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DoD Contract Termination Liability: An Analysis of Special Termination Cost Clause (STCC)

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Acquisition Research Program:
Creating Synergy for Informed Change

DoD Contract Termination Liability: An Analysis of the Special Termination Cost Clause

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Overview

- Purpose of Research
- Termination Liability (TL) Requirements
- Special Termination Cost Requirements
- Observations and Findings
- Alternative Approaches to Funding TL
- Recommendations



Purpose of Research

- Review current policies, practices, and procedures for funding and managing contract termination liability within the DoD
- Propose alternative approaches to funding TL
- Provide recommendations for funding TL



Background

- Termination Liability (TL): The government's liability to the contractor for certain costs and damages resulting from a termination for convenience
 - Applies to incrementally funded contracts
- Regulations require that obligated funds are adequate and sufficient to cover TL expenses at any point during the contract period
 - Protects against possible Anti-Deficiency Act violations



Background

- Two exceptions:
 - Statutory Waiver (Congressional approval)
 - Special Termination Cost (STC) Clause
- STC Clause (DFARS)
 - Limits the amount of certain termination costs (per FAR 31) that the government is liable for in a Termination for Convenience
 - Requires agency head approval and Congressional notification



Observations and Findings

- Inconsistent approach to managing and budgeting for TL
- Diffused guidance between Financial Management Regulation (FMR) and the Federal Acquisition Regulation (FAR)
 - Differing interpretation of policy, guidance, procedures



Observations and Findings

- Insufficient database to conduct proper analysis
 - Number of contracts requiring TL
 - Total amount of TL funding
 - Number of contracts containing STC clauses
 - Total amount of funding managed at higher levels because of STC



Observations and Findings

- Lack of acceptability for STC clause
 - Not well received by Congress or OMB
 - Current environment of cost overruns and schedule delays
 - Not well received by acquisition Program Managers
 - Hesitant to approach higher headquarters



Alternative Approaches to Funding TL

- Impose a “tax” on all programs subject to TL
 - Use tax to fund TL insurance pool to cover TL costs
 - Advantages:
 - PM won’t have to commit funds for TL
 - Less funds tied up at service level for TL and available for program execution
 - Disadvantages
 - All programs subject to TL must pay tax, regardless of termination risk
 - At-risk programs would have less funds for program execution



Alternative Approaches to Funding TL

- Fund TL at the major command or PEO level
 - TL funds managed at higher headquarters level
 - Advantages:
 - PM won't have to commit funds for TL
 - STC clauses would not be needed
 - Disadvantages
 - Congress not receptive (similar to STC)
 - Actual termination may have adverse affects on other programs



Alternative Approaches to Funding TL

- Increase the use of STC Clauses
 - Advantages:
 - More funds available for program execution
 - Elimination of uncertainty of fund availability
 - Disadvantages
 - Congress not receptive
 - OMB not receptive
 - STCs are administratively burdensome



Recommendations

- Remove ambiguity and improve consistency in the FMR and FAR
- Do not impose a tax system to provide TL
- Continue to use STC clauses for major programs having funding or longevity concerns



Summary

- Inconsistent TL regulations subject to misinterpretation
- Inconsistent practices and procedures in managing TL
- Given number of contracts, there is a very small probability of a termination for convenience
- Program managers are satisfied with current practices and procedures for managing TL
- Lack of Congressional support for STC clauses
- Recommend improving regulations pertaining to TL and consider use of STC in major acquisition programs

