

## 49.402-3 Procedure for default.

(a) When a default termination is being considered, the Government *shall* decide which type of termination action to take (*i.e.*, default, convenience, or no-cost cancellation) only after review by *contracting* and technical personnel, and by counsel, to ensure the propriety of the proposed action.

(b) The administrative *contracting officer shall* not issue a show cause notice or cure notice without the prior approval of the *contracting office*, which *should* be obtained by the most expeditious means.

(c) Subdivision (a)(1)(i) of the Default clause covers situations when the contractor has defaulted by failure to make delivery of the *supplies* or to perform the services within the specified time. In these situations, no notice of failure or of the possibility of *termination for default* is required to be sent to the contractor before the actual notice of termination (but see paragraph (e) of this section). However, if the Government has taken any action that might be construed as a waiver of the contract delivery or performance date, the *contracting officer shall* send a notice to the contractor setting a new date for the contractor to make delivery or complete performance. The notice *shall* reserve the Government's rights under the Default clause.

(d) Subdivisions (a)(1)(ii) and (a)(1)(iii) of the Default clause cover situations when the contractor fails to perform some of the other provisions of the contract (such as not furnishing a required performance bond) or so fails to make progress as to endanger performance of the contract. If the termination is predicated upon this type of failure, the *contracting officer shall* give the contractor written notice specifying the failure and providing a period of 10 days (or longer period as necessary) in which to cure the failure. When appropriate, this notice *may* be made a part of the notice described in paragraph (e)(1) of this section. Upon expiration of the 10 days (or longer period), the *contracting officer may* issue a notice of *termination for default* unless it is determined that the failure to perform has been cured. A format for a cure notice is in [49.607](#).

(e)

(1) If *termination for default* appears appropriate, the *contracting officer should*, if practicable, notify the contractor *in writing* of the possibility of the termination. This notice *shall* call the contractor's attention to the contractual liabilities if the contract is terminated for default, and request the contractor to show cause why the contract *should* not be terminated for default. The notice *may* further state that failure of the contractor to present an explanation *may* be taken as an admission that no valid explanation exists. When appropriate, the notice *may* invite the contractor to discuss the matter at a conference. A format for a show cause notice is in [49.607](#).

(2) When a *termination for default* appears imminent, the *contracting officer shall* provide a written notification to the *surety*. If the contractor is subsequently terminated for default, a copy of the notice of default *shall* be sent to the *surety*.

(3) If requested by the *surety*, and agreed to by the contractor and any assignees, arrangements *may* be made to have future checks mailed to the contractor in care of the *surety*. In this case, the contractor *must* forward a written request to the designated disbursing officer specifically directing a change in address for mailing checks.

(4) If the contractor is a small business firm, the *contracting officer shall* immediately provide a copy

of any cure notice or show cause notice to the *contracting office's* small business specialist and the Small Business Administration Area Office nearest the contractor. The *contracting officer should*, whenever practicable, consult with the small business specialist before proceeding with a default termination (see also 49.402-4).

(f) The *contracting officer shall* consider the following factors in determining whether to terminate a contract for default:

- (1) The terms of the contract and applicable laws and regulations.
- (2) The specific failure of the contractor and the excuses for the failure.
- (3) The availability of the *supplies* or services from other sources.
- (4) The urgency of the need for the *supplies* or services and the period of time required to obtain them from other sources, as compared with the time delivery could be obtained from the delinquent contractor.
- (5) The degree of essentiality of the contractor in the Government *acquisition* program and the effect of a *termination for default* upon the contractor's capability as a supplier under other contracts.
- (6) The effect of a *termination for default* on the ability of the contractor to liquidate guaranteed loans, progress payments, or advance payments.
- (7) Any other pertinent facts and circumstances.

(g) If, after compliance with the procedures in paragraphs (a) through (f) of this 49.402-3, the *contracting officer* determines that a *termination for default* is proper, the *contracting officer shall* issue a notice of termination stating-

- (1) The contract number and date;
- (2) The acts or omissions constituting the default;
- (3) That the contractor's right to proceed further under the contract (or a specified portion of the contract) is terminated;
- (4) That the *supplies* or services terminated *may* be purchased against the contractor's account, and that the contractor will be held liable for any excess costs;
- (5) If the *contracting officer* has determined that the failure to perform is not excusable, that the notice of termination constitutes such decision, and that the contractor has the right to appeal such decision under the Disputes clause;
- (6) That the Government reserves all rights and remedies provided by law or under the contract, in addition to charging excess costs; and
- (7) That the notice constitutes a decision that the contractor is in default as specified and that the contractor has the right to appeal under the Disputes clause.

(h) The *contracting officer shall* make the same distribution of the termination notice as was made of the contract. A copy *shall* also be furnished to the contractor's *surety*, if any, when the notice is furnished to the contractor. The *surety should* be requested to advise if it desires to arrange for completion of the work. In addition, the *contracting officer shall* notify the disbursing officer to

withhold further payments under the terminated contract, pending further advice, which *should* be furnished at the earliest practicable time.

(i) In the case of a *construction* contract, promptly after issuance of the termination notice, the *contracting officer shall* determine the manner in which the work is to be completed and whether the materials, appliances, and plant that are on the site will be needed.

(j) If the *contracting officer* determines before issuing the termination notice that the failure to perform is excusable, the contract *shall* not be terminated for default. If termination is in the Government's interest, the *contracting officer may* terminate the contract for the convenience of the Government.

(k) If the *contracting officer* has not been able to determine, before issuance of the notice of termination whether the contractor's failure to perform is excusable, the *contracting officer shall* make a written decision on that point as soon as practicable after issuance of the notice of termination. The decision *shall* be delivered promptly to the contractor with a notification that the contractor has the right to appeal as specified in the Disputes clause.

**Parent topic:** [49.402 Termination of fixed-price contracts for default.](#)