

#### 49.401

weighted value depending on its importance and difficulty. The total weight value of all factors should be easily divisible (e.g., by 100) to determine percentages. The percentage of completion of each factor must be established based upon the specific facts of each contract. When totaled, the percentage of completion of each factor applied to the weighted value of each factor results in the overall percentage of contract completion. The percentage of completion is then applied to the total contract fee or to the fee applicable to the terminated portion of the contract to arrive at an equitable adjustment.

### Subpart 49.4—Termination for Default

#### 49.401 General.

(a) Termination for default is generally the exercise of the Government's contractual right to completely or partially terminate a contract because of the contractor's actual or anticipated failure to perform its contractual obligations.

(b) If the contractor can establish, or it is otherwise determined that the contractor was not in default or that the failure to perform is excusable; i.e., arose out of causes beyond the control and without the fault or negligence of the contractor, the default clauses prescribed in 49.503 and located at 52.249 provide that a termination for default will be considered to have been a termination for the convenience of the Government, and the rights and obligations of the parties governed accordingly.

(c) The Government may, in appropriate cases, exercise termination or cancellation rights in addition to those in the contract clauses (see for example, paragraph (h) of the Default clause at 52.249-8).

(d) For default terminations of orders under Federal Supply Schedule contracts, see subpart 8.4.

(e) Notwithstanding the provisions of this 49.401, the contracting officer may, with the written consent of the contractor, reinstate the terminated contract by amending the notice of termination, after a written determination is made that the supplies or services

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are still required and reinstatement is advantageous to the Government.

#### 49.402 Termination of fixed-price contracts for default.

##### 49.402-1 The Government's right.

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

##### 49.402-2 Effect of termination for default.

(a) Under a termination for default, the Government is not liable for the contractor's costs on undelivered work and is entitled to the repayment of advance and progress payments, if any, applicable to that work. The Government may elect, under the Default clause, to require the contractor to transfer title and deliver to the Government completed supplies and manufacturing materials, as directed by the contracting officer.

(b) The contracting officer shall not use the Default clause as authority to acquire any completed supplies or manufacturing materials unless it has been ascertained that the Government does not already have title under some other provision of the contract. The contracting officer shall acquire manufacturing materials under the Default clause for furnishing to another contractor only after considering the difficulties the other contractor may have in using the materials.

(c) Subject to paragraph (d) below, the Government shall pay the contractor the contract price for any completed supplies, and the amount agreed upon by the contracting officer and the contractor for any manufacturing materials, acquired by the Government under the Default clause.

(d) The Government must be protected from overpayment that might result from failure to provide for the

Government's potential liability to laborers and material suppliers for lien rights outstanding against the completed supplies or materials after the Government has paid the contractor for them. To accomplish this, before paying for supplies or materials, the contracting officer shall take one or more of the following measures:

(1) Ascertain whether the payment bonds, if any, furnished by the contractor are adequate to satisfy all lienors' claims or whether it is feasible to obtain similar bonds to cover outstanding liens.

(2) Require the contractor to furnish appropriate statements from laborers and material suppliers disclaiming any lien rights they may have to the supplies and materials.

(3) Obtain appropriate agreement by the Government, the contractor, and lienors ensuring release of the Government from any potential liability to the contractor or lienors.

(4) Withhold from the amount due for the supplies or materials any amount the contracting officer determines necessary to protect the Government's interest, but only if the measures in subparagraphs (d)(1), (2), and (3) above cannot be accomplished or are considered inadequate.

(5) Take other appropriate action considering the circumstances and the degree of the contractor's solvency.

(e) The contractor is liable to the Government for any excess costs incurred in acquiring supplies and services similar to those terminated for default (see 49.402-6), and for any other damages, whether or not repurchase is effected (see 49.402-7).

#### **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) below). 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 subparagraph (e)(1) below. 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