This article appeared in the Winter 1997 issue (Vol. 7, No. 4) of *The Federal Bar Journal*

From *Torncello* to *Krygoski*: 25 Years of the Government's Termination for Convenience Power

Joseph J. Petrillo and William E. Conner
Petrillo & Powell, P.L.L.C.

One of the distinguishing aspects of federal contracts is the government's ability to terminate a contract for its "convenience." The term "convenience" is obviously broad; its dictionary meaning includes "anything that saves or simplifies work. . . ."[(1)] The regulations implementing this power contain no limits on when this power may be exercised.[(2)] Accordingly, the task of bounding the power to terminate a contract for convenience has fallen to the courts and the boards of contract appeals.

The recent decision by the United States Court of Appeals for the Federal Circuit in *Krygoski Construction Co., Inc. v. United States*[(3)] is the latest in a long line of federal court and administrative decisions which grapple uneasily with precisely what limits to impose on this broad power. The need for a limit on the government's power to terminate contracts for its convenience is the legacy of the 1982 decision of the U. S. Court of Claims in *Torncello v. United States*,[(4)] the first court decision to hold that a termination for convenience was improper and therefore constituted a breach of contract. The *Torncello* opinion was motivated, at least in part, by the concern that some limits on this power were necessary in order to preserve the enforceability of government contracts.

The scope and teaching of *Torncello* has proven to be less than crystal, however, due, in large measure, to the lack of a majority opinion. Even with this uncertainty, we believe that the *Krygoski* decision marks a retreat from the limits sketched by *Torncello* and reinforces a broader governmental power to terminate for convenience. In doing so, it invites revisiting the issues which arise from an virtually unlimited power to terminate for convenience.

In Part I of this article we trace briefly the development of the termination for convenience concept and contract clause. In Part II we critically examine the decision in *Torncello*. In Part III we review how the courts and boards have applied the teachings of *Torncello* leading up to the *Krygoski* case. In Part IV

of the article we review the *Krygoski* case and analyze the appellate court's opinion. Finally, in Part V we offer recommendations to regarding the future of termination for convenience.

I. ORIGINS AND DEVELOPMENT OF TERMINATION FOR CONVENIENCE

A. Evolution as a Wartime Remedy

The notion that the federal government needs extraordinary flexibility in its contractual obligations, including the ability to end them without incurring breach damages, is an old one. Although its precise origins are unclear, the termination for convenience concept appears to date to the Civil War in connection with the need to bring a quick end to wartime production.[(5)] With regard to certain wartime contracts, Rule 1179 of the Civil War era Army Regulations directed that such contracts "shall expressly provide for their termination at such time at the Commissary-General may direct."[(6)]

In 1875, the Supreme Court recognized the government's right to termination for convenience in *United States v. Corliss Steam-Engine Co.*,[(7)] which acknowledged the need for military departments to modify, suspend or settle contracts for armaments due to "contingencies," including the rapid pace of technological improvements. The Court explained as follows:

With the improvements constantly made in ship-building and steam-machinery and in arms, some parts originally contracted for may have to be abandoned, and other parts substituted; and it would be of serious detriment to the public service if the power of the head of the Navy Department did not extend to providing for all such possible contingencies by modification or suspension of the contracts, and settlement with the contractors.[(8)]

During and following the First World War, many contracts were terminated for the government's convenience, pursuant to both statutory and regulatory authority. For example, the Urgent Deficiency Appropriation Act granted the president authority "to modify, suspend, cancel or requisition any existing or future contract for the building, production, or purchase of ships" or other material, although the Act required the government to provide just compensation to contractors.[(9)] Another statute, the Dent Act,[(10)] was enacted in response to a decision by the Comptroller of the Treasury which denied termination settlements for certain "informal" wartime contracts (*i.e.*, contracts awarded hastily without full observation of procurement regulations).[(11)] The Dent Act authorized the Secretary of War to compensate contractors under

wartime agreements, however informally executed, but prohibited recovery of anticipatory profits.

During World War II, a mandatory termination clause was incorporated into War Department fixed-price supply contracts.[(12)] This clause was later revised to allow for negotiated settlements.[(13)] In 1944, the Contract Settlement Act established the Office of Contract Settlement within the War Department to oversee wartime contract terminations.[(14)] One year later, an Appeal Board was created within the Office of Contract Settlement as an "independent quasi-judicial agency" to hear contractor appeals arising from terminations.[(15)]

Following World War II, the termination for convenience concept spread, first into peacetime contracts, then into non-military contracts as well.[(16)] In 1954, the Armed Services Procurement Regulation ("ASPR") mandated termination for convenience clauses in most Department of Defense ("DOD") contracts valued in excess of $1,000.[(17)] As early as 1964, the Federal Procurement Regulation ("FPR"), applicable to "civilian" contracts, provided that optional termination for convenience clauses should be used "whenever an agency consider[ed] it necessary or desirable."[(18)] Then in 1967, the FPR was soon amended to make termination for convenience clauses mandatory in most fixed-price supply contracts and fixed-price construction contracts valued over $2,500 and $10,000, respectively.[(19)] Today, the termination for convenience clause is mandatory in most federal contracts.[(20)]

B. Constructive Termination for Convenience

Convenience termination also evolved into a mechanism to reduce government liability for breach of contract.[(21)] When a termination for default lacks a legally adequate basis, courts and boards have exculpated the government by holding that, although it did not, the government *could have* terminated the contract for its convenience.[(22)] The result of this "constructive" termination for convenience is that the wronged contractor is denied damages for a breach of contract.[(23)]

The roots of this doctrine may lie in the venerable decision in *College Point Boat Corp. v. United States*,[(24)] in which the Supreme Court held that actions by a contracting party may be supported at a later date by any reason that could have been advanced at the time of the actions, even though the party was not then aware of it.[(25)] To take full advantage of this power, the government drafted a standard contract clause.[(26)]

Under this provision, whenever a contracting officer terminates a contract for reasons which are later determined to be legally inadequate, a default

termination is "converted" to one for the convenience of the government. As a result, "the rights and obligations of the parties [are] the same as if the termination had been issued for the convenience of the Government."[(27)] Thus, a contractor's recovery for an improper default termination is limited to its recovery under the termination for convenience clause -- recovery of costs incurred, profit on completed work, and termination proposal preparation costs. Since recovery of anticipatory profits is precluded, the government is insulated from paying breach damages in situations where a private party would have to pay them.[(28)]

Whether this is a just or wise result deserves an analysis beyond the scope of this paper. However, we do touch on one aspect of it below, the situation in which a termination for default is the result of bad faith conduct by the government.

C. Convenience Termination as a Feature of Contracts Lacking a Termination Clause

In 1963, the Court of Claims held that termination for convenience was a "deeply ingrained strand of public procurement policy."[(29)] In fact, it was considered so consequential to modern government contracts that, under the "*Christian* doctrine," the termination for convenience clause is read into a contract, by operation of law, even if contracting officials omit it.[(30)] Thus, not even the omission of the appropriate contract clause will deny the government the benefits of the ability to terminate a contract for its convenience.

In short, what had started as a way to ease the transition from war to peace had become, without any action by Congress, almost universal immunity from damages for breach of contract. The growth of this doctrine, however, ultimately reached its apogee, and the search for limits began.

II. DEVELOPMENT OF LIMITATIONS ON THE GOVERNMENT'S ABILITY TO TERMINATE CONTRACTS FOR ITS CONVENIENCE

A. The Pre-*Torncello* Era

Prior to June 1982, various judicial and administrative decisions suggested that a contractor could successfully prevail in challenging a termination for convenience only by demonstrating bad faith or a clear abuse of discretion on the part of government officials.[(31)] None of these cases, however, actually found that such the circumstances presented amounted to either.

An argument based upon bad faith carries an extremely heavy burden of proof. Federal government officials enjoy a strong (but presumably rebuttable) presumption of acting in good faith.[32] Overcoming this presumption means that a contractor must establish "well-nigh irrefragable proof"[33] by presenting evidence of "specific intent to injure the plaintiff."[34] Not surprisingly, a case founded upon bad faith was (and remains) seldom successful.

Moreover, there is a good deal of controversy about what is necessary to show an abuse of discretion in a contracting context. This standard is sometimes equated with a finding that a government official's actions were "arbitrary and capricious."[35] In some cases, the abuse of discretion standard is so strictly applied that it is either the equivalent of bad faith or a showing that there is no reasonable basis for the government's decision,[36] while in other cases the two standards are treated separately.[37]

The court's opinion in *Colonial Metals Co. v. United States*[38] illustrates how pervasively the power to terminate for convenience insulated the government from damages for breach of contract. There, the Navy awarded a contract to Colonial Metals Co. ("CMC"), a copper dealer operating on the secondary market, for a large but disputed amount of copper ingots. CMC ordered the required amount of ingots, but one month later, the Navy terminated the contract for convenience in order to buy the copper from another supplier at a much lower price. CMC's claim for damages failed at both the Armed Services Board of Contract Appeals ("ASBCA") and the Court of Claims. The court ruled that where "the contracting officer knew of the better price elsewhere when he awarded the contract to plaintiff -- in the absence of some proof of malice or conspiracy against the plaintiff [citation omitted] -- means only that the contract was awarded improvidently and does not narrow the right to terminate."[39] The court went on to explain the government's termination power as follows:

Termination for convenience is as available for contracts improvident in their origin as for contracts which supervening events show to be onerous or unprofitable for the Government. Absent bad faith, therefore, or some other wrong to the plaintiff or illegal conduct such as does not appear here, the Government alone is the judge of its best interest in terminating a contract for convenience, pursuant to the discretionary power reserved by the clause to the Government's contracting officer. Accordingly, no breach took place by the termination, and the plaintiff became entitled only to the costs and profits allowed on a termination for convenience.[40]

Thus, the doctrine of convenience termination seemingly gave the government a unilateral right to repudiate contracts -- even retrospectively -- at any time, for any reason, and without paying damages. Only two circumstances with almost impossibly heavy burdens of proof, bad faith and abuse of discretion, provided even a theoretical a basis for invalidating a termination for convenience.[(41)] Under these circumstances, a government contract began to look like a very different specimen from what the common law regarded as a binding agreement.[(42)] The government's obligations had become so diluted, that it seemed the standard government contract might fail for lack of consideration.[(43)]

B. The *Torncello* Case

In 1982, however, the Court of Claims changed the landscape of convenience termination litigation. In *Torncello v. United States*,[(44)] a plurality opinion by three of the six judges held that, for a termination for convenience to be valid, there must exist some change in the circumstances or the parties' expectations after award to warrant the termination. The other three judges concurred in the result, but not in the reasoning. As we shall see, the fact that *Torncello* was a plurality, rather than a majority, opinion has contributed to the misunderstanding and misapplication of court's ruling.

Briefly, in *Torncello*, the Navy entered into a one-year, twelve-item contract awarded on an "all or none" basis with Soledad Enterprises, Inc. ("Soledad")[(45)] for ground maintenance and refuse removal services for six Navy family housing facilities in San Diego. Although its price was advantageous for the contract as a whole, Soledad charged a very high rate for one of the twelve items, pest control services. The Navy never ordered the pest control services from Soledad, choosing to perform the work more cheaply in-house. The contract was subsequently terminated for default, and Soledad appealed the termination to the ASBCA.[(46)]

1. The ASBCA Decision

Soledad argued before the Board that it had a requirements contract obligating the government to procure all of the services required of the type covered under the contract from it. By obtaining pest control services from the Navy's own Department of Public Works, Soledad contended, the Navy had breached the contract to procure such services only from Soledad. The Board, however, found it "unnecessary" to rule on this point, and held that even if it was a requirements contract, the Navy's failure to order work under the contract did not constitute a breach because the Navy could have terminated the contract for

convenience. Thus, the Navy's failure to abide by the terms of its contract with Soledad constituted a "constructive" termination for convenience. Further, because Soledad's contract incorporated the Federal Acquisition Regulation's ("FAR") "short form" convenience termination clause,[47] which expressly limited recovery to payment for services rendered only up to the time of termination, and as the Navy had not ordered pest control services from Soledad, the Board held that Soledad was not entitled to any recovery.[48]

2. The Court of Claims Decision

On appeal to the Court of Claims, the court heard the case *en banc* "because of the exceptional importance of the legal issues involved."[49] Three of the six judges[50] held that Soledad's contract was a requirements contract, that the Navy's failure to order work under the contract was a breach, and that the Navy could not rely upon the termination for convenience clause to escape liability. Importantly, this plurality opinion by Judges Bennett, Kashiwa and Smith observed that if the government's power to terminate contracts for its convenience were unlimited, then its contracts would be illusory for lack of consideration. "We note as one of the elementary propositions of contract law that a party may not reserve to itself a method of unlimited exculpation without rendering its promises illusory and the contract void, and we question if the government's termination for convenience clause should be construed that broadly."[51]

The plurality found the solution to this conundrum in its view of the history of the clause. The opinion concluded that the clause, properly invoked, was a tool to extricate the government from a contract, without a breach, when there was a change in circumstances subsequent to award (*e.g.*, such as the end of hostilities in a war time contract): "[W]e must read the termination for convenience clause in Soledad's contract to require some kind of change from the circumstances of the bargain or in the expectations of the parties. These are just the historical limits on the use of the clause as they have developed from*Corliss*."[52] The Court's opinion also overruled *Colonial Metals Co. v. United States*.[53]

Although the three other sitting judges of the court concurred in the result, each wrote a separate opinion. The difficulty in harmonizing these four opinions has led to confusion and controversy. The basic division between the plurality and two of the three concurring opinions is over what is and is not sufficient to constitute "bad faith" (Judge Davis) or "abuse of discretion" (Judge Nichols).

The plurality does not define these terms as broadly as these two concurring judges, and so they place a different slant on their rulings.

As we read the opinions, however, a majority of four judges espoused in some form the "changed circumstances" test. Judge Davis's concurring opinion phrases his view of the *Torncello* circumstances as amounting to bad faith. The crux of the matter is that the government cannot avoid its liability for a breach through its power to terminate for convenience where it terminates the contract to take advantage of a better price known before the award of a requirements contract. Since the contracting officer knew of the motivation for the termination -- the better price -- before award, the termination was not due to or justified by a changed circumstance fundamental to the contract.

Indeed, one area of disagreement between Judge Davis and the plurality opinion is whether the government could properly terminate a contract to take advantage of a better price appearing for the first time after contract award. Judge Davis's objection to the plurality's *dictum* that this would be improper stresses that "a better price appearing [after contract execution] appears to be . . . a change in conditions."[(54)]Thus, a faithful reading of *Torncello* finds a majority of four of the six judges in favor of requiring *some* change in circumstances before approving a termination for convenience.

However, the two additional concurring opinions are harder to square with the others. Judge Nichols focuses on the "all or none" aspect of the contract, and finds it improper for the government to terminate a portion of such a contract to enjoy a better price, while retaining the benefit of the rest of the contract.[(55)] The government's foreknowledge of this better price is never mentioned, and so Judge Nichols seems at odds with both the plurality and with Judge Davis's decision. Of the four opinions. the concurrence of Judge Nichols is potentially the most revolutionary. The principle he enunciates and would establish that the "administration of the contract must be consistent with the rules used in evaluating bids."[(56)] Following this idea to its logical conclusion might impose numerous limits on the government's ability to administer contracts.

The last concurring opinion, that of Chief Judge Friedman, is the shortest and most cryptic of all. It reads in pertinent part: "when the government enters into a requirements contract, knowing that it can obtain an item the contract covers for less than the contract price and intending to do so, there cannot be a constructive termination for convenience of the government when the government follows that course."[(57)]Because of the extreme brevity of this

concurrence, it is the least informative as to what are the proper boundaries for convenience termination. Although the proposition advanced by the Chief Judge has been characterized by the Federal Circuit as "unremarkable,"[(58)] it contains not even a single citation to a prior opinion which might support this holding, even in *dictum*. Ironically, this opinion, the shortest of the four by far, has proved to be the most influential, yet why this is so remains puzzling. As Professor Cibinic perceptively points out, the "intending to do so" language quoted above from Chief Judge Friedman's concurring opinion is not supported either by the other opinions in *Torncello* or by the ASBCA's findings of fact.[(59)] Chief Judge Friedman appears to have been transfixed by the repeal of *Colonial Metals*(where there was foreknowledge of a better price), that he lost sight of the case before him.

III. APPLICATION OF *TORNCELLO*

For the most part, the courts and boards of contract appeals have struggled with the proper scope and application of the holding in *Torncello*. The case's forcefulness is diminished by its plurality, rather than majority, opinion, which has resulted in confusion over precisely what *Torncello* teaches. As a result, two views have emerged from *Torncello* regarding convenience terminations. The broad view of*Torncello* limits the government's use of the convenience termination clause to situations in which the circumstances surrounding the parties' bargain at the time of contract award change unexpectedly.[(60)]

Under the narrow view of *Torncello*, only bad faith or abuse of discretion limits the government's discretion to terminate a contract for convenience.[(61)] As the decided cases have turned out, the only clear indication of bad faith or abused discretion is where there is proof that government intended to terminate for convenience even before it entered into the contract. Ironically, it is not clear that the plaintiff in*Torncello* could have met this narrow view. Only two of the judges who decided that case -- Davis and Nichols -- held that the government's conduct had amounted to either bad faith or abuse of discretion, and even then, neither could agree on what those terms meant in this context.

According to Professor Emeritus John Cibinic, "*Torncello* has been cited for various legal propositions in 90 board of contact appeals decisions, 46 Claims Court and Court of Federal Claims decisions, and 12 Federal Circuit decisions."[(62)] These cases, however, generally arise under a few repetitive circumstances, and can be analyzed in this manner.

A. Improper Diversion Under Requirements Contracts

Torncello involved a requirements contract, and most fundamentally, stands for the proposition that, when the government diverts its contracted requirements to another contractor or meets these same needs internally, there is a breach of contract. This proposition continues to be followed, at least by the boards of contract appeals, which award the contractor lost profits in such circumstances.[(63)]

B. Improvidently Awarded Contracts

The scope of the power to terminate for convenience also is at issue when the government tries to extricate itself from a contract it has awarded improvidently. This can happen, for instance, when a bid protest is upheld, or when the government seeks to resolve a bid protest, before decision, by a settlement, or when the contracting agency simply has second thoughts about the legality of a contract award.

In *Nationwide Roofing & Sheet Metal Co. Inc. v. United States*,[(64)] the Claims Court, relying on *Torncello*, held that the government could properly utilize the termination for convenience clause to cure a defective contract award, at least where a formal bid protest has been upheld. The Air Force had awarded a contract for roof repair and replacement to the lowest bidder. That bidder, however, had submitted its bid bond guarantee on the wrong form and the contracting officer determined that this deficiency rendered its bid nonresponsive. The contracting officer made award to the second-lowest bidder, and the rejected bidder filed an agency-level protest. The Air Force sustained the protest and terminated the contract for convenience, awarding the contract to the low bidder. The terminated contractor protested to the General Accounting Office, but lost. It then filed suit in the Claims Court, arguing that under *Torncello* the court should invalidate the convenience termination because the government "knew or should have known" that the low bid was nonresponsive all along. The court disagreed, holding that it was consistent with *Torncello* to "utiliz[e] the termination for convenience clause to limit the government's liability and to correct an improper contract award in order to preserve the integrity of the competitive procurement process." [(65)]

The following year in *Salsbury Indus. v. United States*,[(66)] the Claims Court upheld a convenience termination resulting from a similar court decision involving a bid protest. In *Salsbury*, the contractor brought a breach of contract action after the Postal Service terminated its contract for convenience to comply with a District Court injunction requiring the Postal Service to award the contract to a previously disqualified offeror or to resolicit the procurement.

In sustaining the subsequent convenience termination, the *Salsbury* court explained that: "*Torncello* only requires that the events that provoke the government's conclusion that termination is in its best interests be unexpected, *i.e.*, inconsistent with the assumption of the parties when they entered the contract. It does not require that the events also not be reasonably foreseeable to the parties."[(67)] Thus, the trial court adhered to the "changed circumstances" test articulated by the plurality in *Torncello*.

Salsbury appealed to the United States Court of Appeals for the Federal Circuit, which affirmed. Espousing a different understanding of *Torncello*, the appellate court found the nub of the doctrine in Chief Judge Friedman's brief concurring opinion: "*Torncello* has nothing to do with this case. It stands for the unremarkable proposition that when the government contracts with a party knowing full well that it will not honor the contract, it cannot avoid a breach claim by adverting to the convenience termination clause."[(68)] However, to the extent that the situation in *Salsbury* met the *Torncello* plurality's "changed circumstances" test, as the trial court had held, the appellate court's reading of that case amounts to mere *dictum*.[(69)]

Nevertheless, the *Salsbury* court's explanation of *Torncello* was favorably cited in *Caldwell & Santmyer, Inc. v. Glickman*.[(70)] When errors in the low bid permitted its withdrawal, the contract went to the second low bidder, Caldwell & Santmyer. This bid, however, had the same errors as the low bidder, *i.e.*, the omission of certain equipment. Accordingly, the contracting officer decided to terminate the contract for convenience and resolicit the work. Caldwell & Santmyer pursued its claim for breach damages to the Federal Circuit. Recalling the *dictum* of *Salsbury* that "bad faith . . . is a prerequisite for a*Torncello* claim," the Federal Circuit upheld the government's termination for convenience because there was "no evidence that the Government intended before award to terminate for any reason."[(71)]

At about the same time that panels of the Court of Appeals for the Federal Circuit were eviscerating *Torncello*, the General Services Board of Contract Appeals ("GSBCA") found that the government could not invoke the termination for convenience clause where the apparent motive was to avoid litigation. In *OAO Corp.*,[(72)] the Internal Revenue Service ("IRS") had entered into a settlement agreement with Vanguard Technologies Corporation ("Vanguard") to resolve a prior protest concerning the same procurement to which OAO Corporation ("OAO") was an offeror. In the earlier protest, Vanguard had challenged IRS's decision to exclude Vanguard from the competitive range and to award a contract to OAO. Under the terms of the IRS-

Vanguard settlement agreement, IRS agreed to "avoid the hazards of litigation" by terminating OAO's contract, admit Vanguard into the competitive range, conduct discussions with both firms, call for best and final offers, and make award in accordance with the terms of the solicitation.[(73)] OAO protested the termination for convenience of its contract and the inclusion of Vanguard in the competitive range.

In reviewing the matter, the Board held that the use of the termination for convenience clause solely to avoid litigation was volative of CICA's requirement that "an agency shall award a contract with reasonable promptness to the responsible source whose proposal is most advantageous to the United States, considering only price an the other factors included in the solicitation."[(74)] Accordingly, the Board reinstated the original contract.

C. Convenience Termination as a Method of Damage Limitation

As discussed above, the termination for convenience clause became a method which permitted courts to excuse the government from paying breach damages, in circumstances where a private party ordinarily would be liable. This trend culminated in *Colonial Metals*, which a majority of the *Torncello* panel voted to overrule. It was to be expected, therefore, that the *Torncello* decision would be implicated when the government sought to use its termination power to avoid breach damages.

Two years after the Court of Claims decided *Torncello*, the Claims Court[(75)] issued its opinion in *Municipal Leasing Corp. v. United States*.[(76)] There, the Air Force had entered into a "lease to ownership" contract with Municipal for computer terminals. The contract incorporated an availability of funds clause which stated that option exercise was predicated on the availability of funds, but that the Air Force "shall use its best efforts to obtain appropriations of the necessary funds to meet its obligations and to continue this contract in force."[(77)]

Ultimately, the Air Force notified Municipal that it would not be exercising the second option year of the contract due to an unavailability of funds. Municipal challenged the Air Force's actions, arguing that the Air Force had not used its "best efforts" to obtain contract funding. The government contended that the Air Force had acted properly as funds were unavailable. Alternatively, the government argued that the nonrenewal of the contract was proper as a constructive termination.

The Claims Court ruled against the Air Force on the first point. It had not used its best efforts to obtain contracting funding; indeed, it simply did not seek funds to renew the contract for the second option year. The court also determined that the Air Force intended to repair existing computer terminals rather than buy the Municipal terminals, and that it had considered and rejected this option before contracting with Municipal. This ran afoul of the changed circumstances test. Accordingly, the court held for Municipal, stating that "[t]he termination for convenience clause will not act as a constructive shield to protect [the government] from the consequences of its decision to follow an option considered but rejected before contracting with plaintiff."[(78)]

Several years later in *Maxima Corp. v. United States*,[(79)] the Environmental Protection Agency ("EPA") awarded Maxima a fixed-price, indefinite quantity contract for typing, photocopying, editing, and related services. The contract consisted of a base year of performance and two one-year option periods. The amount of work ordered by EPA, however, continually fell far short of the minimum amounts specified in the contract. Prior to the end of the base year, EPA decided to replace Maxima's contract with a cost reimbursement contract. The parties entered into an agreement whereby Maxima would perform for an additional month beyond the first year then enter into a new cost-plus-fixed-fee contract.

EPA, however, did not order any work under the contract after completion of the additional month. One year later, EPA informed Maxima that the contract had been constructively (and retroactively) terminated for convenience based upon EPA's failure to order the contractual minimum during the term of the first contract. On appeal, the Department of the Interior Board of Contract Appeals held that EPA was only liable for the value of services actually ordered and received.[(80)] Maxima appealed to the Federal Circuit.

On appeal, the government acknowledged that it was obliged to demonstrate changed expectations. However, it argued that the failure to order a minimum level of services was itself proof that things had changed.[(81)] The court did not accept the government's attempt to bootstrap a breach into its own excuse. Instead, the Court held that the government acted unreasonably in attempting a retroactive termination for convenience well after the end of performance.[(82)]

The Claims Court has similarly declined to enforce an exculpatory provision of a surplus sales contract after a material breach by the government, holding that limiting liability to a refund of the purchase price paid would permit the government to rescind the contract at will and without penalty.[(83)] The court

held that having such a broad power of exculpation would render the contract illusory. Accordingly, the court awarded to the contractor anticipatory profits.[(84)]

D. Climbing Mount Improbable: Findings of Bad Faith Termination

As discussed above, some of the decisions interpreting *Torncello* see the opinion as nothing more than an instance where the government's termination power was exercised in bad faith, and therefore was anticipated by *dicta* in earlier cases. These decisions limit the *Torncello* holding to its most restrictive expression -- the brief concurring opinion of Chief Judge Friedman. There appear to be no court decisions holding that the government terminated a contract for convenience in bad faith, and only three administrative decisions to this effect at the boards of contract appeals. In each of these cases, the Board has reached this conclusion on the basis that the government, by virtue of its prior knowledge, entered into the contract with the intent of dishonoring it.

Tamp Corp.[(85)] is one of these three cases.[(86)] There, the Board held that the Navy's convenience termination was improper because the contracting officer had abused his discretion by intending to terminate the contract at the time he entered into a contract extension. The Navy elected not to exercise its option under a contract for mess attendant services at Navy dining facilities in Hawaii, but, when award of a follow-on contract was delayed, sought a one-month extension with Tamp. Tamp, however, desired a three-month extension, and the parties ultimately settled on a two-month extension. Subsequently, the contracting officer awarded the follow-on contract to another vendor and terminated Tamp's contract one month into the extension. Tamp challenged the termination at the ASBCA, and the Board, citing*Torncello*, sustained Tamp's appeal.

The Board found that the contracting officer's "undisclosed intention" to terminate the contract when he entered into the extension "made a mockery of his ostensibly reluctant assent to a two month, rather than a one month, extension."[(87)] The Board explained that:

the opinion for the court in *Torncello* was confined to the proposition that the Government cannot employ the termination clause to end a requirements contract solely to obtain a better price from a different source, of both of which the Government had knowledge when it entered into the contract. However . . . the Government may not use the Termination clause to terminate a contract when it had the intention of later terminating at the time it entered [into] the contract.[(88)]

The Board sustained Tamp's appeal and remanded the matter to the parties to negotiate a settlement.[(89)]

The two other such decisions were decided in a different context. In each, the contractor was terminated for default. After a finding that the contractor was not properly terminated for default, the usual result would be a conversion of the termination to one for the convenience of the government.[(90)] However, in these two cases, the board sidestepped this result by holding that the government had breached the contract, and therefore the contractor was entitled to damages, rather than the limited recovery allowed in a convenience termination. In both cases, the board relied upon a finding of bad faith.

In *Apex Int'l Management Servs., Inc.*,[(91)] the Board declined to convert an improper default termination into a termination for convenience because it had found that the government had acted in bad faith. The Navy awarded an IDIQ contract to Apex for operation and maintenance services at a Naval air station. Prior to contract award, these services had been performed by Navy civilian personnel.

The board held that elements of the Navy at the air station "strenuously argued against award of the contract and expressed hostility 'to the whole idea of contracting out'" for the work.[(92)] The Navy ultimately terminated Apex for default and Apex appealed the termination before the Board. The Board found that:

The record before us discloses beyond question that those administering the contract for the Government, apparently out of a misguided sense of loyalty to Government workers who had lost their jobs when base operation and maintenance were turned over to a private contractor, discharged their duties not only improperly and unfairly, but with hostility and malice, and with the manifest intention of proving that a private contractor could not successfully provide the service which had theretofore been rendered by Government public works employees.[(93)]

Consequently, in light of the uncommonly strong evidence of government impropriety, the Board determined that the Navy had "irrefragably" acted in bad faith and had breached Apex's contract. Bypassing the usual result -- conversion of the nature of the termination from default to convenience -- the Board ruled that Apex was entitled to receive "traditional breach damages, including anticipatory profits" because of the Board's finding that the government acted in bad faith.[(94)]

The other such decision is *Travel Centre v. General Servs. Admin*.[(95)] There, the General Services Board of Contract Appeals invalidated an agency's termination for convenience after determining that the agency had "no intention of fulfilling its promises" to the contractor. That case concerned an indefinite quantity contract awarded by GSA for travel agency management services in Maine and New Hampshire to Travel Centre. The minimum amount guaranteed under the contract was $100. The solicitation had advised offerors that the contractor would be the preferred, but not the mandatory, source for federal agency travel services in the region. The solicitation also had advised offerors to base their proposals on the prior year's ticket sales. Ticket sales in Maine totaled more than $1.8 million, more than half of which were tickets purchased by the Maine Air and Army National Guard.

Just prior to beginning performance, Travel Centre learned that the Guard would not be ordering tickets under the contract. As a result, Travel Centre was forced to close and its contract was terminated for default by GSA in June 1996, but this was later converted to a termination for convenience. Travel Centre appealed the denial of its claim for breach damages to the GSBCA.

In its appeal, Travel Centre argued that GSA knew or should have known that estimates set forth in the solicitation were grossly inflated. GSA conceded that the estimates were negligently prepared, but that in doing so agency conduct did not rise to the level of bad faith constituting breach of contract. Further, GSA argued that since Travel Centre received more than the contractual minimum of $100, no breach could have occurred.

The GSBCA determined that GSA had failed to adequately research and revise the prior year's ticket sales upon which the solicitation estimates were based. Further, the Board found that GSA had received notification that the Guard would not be utilizing travel services under the GSA contract before award was made to Travel Centre, but nonetheless proceeded to award the contract as solicited. The Board reasoned that GSA's estimates were irrationally arrived at and caused Travel Centre to enter into a contract under which it would lose money. Accordingly, the GSBCA held that the agency entered into the contract in bad faith constituting a breach of contract and granted the appeal. Subsequently, the Board expressly stated that its holding was not inconsistent with *Krygoski*. Subsequently, the Board denied GSA's request for reconsideration, finding that even in an IDIQ contract a contractor does not accept the risk that the government will misled the contractor regarding the amount of business the contractor can reasonably expect.[(96)]

Given their facts, however, one must wonder whether the holdings in these three board cases would have survived on appeal. With the possible exception of *Tamp*, there was no direct evidence of bad faith. Instead, it was inferred from other facts, including the apparently vindictive use of the default termination power. One cannot be certain, even in the case of *Tamp,* whether an appellate court would have agreed that the proof met the "well-nigh irrefragable" standard imposed for findings of bad faith action by government officials.

E. "Abuse of Discretion" in Default Termination: a Curious Result

A curious anomaly results from the use of the constructive termination doctrine as a damages limitation device.[(97)] This arises from the situation where a contractor is in technical default of a contract, but the termination of that contract for default would be an abuse of discretion. On this basis, default terminations have been reversed where they were motivated by a desire to rid the government of dealing with the contractor,[(98)] or to end a troubled program.[(99)] When that happens, the default termination is converted to one for the convenience of the government.[(100)] The abuse of discretion which characterized the termination for default does not, *per se,* taint the government's actions sufficiently to deny it the benefits of a termination for convenience.

This can lead to a questionable result. In *Torncello*, for instance, the government breached a requirements contract by diverting the fulfillment of some of its needs to another source. Assume instead that the government had terminated that portion of the contract for default. This termination would have been without cause, and presumably would have been an abuse of discretion. Under the above doctrine, however, the improper default termination would merely have become one for convenience.[(101)] Why should the government be better off when it improperly terminates a contract for default than when it improperly terminates a contract for convenience?

One answer might be that the government actually has a broader scope of discretion to terminate for convenience than for default, and this seems a reasonable premise. However, the case law dealing with abuse of discretion in default terminations needs to recognize this issue and come to grips with it. After concluding that the termination for default was an abuse of discretion, the court or board then needs to consider whether a convenience termination under the same circumstances would also be improper, and therefore, whether the proper remedy is damages for breach of contract.

As noted above, the contract appeals board decisions in *Apex Int'l Management Servs., Inc*. and *Travel Centre* are cases where a finding that a default

termination was characterized by bad faith lead a holding that the government was liable for breach damages. In both cases, the board seems to have overleaped the exculpatory effect of the "conversion" of an improper default termination to one for the convenience of the government. Presumably, this is because the finding of bad faith in the termination would have made it inappropriate for the government to terminate the contract for its convenience.

IV. THE EROSION OF LIMITATIONS ON THE GOVERNMENT'S POWER TO TERMINATE FOR CONVENIENCE

A. The *Krygoski* Case

Although the *Torncello* doctrine began to unravel almost as soon as it was created, its most serious challenge has come from a recent decision by the Federal Circuit in *Krygoski Constr. Co, Inc. v. United States*.[(102)] This ruling repudiates the *Torncello* plurality's "changed circumstances" test for an uncertain substitute.

Krygoski Construction Co., was the low-bidder, at $414,696, for a contract awarded by the United States Army Corps of Engineers ("Corps") to demolish two buildings at an abandoned Air Force facility in the Upper Peninsula of Michigan. Based on blueprints of the buildings and on its own site survey, the Corps estimated that the buildings contained 1,600 linear feet of asbestos pipe insulation and 650 square feet of asbestos tank and duct insulation. The bid package included contract line items, with associated prices, for removal of each.

Prior to commencing performance, Krygoski conducted its own survey of the buildings and discovered additional asbestos present in the floor tiles and roof insulation in both buildings, which had been heavily vandalized. Krygoski proposed to remove this additional asbestos at the unit price for removing the tank and duct insulation under the contract pursuant to the contract's Variation in Estimated Quantities clause. The Corps calculated that removal of the additional asbestos contained in floor tile would cost about $320,000 at the proposed unit price.

The contracting officer considered a price increase of such magnitude (33 percent of the total contract price) to be a "cardinal change"[(103)] and instead terminated the contract for the convenience of the government. The Corps revised its specifications to include removal and disposal of the additional asbestos and resolicited the contract. Krygoski did not submit the low bid in the second competition.

Krygoski filed suit in the United States Court of Federal Claims ("COFC"), alleging that the Corps' convenience termination was a breach of contract. The COFC, relying upon *Torncello*'s changed circumstances test, held that the government had improperly terminated Krygoski's contract, or, alternatively, had abused its discretion in terminating the contract.[(104)] As the trial court observed:

The Government, however, in maintaining its current position that the bad faith/abuse of discretion standard is still the correct legal standard, conveniently overlooks [the] series of cases that apply the *Torncello* rule. Instead, it focuses almost exclusively on the *Salsbury* case, decided in 1990, which it believes reestablishes the bad faith/abuse of discretion standard as the exclusive standard to apply in these termination for convenience cases.[(105)]

Thus, the court found the government's argument "illogical."[(106)] The Court of Federal Claims found that the Corps did not fully understand the cardinal change doctrine, and found that the Corps' administration of Krygoski's contract was arbitrary and capricious.[(107)] The court awarded Krygoski damages, including the anticipatory profits, and the government appealed.

On appeal, the CAFC reversed, concluding that the trial court had committed an error of law by applying *Torncello's* changed circumstances test:

The trial court erred by invoking and relying upon the *Torncello* plurality test. The trial court improperly found no change of circumstances sufficient to justify terminating the contract for the Government's convenience. Although arguably the Government's circumstances had sufficiently changed to meet even the *Torncello* plurality standard, this court declines to reach this issue because *Torncello* applies only when the Government enters a contract with no intention of fulfilling its promises.[(108)]

The Federal Circuit's opinion in *Krygoski* begins with a recitation of the history and evolution of the termination for convenience clause. The CAFC next discusses the *Torncello* opinion, and construes it as merely a "bad faith" termination decision. "Despite the adequate justification to overrule *Colonial Metals* under the existing *Kalvar* ["bad faith"] test, a plurality of judges in *Torncello* proceeded to articulate in dicta a broader test for gauging the sufficiency of a convenience termination."[(109)] This reference, which is phrased more as a criticism of *Torncello* ruling than as an analysis of its holding, ignores the actual opinions. The plurality opinion never concludes that the *Torncello* facts showed bad faith. Moreover, of the three concurring opinions, only Judge Davis appeared willing to pin the label of "bad faith" on

the government's actions. Chief Judge Friedman does not characterize his view of the case with any specific legal doctrine at all. And the concurrence of Judge Nichols, which describes the termination as an "abuse of discretion,"[(110)] finds that the government should be "estopped" to eliminate one of many contract items when offers were evaluated, and the contract awarded, on an "all-or-none" basis.

The CAFC held that the contracting officer did not act in bad faith or abuse his discretion in terminating and resoliciting Krygoski's contract, and reversed the lower court's decision. The CAFC panel reasoned that it was a proper use of the termination for convenience clause to avoid entering into a cardinal change to the contract. Upholding the contracting officer's decision that addition of the newly-found asbestos would amount to a cardinal change, the appellate court found the termination to be within the scope of the rule it had pronounced.

B. Was *Krygoski* Correctly Decided?

The first thing to note about the decision in *Krygoski* is that it was issued by a panel of the Federal Circuit. *Torncello*, however, was decided by the Court of Claims, the predecessor court to the Federal Circuit, in an *en banc* decision.[(111)] Thus, whatever *Torncello* stands for, *Krygoski* cannot overrule it.

The reading of *Torncello* by the *Krygoski* court is an unusual one, although it is not unprecedented. The opinion seeks the meaning of this case not in the plurality opinion, but in the concurring opinion of Chief Judge Friedman. It cites approvingly his view that "when the government enters into a requirements contract, knowing that it can obtain an item the contract covers for less than the contract price and intending to do so, there cannot be a constructive termination for convenience of the government when the government follows that course."[(112)] None of the other *Torncello* opinions, however, cite a need to show that the government must *intend* to dishonor the contract at the time it enters into it.[(113)] Furthermore, as Professor Cibinic points out, there was no record or finding at the Board in *Torncello* to suggest any such intent.[(114)]

The need for a panel decision to avoid overruling an *en banc* decision such as *Torncello* may explain one of the more innovative and curious features of the *Krygoski* opinion. The lynchpin of this decision is that: "Recent enactments . . . have underscored rules of Government's contracting which render the plurality's *dicta* in *Torncello* inapplicable to the present regime of contract

administration. Recent statutes fully address the concerns of the *Torncello* plurality regarding the Government's shopping for lower prices after contract award."[(115)]

These recent enactments and statutes are really just one -- the Competition in Contracting Act ("CICA"),[(116)] which became law in 1984. The opinion states that, by compelling the use of "full and open competition," CICA restricts when a contracting officer should and should not terminate a contract for convenience because of a change in the work being performed.[(117)]

This logic runs as follows. The emphasis of CICA on competition compels a contracting officer to ensure that the government's requirements are properly advertised and to make efforts to obtain an adequate number of competitors. Termination for convenience permits a second chance when the contracting officer determines that an awarded contract did not result from an adequately competitive process.

But the *Krygoski* court also recognized the need to put limits on this connection. Termination for convenience to permit a new contract competition is not justified simply because of the contracting officer's whim or a change of heart. As the opinion puts it, "[n]ot every necessary alteration of the contract scope, however, requires a new bid procedure."[(118)] The *Krygoski* opinion adopts a familiar test to separate those changes which require a new competitive bidding process -- the "cardinal change" doctrine. Under this doctrine, when the government's needs can only be met by a cardinal change in the contract, then termination for convenience is justified, indeed required, to permit a new contract competition.

This new test merits detailed examination. The first striking feature is its novelty. There have been numerous decisions which turned on the *Torncello* issue since the enactment of CICA in 1984, including several at the Federal Circuit, but none of them held that this statute affected the *Torncello* holding, or was implicated in decided the propriety of a convenience termination, until *Krygoski*.

The second odd feature of *Krygoski* is its bold assertion that "[i]n 1984, CICA articulated significant factors addressing a contracting officer's decision to terminate a contract for the government's convenience."[(119)] Indeed, neither the phrase "termination for convenience," nor the concept of a unilateral right to walk away from an agreement at minimal cost, appears anywhere in CICA. The idea of a direct connection, rooted in statute, between convenience termination

and the requirement for competition is, so far as can be determined, entirely an innovation of the *Krygoski* opinion.

But perhaps the most interesting aspect of *Krygoski* is its notion that CICA altered the legal landscape in a way that gave new meaning to the government's authority to terminate for convenience. This idea permits the court to sidestep the troublesome problem of whether it is overruling the *Torncello en banc* opinion. However, the legal innovations which *Krygoski* attributes to CICA are not really new at all, and CICA simply did not alter the law in the ways the opinion suggests.

According to the opinion, the major new feature of CICA with implication for convenience termination is the requirement for "full and open competition."[(120)] However, the pre-CICA regulations, which had the force and effect of law, already required competition to the "maximum practicable extent:"

[DAR] 1-300.1 *Competition*. All procurements, whether by formal advertising or by negotiation, shall be made on a competitive basis to the maximum practicable extent.[(121)]

[FPR] 1-1.301-1 *Competition*. All purchases and contracts, whether by formal advertising or by negotiation, shall be made on a competitive basis to the maximum practicable extent.[(122)]

Although the CICA standard seems more absolute, there is no meaningful distinction between these two formulations in practice.[(123)] Both are strong pro-competitive standards. Further, even under the pre-CICA regime, a new procurement was required when there was a cardinal change.[(124)]

The next feature of CICA raised by the opinion is that it led to regulations which "may compel a new bid" if "a contracting officer discovers that the bid specifications inadequately describe the contract work."[(125)] Again, these post-CICA regulations are indistinguishable from what went before. The test for cancellation of a solicitation and reopening the competition in the post-CICA regulations is a mere rephrasing of the standard which already existed.[(126)]

The conclusion of the court's analysis is the assertion that, when a contract modification would be beyond the scope of the original contract competition, it requires a new bid procedure. Yet even this formulation goes too far.

First, the Comptroller General has held on many occasions that such a profound change is not unlawful, if it can be justified, under CICA, as a sole-source contract.[127] There are certainly situations where legitimate considerations of urgency might justify, under the procedures for noncompetitive contracting, a bilateral contract modification, even if outside the scope of the original contract competition. Second, there are also instances where the government's needs can be satisfied by the award of a second contract to cover what would otherwise be a cardinal change.[128] In either case, termination of the original contract award would be unnecessary, and so it would be inappropriate for the government to avoid its contractual obligations.

Highlighting the close correspondence between the cardinal change doctrine and the reasonable expectations of the original bidders or offerors, the *Krygoski* court noted that a cardinal change, by definition, is a contract modification which goes beyond the scope of the original competition. The two concepts are nearly, but not quite, identical.[129] As Professors Nash and Cibinic have observed:

When competitors protest the Government's issuance of changes in lieu of using new procurement procedures, the test is whether the proposed change is within the *scope of the competition*. This is slightly different from the test used when the contractor questions a change. [130] Thus, *Krygoski* stands for the proposition that termination for convenience is a legitimate escape from a situation which would otherwise develop into a cardinal change.[131]

Krygoski correctly recapitulates the law of cardinal changes. It quotes a 1993 CAFC case which summarizes the test as follows: "[a cardinal change] occurs when the government effects an alteration in the work so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for."[132]

However, *Krygoski* applies this law in a questionable way. Removal of additional asbestos, when a significant amount was already expected, hardly seems "drastic" or "materially different." The contracting officer testified that the convenience termination was motivated by a cardinal change resulting from the "discovery" of additional asbestos to be removed during demolition.[133] The government argued, applying a "rule of thumb," that an increase in price of about 33 percent would constitute a cardinal change.[134] The trial court rejected this justification, citing case law which held that, under proper circumstances, more than doubling the contract price is not itself determinative of a cardinal change. [135]

The appellate court, however, found the contracting officer's views persuasive. It was impressed by the fact that "asbestos removal, originally about 10%, became about 50% of the contract work."[(136)] This change in proportion, speculated the court, might have induced "different bidders, like asbestos removal firms," to enter the competition.[(137)] Since the additional asbestos removal was in the floor tile, rather than the insulation materials called out in two contract line items, the CAFC concurred that this amounted to a material departure from the scope of the original procurement.

This conclusion is a hard pill for practitioners to swallow. Construction contracts are notorious for being richly veined with changes, suspensions, differing site conditions, and other entitlements to additional compensation. It is expected, for example, that an excavating contractor which encounters an underground spring or a rock ledge will, after notice and direction, continue the work and claim the increased costs. Demolition of an old, abandoned, and vandalized structure, like the one involved in *Krygoski*, also may be reasonably expected to have unforeseen conditions and problems and the presence of additional asbestos should have surprised no one. The contract did call out in two line items the removal of asbestos insulation, but the third line item was for "Demolition, Removal, and Disposal" of the structure itself. Why should the removal of undisclosed asbestos not amount to a constructive change under this generic part of the contract obligations? A change is permitted in "the specifications (including drawings and designs)" or "the method or manner of performance of the work," or even in "the Government-furnished . . . site," as provided for in the standard Changes clause used in defense contracts at the time[(138)]

The nexus between the *Krygoski* situation and the cardinal change doctrine is even more tenuous if one concentrates on the relevant aspect of this doctrine: the scope of the competition. The government advertised and competed a contract for the demolition of a building with a known asbestos problem. The removal of additional asbestos, discovered later, should have been an expansion of work that was within the reasonable expectation of the bidders.

Moreover, *Krygoski*'s forceful criticism of the plurality opinion in *Torncello* is curious because it is probably unnecessary. The lynchpin of the plurality opinion is the need for "changed circumstances" to justify a proper termination for convenience. The *Krygoski* court concluded that the removal of the newly-discovered asbestos was a cardinal change to the contract. That most drastic of contract changes would seem to qualify as a changed circumstance under the rule applied by the *Torncello* plurality.

We submit that *Krygoski* is not persuasive. It limits *Torncello* so stringently that it effectively overrules this decision, although the panel did not have this authority. The "cardinal change" test is no improvement over the "changed circumstances" test and its basis in CICA is questionable.
Finally, *Krygoski* even misapplies the "cardinal change" doctrine it invokes.

V. THE FUTURE OF TERMINATION FOR CONVENIENCE

The issues posed by the government's aggressive use of convenience termination are certainly not easy to resolve, either as a matter of precedent or as policy. The questions raised inhabit the shadowland where two major legal themes contend. On the one hand, the government is to be regarded as simply another party to a contract: "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."[(139)] On the other hand, the government has unique legal advantages stemming from its status as the sovereign.

In the wake of the Supreme Court's denial of Krygoski's petition for *certiorari*,[(140)] the contracting community must consider how to adjust to this latest ruling on the scope of the government's power to terminate a contract for convenience. Some routes are clearly foreclosed. However, so long as the termination clause remains mandatory and (nearly) universal, there is little prospect of negotiating limits, during the contract formation process, on the use of convenience termination during contract performance.

A. The Continuing Need for Limits

1. Is the Bad Faith/Abuse of Discretion Test Viable?

We submit that Krygoski does not delineate meaningful limits on the government's right to terminate for convenience. Torncello was the first case in which a contractor actually succeeded in obtaining a ruling that a termination for convenience was (or would be) improper, and that it was entitled to breach damages against the sovereign.

The Krygoski opinion clearly wishes to discredit and discard the "changed circumstances" test of the Torncello plurality. If this is its outcome, we are likely to return to the days before it was decided (e.g., the bad faith or abuse of discretion standard). However, we doubt that the application of this standard will provide meaningful limits on the government's termination power. The case law makes clear that a finding of bad faith requires "well-nigh

irrefragable" evidence of a specific intent on the part of the government to injure the plaintiff.[(141)] This standard is simply too difficult to meet in all but the most egregious cases. As such, it does not prevent the government from disregarding "with impunity" its contractual obligations in many contexts.

One novel solution recently suggested is to dispense with the concept of subjective bad faith and instead adopt an objective test.[(142)] Such an objective standard would, of course, free courts from the need to vilify government employees in order to vindicate contractors. However, adopting an objective test for bad faith may have unintended consequences. For instance, the same commentator suggests that an objective test will enable disappointed bidders to sue for anticipatory profits.[(143)]

2. Back to Changed Circumstances

We suggest that another, and less revolutionary, solution is simply a return to *Torncello's* "changed circumstances" test. As discussed above, it appears that a majority of the Court of Claims, sitting *en banc*, endorsed this test. Returning to a "changed circumstances" test will not immediately resolve all questions; the facts of *Torncello* do not encompass every eventuality. But we believe it is a better starting point than the "intent" test of Chief Judge Friedman's concurrence or the "cardinal change" standard of the *Krygoski* opinion.

The "changed circumstances" test can be revived, for example, by an *en banc* decision of the Court of Appeals for the Federal Circuit. Since contractors have little recourse save aggressive litigation, there will be opportunities for such a ruling.

3. Self-Imposed Limits

Another route to meaningful limits would be through a change to the Federal Acquisition Regulation. The ABA Section of Public Contract Law is pursuing this prospect. However, it is questionable that the government is or will be motivated to limit its currently broad powers to stop contract performance without fear of liability for expectation damages.

B. A Litmus Test for Commercial Practices?

In ancient Rome the temple of Janus honored a god with two faces. It was this deity, the god of duality, whom the Romans worshiped first in time of war. Ever since, republican governments have had to cope with a similar duality. The accustomed liberties of peace were too lax for times of war.

The government of the United States also has a two-faced nature. Practices unacceptable in peace were tolerated in war, up to and including President Lincoln's famous suspension of the writ of *habeas corpus*.

There is no reason that government contracting should not reproduce this duality. The government, as a contracting party, is the sovereign acting as if it were a private party, making promises which it represents are binding and enforceable. In times of war, the government's sovereign powers might make it inappropriate to enforce strictly every contractual undertaking. However, the long years of the Cold War have blurred the distinction between times of war and times of peace. With the disintegration of the Soviet Union and its Eastern European empire, it may be time to reinstate rules of contracting more appropriate to peacetime.

One approach to the problems sketched above would be legislative or regulatory action to limit terminations for convenience to contracts for weapons systems, wartime requirements, or other uniquely governmental needs. The issue of limits on the power to terminate for convenience might still arise. But it would happen much less frequently, and in a context where the government's interests were more compelling.

Restricting the convenience termination clause to only certain contracts is consistent with the current trend to "commercialize" government procurement. A unilateral right to disavow obligations, without answering in money damages, is rare or unheard of in commercial contracts, because of the need for consideration which is not illusory.[(144)] To be sure, some commercial contracts include a cancellation right. But these almost always require advance notice and are either exercisable by either party or restricted to contracts where cancellation would have little or no impact on the terminated party.

Mutuality may help solve the consideration problem. For example, a clause containing a bilateral right to cancel the contract on thirty days notice is now incorporated into GSA's Federal Supply Service Multiple Award Schedule contracts.[(145)] Indeed, the FAR now permits contracts for commercial items to be "tailored" to customary commercial market practices.[(146)] Although the FAR lists certain provisions which cannot be altered, the termination for convenience clause is not on this list, and, therefore, it can be modified for, or even excluded (theoretically) from, contracts for commercial items.[(147)]

However, the regulations for procuring commercial items do include a "standard," but nonmandatory, termination provision, which perpetuates the government's right to terminate a contract for its convenience.[(148)] When a

commercial item contract is terminated for convenience, the contractor's recovery is limited to "a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system."[(149)] In other words, no anticipatory profit.

As the Federal government increasingly attempts to mimic commercial practices in its procurement operations, it will be interesting to see whether it is willing to shed advantageous, government-specific features like convenience termination. Whether the contract contains such a clause may be a simple but effective test for whether a contract is truly "commercial."

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3. 94 F.3d 1537 (Fed. Cir. 1996), *cert. denied*, 117 S. Ct. 1691 (1997).

4. 681 F.2d 756 (Ct. Cl. 1982) (*en banc*).

5. *Id*. at 764.

6. 2 Ralph C. Nash, Jr. & John Cibinic, Jr., *Federal Procurement Law* 1105 (3d ed. 1980) [*hereinafter Federal Procurement Law*]. *See also United States v. Speed*, 75 U.S. (8 Wall.) 77, 82-83 (1868) (holding that Rule 1179 of Army Regulations was inapplicable to contracts for services or labor and to contracts for "a certain amount of supplies").

7. 10 Ct. Cl. 494 (1874), *aff'd*, 91 U.S. 321 (1875).

8. *Id*. at 323.

9. 40 Stat. 182 (1917). "Just compensation" was soon held not to include anticipated profits, however. *See Russell Motor Car Co. v. United States*, 261 U.S. 514 (1923).

10. 40 Stat. 1272 (1919).

11. 25 Comp. Treas. 398 (1918).

12. *Federal Procurement Law, supra* note 6, at 1106.

13. *Id*.

14. 58 Stat. 649 (1944). The Contract Settlement Act was superseded by the Armed Services Procurement Act of 1947. 10 U.S.C. 2301-2314.

15. *Federal Procurement Law, supra* note 6, at 1107.

16. *Id*. It is unclear whether a similar termination clause was common between the World Wars.

17. ASPR 8-701.5 (1954).

18. FPR 1-8.700-1 (1964).

19. 32 Fed. Reg. 9683 (1967).

20. *See* 48 C.F.R. 49.502 (1997).

21. *See, e.g., Best Foam Fabricators, Inc. v. United States*, 38 Fed. Cl. 627, 638 (1997) (citing *Krygoski*); *Erwin v. United States*, 19 Cl. Ct. 47, 53 (1989).

22. *See Salsbury Indus. v. United States*, 17 Cl. Ct. 47, 57 n.7 (1989) (and cases cited therein).

23. *Federal Procurement Law, supra* note 6, at 1121-26.

24. 267 U.S. 12 (1925). In *College Point Boat Corp*., the Court denied a contractor's claim for breach damages, including anticipatory profits, arising from the government's order to cease performance of contract awarded just weeks prior to the end of World War I. In that case, however, that the government's termination authority was based on a wartime statute rather than a contract clause.

25. *Id*. at 16.

26. 48 C.F.R. 52.249-8(g) (1997).

27. *Id*.

28. *Torncello*, 681 F.2d at 768. *See also Engers v. Perini Corp.*, No. 92-19821993 WL 235911 (E.D. Pa. June 28, 1993) (refusing to expand the doctrine of constructive termination for convenience to private parties).

29. *G.L. Christian & Assocs. v. United States*, 312 F.2d 418, 426 (Ct. Cl.), *reh'g denied*, 320 F.2d 345, *cert. denied*, 375 U.S. 954 (1963).

30. *See General Eng'g & Mach. Works v. O'Keefe*, 991 F.2d 775 (Fed. Cir. 1993); *G.L. Christian & Assocs. v. United States*, 312 F.2d 418 (Ct. Cl. 1963).

31. *See, e.g., John Reiner & Co. v. United States*, 325 F.2d 438, 442 (Ct. Cl. 1963) ("[I]n absence of bad faith or a clear abuse of discretion the Contracting Officer's election to terminate is conclusive."), *cert. denied*, 377 U.S. 931 (1964). *See also Federal Procurement Law, supra* note 6, at 1104 ("In no other area of contract law has one party been given such complete authority to escape from contractual obligations.").

32. *See, e.g., Sanders v. United States Postal Serv.*, 801 F.2d 1328, 1331 (Fed. Cir. 1986); *Burroughs Corp. v. United States*, 617 F.2d 590, 597 (Ct. Cl. 1980); *Librach v. United States*, 147 Ct. Cl. 605, 612 (1959).

33. *Kalvar Corp. v. United States*, 543 F.2d 1298, 1301-02 (Ct. Cl. 1976), *cert. denied*, 434 U.S. 830 (1977). *See also American Gen. Leasing v. United States*, 587 F.2d 54, 59 (Ct. Cl. 1978) (finding bad faith means "alleg[ing] facts from which could be inferred a 'specific intent to injure the plaintiff'"); *Knotts v. United* States, 121 F. Supp. 630, 631 (Ct. Cl. 1954) (finding bad faith only in context of "conspiracy . . . to get rid of plaintiff"); *Struck Constr. Co. v. United States*, 96 Ct. Cl. 186, 222 (1942) (finding bad faith where government conduct was "designedly oppressive"); *Continental Collection & Disposal, Inc. v. United States*, 29 Fed. Cl. 644, 652 (1993) (finding bad faith requires that "specific instances of the government's ill will directed toward the plaintiff must be identified").

34. *Kalvar Corp.*, 543 F.2d at 1301-02; *American Gen. Leasing*, 587 F.2d at 58-59.

35. In *United States Fidelity & Guar. Co. v. United States*, 676 F.2d 622, 630 (Ct. Cl. 1982), the court enumerated four guiding principles of "arbitrary and capricious" behavior:

(1) evidence of subjective bad faith on the part of the government official;

(2) no reasonable basis for the government decision;

(3) the degree of proof necessary is related to the amount of discretion given to the government official;

(4) proven violation of an applicable statute or regulation.

Further, to obtain a trial on the merits, a plaintiff must demonstrate more than a "naked allegation" of arbitrary and capricious conduct. *Keco Indus., Inc. v. United States*, 492 F.2d 1200, 1208 (Ct. Cl. 1963).

36. *See United States Fidelity & Guar. Co.*, 230 Ct. Cl. at 369.

37. *See Vibra-Tech Eng'rs, Inc. v. United States*, 567 F. Supp. 484, 486-87 (D. Colo. 1983); *Viktoria Transport GmbH & Co., KG*, ASBCA No. 30371, 88-3 BCA 20,921 at 105,737.

38. 494 F.2d 1355 (Ct. Cl. 1974).

39. *Id.* at 1361. As Professors Nash and Cibinic perceptively point out, however, the court in *Colonial Metals* cited "no authorities where such action had been approved. There appear to be none, other than a Comptroller General decision stating his opinion that such action would be appropriate, Comp. Gen. Dec. B-152486, Dec. 6, 1963." *Federal Procurement Law, supra* note 6, at 1112. *See also Linan-Faye Constr. Co., Inc. v. Housing Auth. of City of Camden*, 49 F.3d 915, 924 (3d Cir. 1995) (describing *Colonial Metals* as "perhaps the high-watermark of courts' permissiveness in allowing the government to terminate for convenience, constructively or otherwise").

40. *Colonial Metals Co.*, 495 F.2d at 1361.

41. *See, e.g., National Factors, Inc. v. United States*, 492 F.2d 1383, 1385 (Ct. Cl. 1974) ("The termination of a contract for the convenience of the government is valid only in the absence of bad faith or a clear abuse of discretion.").

42. *See Commerce Int'l Co. v. United States*, 338 F.2d 81, 85 (Ct. Cl. 1964) (holding that duty of the government to carry out its bargain reasonably and in good faith was implicit in all government contracts). For a comprehensive examination of the state of public contract law as pertains to contract formation and termination see Frederick W. Claybrook, Jr., *Good Faith in the Termination and Formation of Federal Contracts*, 56 Md. L. Rev. 555 (1997)

(arguing that federal contract law should apply principles of common law good faith dealing to contract formation and termination).

43. Consideration is, of course, an essential element of a valid, enforceable government contract. *Simpson v. United States*, 172 U.S. 372 (1899); *Willard, Sutherland & Co. v. United States*, 262 U.S. 489 (1923).

44. 681 F.2d 756 (Ct. Cl. 1982) (*en banc*).

45. Ronald A. Torncello was the president and later trustee in bankruptcy of Soledad Enterprises, Inc.

46. For additional treatment of *Torncello* see Michael D. Garson, Note, Krygoski *and the Termination for Convenience: Have Circumstances Really Changed?*, 27 Pub. Cont. L.J. 117 (1997); Karl M. Elcessor, III, Torncello *and the Changed Circumstances Rule: A Sheep in Wolf's Clothing*, Army Law. (Nov. 1991); Stephen N. Young, Note, *Limiting the Government's Ability to Terminate for Its Convenience Following* Torncello, 52 Geo. Wash. L. Rev. 892 (1984).

47. The short form termination for convenience clause in *Soledad* is essentially the same as 48 C.F.R. 52.249-4 (1997) (Termination For Convenience Of The Government (Services)) (Short Form).

48. *See Soledad Enters., Inc.*, ASBCA Nos. 20424 *et al.*, 77-2 BCA 12,552. Under the FAR's standard (long form) termination for convenience clause, 48 C.F.R. 52.249-2, Soledad likely would have recovered the usual termination costs.

49. *Torncello*, 681 F.2d at 757 n.* (editors' note).

50. The seventh member of the panel, Judge Kunzig, died after oral argument and did not participate in the decision. *Id.*

51. *Id.* at 760. *See also* 1 Williston, *Contracts* 105, 418 (3d ed. 1957) ("An agreement wherein one party reserves the right to cancel at his pleasure cannot create a contract."). The idea that an unlimited power to terminate for convenience would undermine the enforceability of a contract seemingly derives from Professors Nash and Cibinic. *See Federal Procurement Law, supra* note 6, at 1115 n.5.

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

53. *Id*.

54. *Torncello*, 681 F.2d at 774.

55. The D.C. Court of Appeals made a similar point of interpreting *Torncello* in *District of Columbia v. Organization for Envt'l Growth, Inc*., 700 A.2d 185 (D.C. 1997). Noting that the exclusivity in a requirements contract was fundamental to the consideration furnished by the buyer, the court noted that, by diverting a portion of its requirements away from the contract, the government in *Torncello* had ". . . destroy[ed] the only consideration that it had brought to the bargain. . . ." *Id*. at 200.

56. *Torncello*, 681 F.2d at 774.

57. *Id*. at 773. In at least one area, however, the decided law follows this precept. A contract modification is improper if it is beyond the "scope of the competition" for the contract. *AT&T Communications, Inc. v. WilTel, Inc*., 1 F.3d 1201, 1205 (Fed. Cir. 1993).

58. *Krygoski Constr. Co., Inc. v. United States*, 94 F.3d 1537, 1542 (Fed. Cir. 1996) (quoting *Salsbury Indus. v. United States*, 905 F.2d 1518, 1521 (Fed. Cir. 1990)).

59. 10 Nash & Cibinic Report 52 (Oct. 1996).

60. *See, e.g., Maxima Corp. v. United States*, 847 F.2d 1549 (Fed. Cir. 1988) (finding retroactive constructive termination for convenience improper absent changed circumstances because it rendered contract illusory); *SMS Data Prods. Group, Inc. v. United States*, 19 Cl. Ct. 612 (1990) (upholding agency termination for convenience because "circumstances of the bargain" changed); *Municipal Leasing Corp. v. United States*, 7 Cl. Ct. 43, 46 (1984) (use of termination for convenience clause is proper only where change in circumstances of the bargain or parties' expectation exists); *Municipal Leasing Corp. v. United States*, 1 Cl. Ct. 771, 774-75 (1983) ("[T]he 'Termination for the Convenience of the Government' clauses in government contracts can appropriately be invoked only in the event of some kind of change in the circumstances of the bargain or in the expectations of the parties.").

61. *See, e.g., Caldwell & Santmyer, Inc. v. Glickman*, 55 F.3d 1578, 1582 (1995) ("bad faith . . . is a prerequisite for a *Torncello* claim"); *Salsbury Indus. v. United States*, 905 F.2d 1518 (Fed. Cir. 1990) (rejecting *Torncello's* changed circumstances test); *Special Waste, Inc*., ASBCA No. 36775, 90-2 BCA 22,935

at (*Torncello's* "'abuse of discretion/bad faith' rule is the one followed by this Board"); *Vec-Tor, Inc*. ASBCA No. 25807, 85-1 BCA 17,755 at 88,677, *aff'd*, 785 F.2d 320 (Fed. Cir. 1985) ("We agree with the concurring opinions [in *Torncello*] and will follow the bad/faith abuse of discretion rule regarding convenience-termination until the 'change of circumstances' rule is adopted by a clear majority of the [Federal Circuit].").

62. 10 Nash & Cibinic Report 52 (Oct. 1996). These statistics, of course, do not include cases reported after that date.

63. *See, e.g., Viktoria Transport GmbH & Co., KC*, ASBCA No. 30371, 88-3 BCA 20,291; *S & W Tire Servs., Inc*., GSBCA No. 6376, 82-2 BCA 16,048.

64. 14 Cl. Ct. 733 (1988).

65. *Id*. at 736.

66. 17 Cl. Ct. 47 (1989), *aff'd*, 905 F.2d 1518 (Fed. Cir. 1990), *cert. denied*, 498 U.S. 1024 (1991).

67. *Salsbury*, 17 Cl. Ct. at 58. *See also Biener GmbH v. United States*, 17 Cl. Ct. 802 (1989) (changed circumstances rule not applicable in absence of short form termination for convenience clause and knowledge at time of contracting that work could be obtained from another source at cheaper price).

68. *Salsbury*, 905 F.2d at 1521.

69. This narrow reading of *Torncello* was adopted by a New York court interpreting a similar provision in a contract with a state agency, *A.J. Temple Marble v. Long Island R.R*., 659 N.Y.S.2d 412 (Sup. 1997), and by the D.C. Court of Appeals for a termination provision in a contract with the District of Columbia, *District of Columbia v. Organization for Envt'l Growth, Inc*., 700 A.2d 185 (D.C. 1997).

70. 55 F.3d 1578 (Fed. Cir. 1995).

71. *Id*. at 1582.

72. GSBCA No. 10186-P, 90-1 BCA 22,332.

73. *Id*. at 112,229-30. The IRS also agreed to pay Vanguard $15,000 in attorneys' fees and costs of pursuing the protest. *Id*. at 112,230.

74. *Id*. at 112,237 (quoting 41 U.S.C. 253b(d)(4) (Supp. V 1987)). Further limiting the government's termination power, the GSBCA also has held that a termination for convenience is improper when the termination is based upon defects in the procurement process which did not result in any prejudice to an actual or potential offeror. *See Diversified Sys. Resources, Ltd*., GSBCA No. 8493-P, 88-3 BCA 21,017.

75. Effective Oct. 1, 1982, the U.S. Court of Claims was abolished and was replaced by the U.S. Court of Appeals for the Federal Circuit and a new U.S. Claims Court. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 101, 171-77, 96 Stat. 25, 27-28 (1982). The Claims Court was renamed the U.S. Court of Federal Claims effective October 29, 1992. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, Title IX, 902(b), 106 Stat. 4506, 4516 (1992).

76. 7 Cl. Ct. 43 (1984).

77. *Id*. at 45.

78. *Id*. at 47.

79. 847 F.2d 1549 (Fed. Cir. 1988).

80. IBCA No. 1828, 86-2 BCA 18,888.

81. *Maxima*, 847 F.2d at 1555.

82. The court based its holding on the premise that "[t]he purpose of the [termination for convenience] clause is not to authorize unilateral negotiation of a contract after it has been fully performed." *Id*.

83. *Stoner-Caroga Corp. v. United States,* 3 Cl. Ct. 92, 96 (1983).

84. *Id*. The Court of Claims had previously reached the same conclusion under yet another surplus sales contract with an identical exculpatory provision. *See Peck Iron & Metal Co. v. United States,* 603 F.2d 171, 172-73 (Ct. Cl. 1979).

85. ASBCA No. 25692, 84-2 BCA 17,460.

86. *See also Operational Serv. Corp*., ASBCA Nos. 37059 *et al*., 93-3 BCA 26,190 (finding convenience termination was abuse of discretion and a breach where contracting agency intended at time of award to terminate contract to

give work to another company). Contractors alleging bad faith on the part of government officials are rarely successful due to an extremely difficult burden of proof. *Salsbury Indus. v. United States*, 17 Cl. Ct. 47, 55 (1989) (absent "bad faith or a clear abuse of discretion the contracting officer's election to terminate is conclusive"); *Continental Collection & Disposal, Inc. v. United States*, 29 Fed. Cl. 644, 652 (1993) (irrefragable proof equates to proof of specific government intent to injure plaintiff); *Haney v. United States*, 676 F.2d 584, 586 (Ct. Cl. 1982) (to adequately demonstrate government intent to injure plaintiff, plaintiff must identify specific instances of government ill will directed at plaintiff); *Advanced Materials, Inc. v. United States*, 34 Fed. Cl. 480, 483 (1995) (finding of bad faith requires actual knowledge on part of contracting officer that the contract would not be performed).

87. *Tamp Corp.*, 84-2 BCA at 86,977.

88. *Id.* The evidence of intent cited by the opinion is the hearing transcript, suggesting that the contracting officer made this damaging admission in his testimony. *Id.* at 86,976.

89. A board of contract appeals also used a finding of bad faith conduct to prevent a defective termination for default from being converted to a termination for convenience. *See Apex Int'l Management Servs., Inc.*, ASBCA Nos. 44647 *et al.*, 94-2 BCA 26,842.

90. *See id.*; *Travel Centre v. General Servs. Admin*, GSBCA No. 14057, 98-1 BCA 29,422, *recon. denied*, 1998 WL 29972.

91. ASBCA Nos. 44647 *et al.*, 94-2 BCA 26,842.

92. *Id.* at 133,518.

93. *Id.* at 133,548.

94. *Id.* at 133,550 ("[T]he amount of appellant's recovery would not be limited to termination for convenience damages, as the Government contends . . ., since a termination for the convenience of the Government, either directly or constructively, is valid only in the absence of bad faith or a clear abuse of discretion.").

95. GSBCA No. 14057, 98-1 BCA 29,422.

96. GSBCA No. 14057 (Jan. 23, 1998), 1998 WL 29972.

97. We are indebted to our good friend Alan V. Washburn, Esq. for bringing this anomaly to our attention.

98. *Darwin Constr. Co., Inc. v. United States*, 811 F.2d 593 (Fed. Cir. 1987).

99. *McDonnell Douglas Corp. v. United States*, 35 Fed. Cl. 358 (1996).

100. *Darwin Constr. Co., Inc.*, 811 F.2d at 594; *McDonnell Douglas Corp.*, 35 Fed. Cl. at 369.

101. Recall that because Soledad's contract contained a short form termination for convenience clause, it was entitled to no recovery at all. *Torncello*, 681 F.2d at 759-60.

102. 94 F.3d 1537 (Fed. Cir. 1996).

103. A "cardinal change" is a change that "exceeds the scope of the contract's changes clause. . . ." *AT&T Communications, Inc. v. WilTel, Inc.*, 1 F.3d 1201, 1205 (Fed. Cir. 1993).

104. *Krygoski Constr. Co., Inc. v. United States*, No. 214-89C (Fed. Cl. March 2, 1993), 1993 WL 840295 (Fed. Cl.).

105. *Id.* at 9.

106. *Id.* at 15.

107. *Id.* at 21.

108. *Krygoski*, 94 F.3d at 1545.

109. *Id.*

110. *Torncello*, 681 F.2d at 774.

111. *See South Corp. v. United States*, 690 F.2d 1368, 1370 n.2 (Fed. Cir.1982) (decisions of Court of Claims are binding precedent unless and until overruled by Federal Circuit sitting *en banc*).

112. *Torncello*, 681 F.2d at 773. This precept was also cited approvingly in both *Salsbury* (905 F.2d at 1521) and *Caldwell & Santmyer* (55 F.3d at 1582).

113. The central premise of Federal Circuit's decision in *Krygoski* rests upon an erroneous reading of *Torncello*, which the court asserted "overruled *Colonial Metals* because the Navy used the termination for convenience clause to escape a promise it never had an intention to keep." *Krygoski*, 94 F.3d at 1541-42. However, it will be recalled that only Chief Judge Friedman and Judge Davis grounded their opinions on the fact that the Navy's breach of contract was premeditated. *See Torncello*, 681 F.2d at 773-74.

114. 10 Nash & Cibinic Report 52 (Oct. 1996). As Professor Cibinic points out:

[It] is ironic to find the *Salsbury*, *Caldwell & Santmyer*, and *Krygoski* panels using the concurring opinions [in *Torncello*] to discredit the plurality opinion, then quoting from the discredited plurality opinion for the proposition that specific intent to harm is required and ignoring the concurring opinion's reservations concerning the need for proof of specific intent to harm.

Id.

115. *Krygoski*, 94 F.3d at 1542.

116. Pub. L. No. 98-369, 98 Stat. 1175 (1984), codified as amended at 10 U.S.C. 2304 *et seq*.; 41 U.S.C. 251 *et seq*. Actually, CICA was only two years old when Krygoski's contract was terminated for convenience.

117. *Krygoski*, 94 F.3d at 1542-43.

118. *Id*. at 1543.

119. *Id*. at 1542.

120. The opinion cites in this regard 41 U.S.C. 253(a)(1)(A), 401, 405(a), 416 and 10 U.S.C. 2304. The Federal Circuit's opinion, dated August 1, 1996, does not reflect the fact that 41 U.S.C. 401 was repealed by the Clinger-Cohen Act effective February 10, 1996. *See* Pub. L. No. 104-106, Div. D, Title XLIII, 4305(a)(2), 110 Stat. 665 (1996).

121. DAR 1-300.1, 32 C.F.R. 1-300.1 (1983).

122. FPR 1-1.301-1, 41 C.F.R. 1-1.301-1 (1983).

123. CICA requires that contracting agencies "obtain full and open competition through use of competitive procedures." 10 U.S.C. 2305(a)(1); 41 U.S.C.

253(a)(1)(A). Under the pre-CICA statutes, proposals were be solicited from "the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured." 10 U.S.C. 2304(g) (1982) (pre-CICA version); 41 U.S.C. 253 (1982) (pre-CICA version). According to Professors Nash and Cibinic, the intent of these pre-CICA statues and regulations was "to foster as much competition from as many qualified sources as is reasonable." *Federal Procurement Law, supra* note 6, at 328 n.6. *See also* John Cibinic, Jr. & Ralph C. Nash, Jr., *Formation of Government Contracts* 327 (1982) (describing pre-CICA standard as "[t]he fundamental policy of federal procurement is that competition is to be obtained whenever practicable.").

124. *See, e.g., American Air Filter Co., Inc.*, 57 Comp. Gen. 285 (1978), 78-1 CPD 136; *Webcraft Packaging, Div. Of Beatrice Foods Co.*, B-194087, Aug. 14, 1979, 79-2 CPD 120; *Memorex Corp.*, 61 Comp. Gen. 42 (1981), 81-2 CPD 334.

125. *Krygoski*, 94 F.3d at 1543.

126. *Compare* FAR 15.606 *with* DAR 3-805.4 and FPR 1-3.805-1(a) (negotiated procurements); *compare* FAR 14.209 *with* DAR 2-209 and FPR 1-2.208 (advertised procurements).

127. *See, e.g., Corbin Superior Composites, Inc.*, B-235019; B-235019.2, July 20, 1989, 89-2 CPD 67; *Indian & Native Am. Employment & Training Coalition*, B-216421, April 16, 1985, 85-1 CPD 432;*W.H. Mullins*, B-207200, Feb. 16, 1983, 83-1 CPD 158.

128. *See, e.g., Hunkin Conkey Constr. Co. v. United States,* 461 F.2d 1270 (Ct. Cl. 1972).

129. *See* John Cibinic, Jr. & Ralph C. Nash, Jr., *Administration of Government Contracts* 388 (3d ed. 1995).

130. Professors Nash and Cibinic quote the following passage from *AT&T Communications, Inc. v. WilTel, Inc.*, 1 F.3d 1201 (Fed. Cir. 1993), stating at 1205:

This case does not ask whether Government modifications breached a contract, but asks instead whether Government modifications changed the contract enough to circumvent the statutory requirement of competition. The cardinal change doctrine asks whether a modification exceeds the scope of the contract's

changes clause; this case asks whether the modification is within the scope of the competition conducted to achieve the original contract. In application, these questions overlap. . . . A modification generally falls within the scope of the original procurement if potential bidders would have expected it to fall within the contract's changes clause.

Id.

131. In *International Electronics Corp. v. United States*, 646 F.2d 496 (Ct. Cl. 1981); *appeal after remand*, 2 Cl. Ct. 570, *aff'd*, 727 F.2d 1120 (Fed. Cir. 1983), the court held that conversion of a termination from default to convenience made it unnecessary to consider whether the government's failure to provide certain promised equipment for contract performance amounted to a cardinal change.

132. *AT&T Communications, Inc. v. WilTel, Inc*., 1 F.3d 1201, 1205 (Fed. Cir. 1993).

133. *Krygoski*, slip op. at 20.

134. *Id*. at 19.

135. *General Dynamics Corp. v. United States,* 585 F.2d 457, 466 (Ct. Cl. 1978); *see also Reliance Ins. Co. v. United States,* 931 F.2d 863 (Fed. Cir. 1991) (over 200 change orders do not amount, cumulatively, to a cardinal change).

136. *Krygoski*, 94 F.3d at 1544.

137. *Id*. at 1545. There was, however, no indication in either the trial or appellate court opinions of an evidentiary basis for this speculation.

138. Changes (1968 FEB), DAR 7-602.3(a), 32 C.F.R. 7-602.3(a) (1983).

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

140. 117 S. Ct. 1691 (1997).

141. The apotheosis of this position, in the context of termination for convenience, may be *A.J. Temple Marble v. Long Island R.R., supra*. There, the court held that it was not enough for a plaintiff to show that the government entered into the contract with no intention of honoring it; he would also have to

establish that the government had acted in "bad faith," *i.e.*, with malicious intent to harm him. 659 N.Y.S.2d at 415.

142. *See* Claybrook, *supra* note 42.

143. *See id*. at 593-602.

144. *See generally* Restatement (Second) of Contracts, 77, cmts. a & b (1981); John D. Calamari & Joseph M. Perillo, *Contracts* 228-31 (3d ed. 1987).

145. This clause reads in its entirety as follows:

G.5 CANCELLATION

Resultant contracts may be canceled, in whole or in part, by either party upon thirty (30) calendar days written notice. The Government may exercise its cancellation rights at any time. If the contract is canceled by the contractor, the one hundred dollar minimum guarantee will not be reimbursed by the Government.

Federal Supply Service Information Technology Schedule, Clause G.5.

146. 48 C.F.R. 12.302.

147. However, the termination for convenience clause would be read into a contract omitting the clause by operation of law under the *Christian* doctrine. *Aerolease Long Beach v. United States*, 31 Fed. Cl. 342, 374 (Fed. Cl. 1994) ("Even if the contract contained no termination for convenience clause, the *Christian* doctrine would incorporate such a clause by operation of law.").

148. 48 C.F.R. 52.212-4.

149. 48 C.F.R. 12.403(d) & 52.212-4(l).