. With the departure date fast approaching, details of the United States' exit strategy have been sparse, particularly when it comes to the more than 18,000 government contractor personnel who are supporting U.S. missions in Afghanistan. Contractors currently provide the U.S. and Afghan governments a wide range of critical services, including base life support, maintenance of military equipment, transportation and logistics, fuel, and various categories of professional services, such as private security, military training, and translation.

The top priority in the coming months for the U.S. and its contractors will be to ensure that they get their personnel and property out of Afghanistan as safely and efficiently as possible. But before the dust settles on this precipitous exit, prime contractors and their subcontractors must also turn to evaluating and pursuing any requests for equitable adjustment or claims for payment arising from the termination, modification, or interruption of their contracts. In many cases, contractors and subcontractors will be entitled to compensation from the United States (or from each other), though they will have to satisfy certain contractual and legal requirements to recover. This alert explains how government contractors in Afghanistan can prepare now to maximize their recoveries and avoid unnecessary losses as the U.S. makes its departure from the country.

Contract Issues: Likely Scenarios and How to Prepare

Though the full details of the U.S. exit plan remain to be seen, one point already seems clear—the United States gradually will require less contracted support as the date for withdrawal draws closer. With "Go to Zero" operations now underway in Afghanistan, U.S. contracting officers have started to terminate, modify, or pause existing contracts due to declining demand for contracted support. The exact nature and timing of these actions will differ based on a variety of factors, such as a contract's terms and conditions and how long the U.S. government will need certain supplies and services. Decisions to continue contracted support for the Afghan government following the withdrawal will also determine the fate of particular contracts. Regardless, the U.S. government in most cases will use well-established procedures to wind down existing contracts. Below we outline several likely scenarios and provide guidance to help contractors prepare now.

Terminations for Convenience. In situations where the government no longer needs a contractor's support, the contracting officer will likely end the prime contract via a termination for convenience. For example, once U.S. personnel leave a given area, certain local support contracts (*e.g.*, for fuel delivery, translation services) may no longer serve a purpose and can be terminated in full. Similarly, if the U.S. plans to demobilize an operating base, the government may gradually draw down base life support contracts (*e.g.*, for food service, water production, billeting, power generation, laundry, operations, and maintenance) in a series of partial terminations for convenience.

A termination for convenience is formally initiated in a written Notice of Termination. The government has significant discretion to terminate a contract for its convenience, and contractors have limited options to overturn such a decision. Thankfully, virtually every standard termination for convenience clause is written with the goal of fairly compensating the contractor for work performed. Also, a contractor's past performance ratings generally should not suffer because of a termination for convenience. Upon receiving a Notice of Termination, a contractor should immediately review the notice and the terms of the applicable Termination for Convenience clause included in its contract or the Federal Acquisition Regulation (FAR). In most cases, the contractor will be required immediately to take the following actions:

- Stop work as stated in the notice (but continue any non-terminated portions of work).
- Place no further subcontracts or orders for materials, services, or facilities, except as necessary to continue performing any non-terminated portions of work.
- Terminate all subcontracts to the extent they relate to the terminated work.
- If directed by the contracting officer, assign all right, title, and interest of the contractor under the terminated subcontracts. In this scenario, the government will have the right to settle and pay any termination settlement proposals with such subcontractors.
- If the right to settle with terminated subcontractors is not assigned to the government, settle all outstanding liabilities and termination settlement proposals with such subcontractors (subject to approval and ratification by the contracting officer to the extent required by the government).
- Follow the contracting officer's instructions regarding the transfer, delivery, protection, preservation, disposition and sale of parts, completed work, supplies, materials, plans, drawings, information, and other property relevant to the contract.

See, e.g.., FAR 52.249-2, Termination for Convenience of the Government (Fixed-Price) (Apr. 2012); FAR 52.249-6(a)(1), Termination (Cost-Reimbursement) (May 2004); *see also* FAR 52.212-4(l), Contract Terms and Conditions—Commercial Items (Oct. 2018).

In a termination for convenience, a contractor generally is entitled to be paid for work performed, including a reasonable profit. Costs incurred as a result of a termination for convenience also are recoverable (*e.g.*, costs of terminating and settling subcontracts; accounting, legal, clerical, and other expenses reasonably necessary to prepare a termination settlement proposal; and storage, transportation, and other costs reasonably necessary to preserve, protect, and dispose of property). Contractors must keep in mind, however, that the exact amounts they can recover following a termination for convenience will vary depending on the contract type and the terms of the applicable termination for convenience clause. Therefore, a terminated contractor must carefully examine its contract and the pertinent termination clause before seeking any compensation from the government.

Following a termination for convenience, a contractor may request payment from the government of amounts owed and previously unpaid by submitting a termination settlement proposal to the contracting officer. Preparing an effective settlement proposal is a team effort and typically requires input from a company's contracts administration, program management, accounting, property management, and legal personnel. Under non-commercial item contracts, the proposal must be submitted within one year of the termination's effective date, unless extended by the contracting officer in writing. The contractor also must submit complete termination inventory schedules within 120 days of the termination's effective date. Most termination proposals are settled in a negotiated agreement or, if the parties fail to agree, through a unilateral determination by the contracting officer. In each case, the settlement amount may not exceed the contract price. If a contractor is dissatisfied with a contracting officer's unilateral settlement determination, it may appeal the decision under the contract's Disputes clause, either to a Board of Contract Appeals or the U.S. Court of Federal Claims.

Contractors tend to be most successful in such appeals when they can demonstrate that they:

- Complied with the terms of the Notice of Termination and the applicable Termination for Convenience clause.
- Met all relevant time deadlines, including for the submission of a termination settlement proposal, termination inventory schedules, responding to government requests for information, and appeals to the appropriate tribunal.
- Accurately and comprehensively tracked all costs arising from the termination.
- Took reasonable steps to minimize costs, including with respect to subcontractors.

- Incurred the requested amounts due to the government's termination decision.

The government's termination of a prime contract also can have significant ramifications for subcontractors. Many prime contractors use a standard FAR termination for convenience clause in subcontracts or incorporate a tailored version that allows the prime to terminate for its convenience to the same extent as the government. But some primes fail to include an appropriate termination clause in their subcontracts or improperly invoke the right to terminate in circumstances not covered by the provision they have included. With potentially significant sums at stake, a subcontractor should not accept a termination for convenience without first assessing its contractual rights. Upon receiving a notice of termination from a prime, subcontractors should carefully review the terms of the subcontract termination for convenience clause (if any). This review should focus on determining if the prime's actions are justified or if the purported termination constitutes an actionable breach of the subcontract.

Written Change Orders and Constructive Changes . The rapid drawdown of U.S. resources from Afghanistan will create a highly fluid situation over the next several months and, to keep pace, the government may direct contractors to perform tasks or in ways that differ from the stated requirements of their contracts. For example, the U.S. may instruct a contractor to relocate equipment or perform services in areas or under conditions not contemplated by the contract. The U.S. government also could direct the contractor to provide its services to other U.S. or allied entities or to support Afghan personnel during or even after the withdrawal. In a perfect world, the contracting officer would provide such direction in a written change order, as contemplated in clauses such as FAR 52.243-1, Changes-Fixed-Price (Aug. 1987), FAR 52.243-2, Changes-Cost-Reimbursement (Aug. 1987) and FAR 52.243-3, Changes-Time-and-Materials or Labor-Hours (Sep. 2000). These clauses allow the government to make changes within the general scope of the contract, including (as applicable) changes to contract drawings, designs or specifications, method of shipment or packing of supplies, place of delivery, description of services, or time or place of performance. Generally, if such a change causes an increase or decrease in the cost of or the time required for performance, the contractor will be entitled to an equitable price or schedule adjustment. A contractor must assert its right to such an adjustment within 30 days of receiving the written change order. Ideally, the contractor and the government would then negotiate the request for equitable adjustment (REA) to a mutually agreeable resolution.

But circumstances may not be "ideal" in what promises to be a quick departure, and the government could also make contract changes without the issuance of a formal written order. Such "constructive changes" occur when a contractor is forced to perform work not required by the contract and the new work was either informally ordered by the government (*e.g.*, through an oral or written act or omission) or caused by government fault. A constructive change may entitle the contractor to an equitable price or schedule adjustment and can be asserted in an REA to the contracting officer. Tribunals have found constructive changes where the government improperly interprets a contract, impedes or fails to cooperate with a contractor's performance, prevents the contractor from performing efficiently, provides defective specifications, fails to disclose superior knowledge, or speeds up the contractor's timeline for performance. For example, with a looming exit deadline from Afghanistan, contracting officials may accelerate a contractor's work by exerting pressure on the company to deliver earlier than required by the contract. The government may also withdraw certain contractually required support that is intended to facilitate the contractor's performance (*e.g.*, individual protective equipment, force protection, evacuation services, clothing, weapons, mortuary affairs), or interpret the contract in a way that makes it more costly for the contractor to continue or end its work.

Whether arising from a formal change order or a constructive change, if the parties do not reach agreement on an REA that is satisfactory to the contractor, the contractor may prepare and submit a claim under the contract's Disputes clause. This clause outlines the procedures for filing such claims with the contracting officer pursuant to the Contract Disputes Act of 1978 (CDA). See FAR 52.233-1. A contractor also may convert an REA into a claim at any time or skip the REA process entirely and simply submit a claim with the contracting officer. In each case, the contractor's claim must satisfy the requirements of the CDA, including the requirement to demand payment of a "sum certain" and to properly certify any claim seeking more than $100,000. Further, to be considered timely, a contractor must assert a CDA claim within six years from the date of accrual, as defined in FAR 33.201. If the contracting officer denies a claim (or fails to issue a decision within 60 days), the contractor may appeal the decision to an appropriate Board of Contract Appeals or the U.S. Court of Federal Claims. In CDA appeals involving changes or constructive changes, contractors are most successful when their underlying claim:

- Is supported by comprehensive, contemporaneous documentation.
- Describes the government actions and inactions that caused the contractor's increased costs or delays.
- Asserts the various facts and alternative legal theories they are likely to raise on appeal.
- Seeks costs that are allowable, as defined in FAR 31.201-2.

Subcontractors also can be greatly impacted by government-directed changes and constructive changes. But because they lack privity of contract with the government, subcontractors typically must first submit REAs and claims to the prime contractor, which can then choose to make a "sponsored" submission to the government. Subcontractors also should keep in mind that, in some cases, the prime contractor may have caused a change or even assumed some of the contractual risk for government-caused changes (*e.g.*, promising to work with the government to provide base access or force protection to subcontractor employees). Therefore, if faced with a change, a subcontractor should carefully review the terms of its subcontract to determine if it may also have recourse against the prime.

Suspension of Work or Stop-Work Orders . Given the many unknowns in Afghanistan over the coming months, the government may not yet know if or how long it will need a given contractor to continue performing. For example, as the U.S. solidifies plans for its post-withdrawal role in the region, the government may be unsure if it will extend or assign certain contracted services for the benefit of the Afghan government (*e.g.*, facilities construction, military training, military equipment maintenance, logistics, and transportation support). In these circumstances, the contracting officer may look to temporarily pause a contract until the government decides whether to continue or terminate such an agreement. To implement such a pause, a contracting officer may invoke the contract's Suspension of Work (FAR 52.242-14 (Apr. 1984)) clause (required in fixed-price construction and architect-engineer contracts) or Stop-Work Order (FAR 52.242-15 (Aug. 1989)) clause (required contracts for supplies, services, and research and development). This typically is done in writing, though government personnel also can initiate a "constructive suspension" by their words and actions.

Under the Suspension of Work clause, the government may "suspend, delay, or interrupt all or any part of the work [under a contract] for a period of time that the Contracting Officer determines appropriate for the convenience of the Government." FAR 52.242-14(a). The contractor is entitled to a price or schedule adjustment, however, if the contract is paused for "an unreasonable period of time" due to the actions or inactions of the contracting officer. Similarly, under the Stop-Work Order clause, the contracting officer may halt all or part of the work on a contract for up to 90 days or any "further period" agreed upon by the parties. See FAR 52.241-15(a). If the government lifts the order, the contractor must resume performance. Regardless, the contractor is entitled to a price or schedule adjustment (or both) if the stop-work order increases the time needed to perform, or the costs properly allocable to, any portion of the contract. The contractor must request an equitable adjustment within 30 days after the end of the period of work stoppage. Like any other REA, such a request must be well-documented and carefully connect the dots between the government's actions and the increased costs or delays incurred by the contractor. Prime contractors often flow down the suspension of work and stop-work order clauses to subcontractors or otherwise instruct subcontractors to pause work when directed by the government. Depending on the terms of the agreement, such direction from a prime may entitle the subcontractor to its own equitable price or schedule adjustment.

Operational Issues: Likely Scenarios and How to Prepare

Apart from the contracting issues discussed above, contractors in Afghanistan will soon face a host of operational challenges caused by the U.S.'s withdrawal. Below we discuss a few of these challenges, focusing on likely scenarios that could most directly impact contractor personnel and property.

Demobilization and Redeployment. Contractors and subcontractors currently have personnel, equipment, and other tangible assets located throughout Afghanistan. When it comes to equipment and tangible assets, some contracts may contain explicit demobilization instructions, but many contracts will not. In the absence of clear written guidance, contractors should initiate

discussions with authorized U.S. contracting officials about the government's plans to demobilize specific sites. As part of these discussions, contractors should request government direction on when to demobilize their equipment and assets, the specific locations and areas to which those items should be relocated, and the means for transporting and securing them in transit and at each destination along the way. With respect to personnel, contractors should initiate similar discussions with the government, focusing on applicable contract requirements (*e.g.*, DFARS 252.225-7040, Contractor Personnel Supporting U.S. Armed Forces Deployed Outside the United States) and theater-specific guidance issued by the military. For example, on April 20, 2021, Army Contracting Command-Afghanistan issued a memorandum with detailed procedures for redeploying contractor personnel through an "established redeployment theater gateway cell" located at Bagram Air Field (also known as Bagram Airbase). Among other guidance, the memorandum emphasizes the importance of maintaining accurate contractor data in the Synchronized Pre-deployment & Operational Tracker (SPOT), the Department of Defense (DoD) database for tracking personnel during stability operations.

Physical Security and Force Protection. Following the U.S.'s announcement in mid-April that it would not meet its original withdrawal deadline of May 1, 2021, the Taliban threatened to take countermeasures against "the occupying forces" and the Afghan government. A few weeks later, on April 27, the U.S. Embassy in Kabul issued a security alert stating that it had ordered the evacuation of non-essential embassy personnel and urging U.S. citizens to depart the country as soon as possible. Then last week, Taliban fighters launched attacks throughout Afghanistan, including a major offensive in the southern Helmand province, according public reports. If these recent events are any indication of what lies ahead, the need for physical security in Afghanistan will be at an even higher premium in the coming months. Current DoD policy states that military force protection will be provided to contractors if it is not operationally or cost-effective for contractors to provide their own security. This includes situations where security conditions deteriorate so badly that the U.S. military must step in to protect contractors. But with contractors greatly outnumbering available U.S. troops in Afghanistan (approximately 18,000 to 2,500 or a ratio of 36 to 5), the U.S. military would be hard-pressed to provide all the necessary force protection on its own. As such, contractors may also need to rely on a combination of Afghan military forces, private security companies, and their own armed personnel for security. If you are a contractor in Afghanistan and have not already done so, you should immediately plan and arrange for your physical security needs during the withdrawal. This should include consideration of static security at locations housing company personnel and property (however temporary), as well as movement security while traveling by ground or air.

Government and Contractor Property. Withdrawing from an unstable environment that is controlled by a foreign sovereign can create tricky questions about the appropriate disposition of property such as equipment and facilities. The rules addressing the management and disposition of U.S. government-furnished property (GFP) are well-established and contractors and subcontractors in Afghanistan should take the time now to carefully review any GFP clauses included in their contracts. *See, e.g.*, FAR 52.245-1, Government Property (Jan. 2017). But contractors should not assume that it will be easy to implement those rules as the U.S. prepares to exit. The government in some instances will want GFP to be transported out of the country for reuse, while in others it may decide to abandon or transfer the property to the Afghan government or other entities. These decisions may change, be delayed until the eleventh hour, or encounter practical barriers (*e.g.*, closed roads, dangerous conditions). In all cases, however, the key to minimizing losses is early, continuous, and documented communication with the government about its plans for GFP. Initiating these discussions now will help avoid misunderstandings down the road. These discussions also should address plans for any contractor-owned equipment, facilities, and other assets which may have been leased by or operated for the benefit of the U.S. government. In the past, miscommunications with the U.S. government have resulted in contractor-owned property being taken by or turned over to the host nation, requiring the owner to then seek relief from the courts. *See, e.g., Langenegger v. United States*, 756 F.2d 1565 (Fed. Cir. 1985); *Kuwait Pearls Catering Co., WLL v. United States* , 145 Fed. Cl. 357 (2019). The preferable approach, of course, is to proactively engage your U.S. government counterparts and avoid any misunderstandings altogether.

Conclusion

With less than five months before the United States' scheduled withdrawal, government contractors in Afghanistan will soon face a wide range of complex contractual and operational challenges. Many of these challenges will be unavoidable and may not materialize for some time, but as explained above, contractors can and should take practical steps now that will protect their personnel,

property, and bottom line if and when those challenges do arise.

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