

# Subpart 49.1 - General Principles

Parent topic: [Part 49 - Termination of Contracts](#)

## 49.100 Scope of subpart.

(a) This subpart deals with-

(1) The authority and responsibility of *contracting officers* to terminate contracts in whole or in part for the convenience of the Government or for default;

(2) Duties of the contractor and the *contracting officer* after issuance of the notice of termination;

(3) General procedures for the settlement of terminated contracts; and

(4) *Settlement agreements*.

(b) Additional principles applicable to the *termination for convenience* and settlement of fixed-price and cost-reimbursement contracts are included in [subparts 49.2](#) and [49.3](#). Additional principles applicable to the termination of contracts for default are included in [subpart 49.4](#).

## 49.101 Authorities and responsibilities.

(a) The termination clauses or other *contract clauses* authorize *contracting officers* to terminate contracts for convenience, or for default, and to enter into *settlement agreements* under this regulation.

(b) The *contracting officer shall* terminate contracts, whether for default or convenience, only when it is in the Government's interest. The *contracting officer shall* effect a no-cost settlement instead of issuing a termination notice when-

(1) It is known that the contractor will accept one,

(2) Government property was not furnished, and

(3) There are no outstanding payments, debts due the Government, or other contractor obligations.

(c) When the price of the undelivered balance of the contract is less than \$5,000, the contract *should* not normally be terminated for convenience but *should* be permitted to run to completion.

(d) After the *contracting officer* issues a notice of termination, the termination *contracting officer* (TCO) is responsible for negotiating any settlement with the contractor, including a no-cost settlement if appropriate. Auditors and TCO's *shall* promptly schedule and complete audit reviews and negotiations, giving particular attention to the need for timely action on all settlements involving small business concerns.

(e) If the same item is under contract with both large and small business concerns and it is

necessary to terminate for convenience part of the units still to be delivered, preference *shall* be given to the continuing performance of small business contracts over large business contracts unless the chief of the *contracting office* determines that this is not in the Government's interest.

(f) The *contracting officer* is responsible for the release of excess funds resulting from the termination unless this responsibility is specifically delegated to the TCO.

## **49.102 Notice of termination.**

(a) *General.* The *contracting officer shall* terminate contracts for convenience or default only by a written notice to the contractor (see [49.601](#)). The notice of termination *may* be expedited by means of electronic communication capable of providing confirmation of receipt by the contractor. When the notice is mailed, it *shall* be sent by certified mail, return receipt requested. When the *contracting office* arranges for hand delivery of the notice, a written acknowledgment *shall* be obtained from the contractor. The notice *shall* state-

(1) That the contract is being terminated for the convenience of the Government (or for default) under the *contract clause* authorizing the termination;

(2) The *effective date of termination*;

(3) The extent of termination;

(4) Any special instructions; and

(5) The steps the contractor *should* take to minimize the impact on personnel if the termination, together with all other outstanding terminations, will result in a significant reduction in the contractor's work force (see paragraph (g) of the notice in [49.601-2](#)). If the termination notice is by telegram, include these "steps" in the confirming letter or modification.

(b) *Distribution of copies.* The *contracting officer shall* simultaneously send the termination notice to the contractor, and a copy to the *contract administration office* and to any known assignee, guarantor, or *surety* of the contractor.

(c) *Amendment of termination notice.* The *contracting officer may* amend a termination notice to-

(1) Correct nonsubstantive mistakes in the notice;

(2) Add supplemental data or instructions; or

(3) Rescind the notice if it is determined that items terminated had been completed or shipped before the contractor's receipt of the notice.

(d) *Reinstatement of terminated contracts.* Upon written consent of the contractor, the *contracting office may* reinstate the terminated portion of a contract in whole or in part by amending the notice of termination if it has been determined *in writing* that-

(1) Circumstances clearly indicate a requirement for the terminated items; and

(2) Reinstatement is advantageous to the Government.

## **49.103 Methods of settlement.**

Settlement of terminated cost-reimbursement contracts and fixed-price contracts terminated for convenience *may* be effected by (a) negotiated agreement, (b) determination by the TCO, (c) costing-out under vouchers using SF 1034, Public Voucher for Purchases and Services Other Than Personal, for cost-reimbursement contracts (as prescribed in subpart 49.3), or (d) a combination of these methods. When possible, the TCO *should* negotiate a fair and prompt settlement with the contractor. The TCO *shall* settle a *settlement proposal* by determination only when it cannot be settled by agreement.

## **49.104 Duties of prime contractor after receipt of notice of termination.**

After receipt of the notice of termination, the contractor *shall* comply with the notice and the termination clause of the contract, except as otherwise directed by the TCO. The notice and clause applicable to convenience terminations generally require that the contractor-

- (a) Stop work immediately on the *terminated portion of the contract* and stop placing subcontracts thereunder;
- (b) Terminate all subcontracts related to the terminated portion of the prime contract;
- (c) Immediately advise the TCO of any special circumstances precluding the stoppage of work;
- (d) Perform the *continued portion of the contract* and submit promptly any request for an equitable adjustment of price for the continued portion, supported by evidence of any increase in the cost, if the termination is partial;
- (e) Take necessary or directed action to protect and preserve property in the contractor's possession in which the Government has or *may* acquire an interest and, as directed by the TCO, deliver the property to the Government;
- (f) Promptly notify the TCO *in writing* of any legal proceedings growing out of any subcontract or other commitment related to the *terminated portion of the contract*;
- (g) Settle outstanding liabilities and proposals arising out of termination of subcontracts, obtaining any approvals or ratifications required by the TCO;
- (h) Promptly submit the contractor's own *settlement proposal*, supported by appropriate schedules; and
- (i) Dispose of *termination inventory*, as directed or authorized by the TCO.

## **49.105 Duties of termination contracting officer after issuance of notice of termination.**

(a) Consistent with the termination clause and the notice of termination, the TCO *shall*-

(1) Direct the action required of the prime contractor;

(2) Examine the *settlement proposal* of the prime contractor and, when appropriate, the *settlement proposals* of sub-contractors;

(3) Promptly negotiate settlement with the contractor and enter into a *settlement agreement*; and

(4) Promptly settle the contractor's *settlement proposal* by determination for the elements that cannot be agreed on, if unable to negotiate a complete settlement.

(b) To expedite settlement, the TCO *may* request specially qualified personnel to-

(1) Assist in dealings with the contractor;

(2) Advise on legal and contractual matters;

(3) Conduct accounting reviews and advise and assist on accounting matters; and

(4) Perform the following functions regarding *termination inventory* (see [subpart 45.6](#)):

(i) Verify its existence.

(ii) Determine qualitative and quantitative allocability.

(iii) Make recommendations concerning serviceability.

(iv) Undertake necessary screening and redistribution.

(v) Assist the contractor in accomplishing other disposition.

(c) The TCO *should* promptly hold a conference with the contractor to develop a definite program for effecting the settlement. When appropriate in the judgment of the TCO, after consulting with the contractor, principal subcontractors *should* be requested to attend. Topics that *should* be discussed at the conference and documented include-

(1) General principles relating to the settlement of any *settlement proposal*, including obligations of the contractor under the termination clause of the contract;

(2) Extent of the termination, point at which work is stopped, and status of any plans, drawings, and information that would have been delivered had the contract been completed;

(3) Status of any continuing work;

(4) Obligation of the contractor to terminate subcontracts and general principles to be followed in settling subcontractor *settlement proposals*;

(5) Names of subcontractors involved and the dates termination notices were issued to them;

(6) Contractor personnel handling review and settlement of subcontractor *settlement proposals* and the methods being used;

(7) Arrangements for transfer of title and delivery to the Government of any material required by the Government;

(8) General principles and procedures to be followed in the protection, preservation, and disposition of the contractor's and subcontractors' *termination inventories*, including the preparation of *termination inventory* schedules;

(9) Contractor accounting practices and preparation of SF 1439 (Schedule of Accounting Information (49.602-3));

(10) Form in which to submit *settlement proposals*;

(11) Accounting review of *settlement proposals*;

(12) Any requirement for interim financing in the nature of partial payments;

(13) Tentative time schedule for negotiation of the settlement, including submission by the contractor and subcontractors of *settlement proposals*, *termination inventory* schedules, and accounting information schedules (see 49.206-3 and 49.303-2);

(14) Actions taken by the contractor to minimize impact upon employees affected adversely by the termination (see paragraph (g) of the letter notice in 49.601-2); and

(15) Obligation of the contractor to furnish accurate, complete, and current *cost or pricing data*, and to certify to that effect in accordance with 15.403-4(a)(1) when the amount of a *termination settlement agreement*, or a *partial termination settlement agreement* plus the estimate to complete the *continued portion of the contract* exceeds the threshold in 15.403-4.

#### **49.105-1 Termination status reports.**

When the TCO and *contracting officer* are in different activities, the TCO will furnish periodic status reports on termination actions to the *contracting office* upon request. The *contracting office* shall specify the information required.

#### **49.105-2 Release of excess funds.**

(a) The TCO shall estimate the funds required to settle the termination, and within 30 days after the receipt of the termination notice, recommend the release of excess funds to the *contracting officer*. The initial deobligation of excess funds should be accomplished in a timely manner by the *contracting officer*, or the TCO, if delegated the responsibility. The TCO shall not recommend the release of amounts under \$1,000, unless requested by the *contracting officer*.

(b) The TCO shall maintain continuous surveillance of required funds to permit timely release of any additional excess funds (a recommended format for release of excess funds is in 49.604). If previous releases of excess funds result in a shortage of the amount required for settlement, the TCO shall promptly inform the *contracting officer*, who shall reinstate the funds within 30 days.

### **49.105-3 Termination case file.**

The TCO responsible for negotiating the final settlement *shall* establish a separate case file for each termination. This file will include memoranda and records of all actions relative to the settlement (see [4.801](#)).

### **49.105-4 Cleanup of construction site.**

In the case of terminated *construction* contracts, the *contracting officer shall* direct action to ensure the cleanup of the site, protection of serviceable materials, removal of hazards, and other action necessary to leave a safe and healthful site.

### **49.106 Fraud or other criminal conduct.**

If the TCO suspects fraud or other criminal conduct related to the settlement of a terminated contract, the TCO *shall* discontinue negotiations and report the facts under agency procedures.

### **49.107 Audit of prime contract settlement proposals and subcontract settlements.**

(a) The TCO *shall* refer each prime contractor *settlement proposal* valued at or above the threshold for obtaining *certified cost or pricing data* set forth in FAR [15.403-4\(a\)\(1\)](#) to the appropriate audit agency for review and recommendations. The TCO *may* submit *settlement proposals* of less than the threshold for obtaining *certified cost or pricing data* to the audit agency. Referrals *shall* indicate any specific information or data that the TCO considers relevant and *shall* include facts and circumstances that will assist the audit agency in performing its function. The audit agency *shall* develop requested information and *may* make any further accounting reviews it considers appropriate. After its review, the audit agency *shall* submit written comments and recommendations to the TCO. When a formal examination of *settlement proposals* valued under the threshold for obtaining *certified cost or pricing data* is not warranted, the TCO will perform or have performed a desk review and include a written summary of the review in the termination case file.

(b) The TCO *shall* refer subcontract settlements received for approval or ratification to the appropriate audit agency for review and recommendations when—

(1) The amount exceeds the threshold for obtaining *certified cost or pricing data*; or

(2) The TCO determines that a complete or partial accounting review is advisable. The audit agency *shall* submit written comments and recommendations to the TCO. The review by the audit agency does not relieve the prime contractor or higher tier subcontractor of the responsibility for performing an accounting review.

(c)

(1) The responsibility of the prime contractor and of each subcontractor (see [49.108](#)) includes performance of accounting reviews and any necessary field audits. However, the TCO *should* request the Government audit agency to perform the accounting review of a subcontractor's *settlement proposal* when-

(i) A subcontractor objects, for competitive reasons, to an accounting review of its records by an upper tier contractor;

(ii) The Government audit agency is currently performing audit work at the subcontractor's plant, or can perform the audit more economically or efficiently;

(iii) Audit by the Government is necessary for consistent audit treatment and orderly administration; or

(iv) The contractor has a substantial or controlling financial interest in the subcontractor.

(2) The audit agency *should* avoid duplication of accounting reviews performed by the upper tier contractor on subcontractor *settlement proposals*. However, this *should* not preclude the Government from making additional reviews when appropriate. When the contractor is performing accounting reviews according to this section, the TCO *should* request the audit agency to periodically examine the contractor's accounting review procedures and performance, and to make appropriate comments and recommendations to the TCO.

(d) The audit report is advisory only, and is for the TCO to use in negotiating a settlement or issuing a unilateral determination. Government personnel handling audit reports *must* be careful not to reveal privileged information or information that will jeopardize the negotiation position of the Government, the prime contractor, or a higher tier subcontractor. Consistent with this, and when in the Government's interest, the TCO *may* furnish audit reports under paragraph (c) of this section to prime and higher tier subcontractors for their use in settling subcontract *settlement proposals*.

## **49.108 Settlement of subcontract settlement proposals.**

### **49.108-1 Subcontractor's rights.**

A subcontractor has no contractual rights against the Government upon the termination of a prime contract. A subcontractor *may* have rights against the prime contractor or intermediate subcontractor with whom it has contracted. Upon termination of a prime contract, the prime contractor and each subcontractor are responsible for the prompt settlement of the *settlement proposals* of their immediate subcontractors.

### **49.108-2 Prime contractor's rights and obligations.**

(a) *Termination for convenience* clauses provide that after receipt of a termination notice the prime contractor *shall*, unless directed otherwise by the TCO, terminate all subcontracts to the extent that they relate to the performance of prime work terminated. Therefore, prime contractors *should* include a termination clause in their subcontracts for their own protection. Suggestions regarding use of subcontract termination clauses are in [subpart 49.5](#).

(b) The failure of a prime contractor to include an appropriate termination clause in any subcontract, or to exercise the clause rights, *shall not*-

(1) Affect the Government's right to require the termination of the subcontract; or

(2) Increase the obligation of the Government beyond what it would have been if the subcontract had contained an appropriate clause.

(c) In any case, the reasonableness of the prime contractor's settlement with the subcontractor *should* normally be measured by the aggregate amount due under paragraph (f) of the subcontract termination clause suggested in 49.502(e). The TCO *shall* allow reimbursement in excess of that amount only in unusual cases and then only to the extent that the terms of the subcontract did not unreasonably increase the rights of the subcontractor.

### **49.108-3 Settlement procedure.**

(a) Contractors *shall* settle with subcontractors in general conformity with the policies and principles relating to settlement of prime contracts in this subpart and subparts 49.2 or 49.3. However, the basis and form of the subcontractor's *settlement proposal must* be acceptable to the prime contractor or the next higher tier subcontractor. Each settlement *must* be supported by accounting data and other information sufficient for adequate review by the Government. In no event will the Government pay the prime contractor any amount for loss of anticipatory profits or consequential damages resulting from the termination of any subcontract (but see 49.108-5).

(b) Except as provided in 49.108-4, the TCO *shall* require that-

(1) All subcontractor *termination inventory* be disposed of and accounted for in accordance with the procedures contained in paragraph (j) of the clause at 52.245-1, Government Property; and

(2) The prime contractor submit, for approval or ratification, all termination settlements with subcontractors.

(c) The TCO *shall* promptly examine each subcontract settlement received to determine that the subcontract termination was made necessary by the termination of the prime contract (or by issuance of a *change order*-see 49.002(b)). The TCO will also determine if the settlement was arrived at in good faith, is reasonable in amount, and is allocable to the *terminated portion of the contract* (or, if allocable only in part, that the proposed allocation is reasonable). In considering the reasonableness of any subcontract settlement, the TCO *shall* generally be guided by the provisions of this part relating to the settlement of prime contracts, and *shall* comply with any applicable requirements of 49.107 and 49.111 relating to accounting and other reviews. After the examination, the TCO *shall* notify the contractor *in writing* of-

(1) Approval or ratification, or

(2) The reasons for disapproval.

### **49.108-4 Authorization for subcontract settlements without approval or ratification.**



(a)

(1) The TCO *may*, upon written request, give written authorization to the prime contractor to conclude settlements of subcontracts terminated in whole or in part without approval or ratification when the amount of settlement (see 49.002(d)) is \$100,000 or less, if-

(i) The TCO is satisfied with the adequacy of the procedures used by the contractor in settling *settlement proposals*, including proposals for retention, sale, or other disposal of *termination inventory* of the immediate and lower tier subcontractors (the TCO *shall* obtain the advice and recommendations of-

(A) The appropriate audit agency relating to the adequacy of the contractor's audit administration, including personnel, and

(B) The cognizant *plant clearance officer* relating to the adequacy of the contractor's procedures and personnel for the administration of property disposal matters);

(ii) Any *termination inventory* included in determining the amount of the settlement will be disposed of as directed by the prime contractor, except that the disposition of the inventory *shall* not be subject to-

(A) Review by the TCO under 49.108-3(c); or

(B) The screening requirements in 45.602-3; and

(iii) A certificate similar to the certificate in the *settlement proposal* form in 49.602-1(a) will accompany the settlement.

(2) Except as provided in paragraph (a)(4) of this section, authority granted to a prime contractor under paragraph (a)(1) of this section by any TCO *shall* apply to all *Executive agencies'* prime contracts that are terminated, or modified by *change orders*.

(3) Except as provided in paragraph (a)(4) of this section, the TCO *shall* accept, as part of the prime contractor's *settlement proposal*, settlements of terminated lower tier subcontracts concluded by any of the prime contractor's immediate or lower tier subcontractors who have been granted authority as prime contractors to settle subcontracts; provided, that the settlement is within the limit of the authority. Authorization to settle proposals of lower tier subcontractors *shall* not be granted directly to subcontractors. However, a prime contractor authorized to approve subcontractor settlements *may* also exercise this authority in its capacity as a subcontractor, with respect to its terminated subcontracts and orders. When exercising this authority as a subcontractor, the contractor *shall* notify the purchaser.

(4) The provisions of paragraphs (a)(1), (2), and (3) of this section *shall* not apply to contracts under the administration of any *contracting officer* if the *contracting officer* so notifies the prime contractor concerned. This notice *shall*

(i) Be *in writing*, and

(ii) If paragraph (a)(3) of this section is involved, specify any subcontractor affected.

(b) Section 45.602 *shall* apply to disposal of completed end items allocable to the terminated subcontract. However, these items *may* be disposed of without review by the TCO under 49.108-3 and without screening under 45.602-3, if the items do not require demilitarization and the total

amount (at the subcontract price) when added to the amount of the settlement does not exceed the amount authorized under this subsection.

(c) A TCO granting the authorization in paragraph (a)(1) of this section *shall* periodically (at least annually) make a selective review of settlements and settlement procedures to determine if the contractor is making adequate reviews and fair settlements, and whether the authorization *should* remain in effect. The TCO *shall* obtain the advice and recommendations of the appropriate audit agency and the cognizant *plant clearance officer*. When it is determined that the contractor's procedures are not adequate, or that improper settlements are being made, or when the authority has not been used in the preceding 2 years, the TCO *shall* revoke the authorization by written notice to the contractor, effective on the date of receipt.

(d) The contractor *may* make any number of separate settlements with a single subcontractor but *shall* not divide *settlement proposals* solely to bring them under an authorization limit. Separate *settlement proposals* that would normally be included in a single proposal, such as those based on a series of separate orders for the same item under one contract, *shall* be consolidated whenever possible.

(e) Upon written request of the contractor, the TCO *may* increase an authorization granted under paragraph (a)(1) of this subsection to authorize the contractor to conclude settlements under a particular prime contract. The TCO *may* limit the increased authorization to specific subcontracts or classes of subcontracts.

(f) Authorizations granted under this [49.108-4](#) *shall* not authorize the settlement of requisitions or orders placed with any unit within the contractor's corporate entity.

(g) Recommended formats for a request to settle subcontractor *settlement proposals* and the TCO's letter of authorization to the contractor are in [49.605](#) and [49.606](#), respectively.

### **49.108-5 Recognition of judgments and arbitration awards.**

(a) When a subcontractor obtains a final judgment against a prime contractor, the TCO *shall*, for the purposes of settling the prime contract, treat the amount of the judgment as a cost of settling with the contractor, to the extent the judgment is properly allocable to the terminated portion of the prime contract, if-

(1) The prime contractor has made reasonable efforts to include in the subcontract a termination clause described in [49.502\(e\)](#), [49.503\(c\)](#), or a similar clause excluding payment of anticipatory profits or consequential damages;

(2) The provisions of the subcontract relating to the rights of the parties upon its termination are fair and reasonable and do not unreasonably increase the common law rights of the subcontractor;

(3) The contractor made reasonable efforts to settle the *settlement proposal* of the subcontractor;

(4) The contractor gave prompt notice to the *contracting officer* of the initiation of the proceedings in which the judgment was rendered and did not refuse to give the Government control of the defense of the proceedings; and

(5) The contractor diligently defended the suit or, if the Government assumed control of the defense of the proceedings, rendered reasonable assistance requested by the Government.

(b) If the conditions in paragraphs (a)(1) through (5) of this section are not all met, the TCO *may* allow the contractor the part of the judgment considered fair for settling the subcontract *settlement proposal*, giving due regard to the policies in this part for settlement of proposals.

(c) When a contractor and a subcontractor submit the subcontractor's *settlement proposal* to arbitration under any applicable law or contract provision, the TCO *shall* recognize the arbitration award as the cost of settling the proposal of the contractor to the same extent and under the same conditions as in paragraphs (a) and (b) of this section.

#### **49.108-6 Delay in settling subcontractor settlement proposals.**

When a prime contractor's inability to settle with a subcontractor delays the settlement of the prime contract, the TCO *may* settle with the prime contractor. The TCO *shall* except the subcontractor *settlement proposal* from the settlement in whole or part and reserve the rights of the Government and the prime contractor with respect to the subcontractor proposal.

#### **49.108-7 Government assistance in settling subcontracts.**

In unusual cases the TCO *may* determine, with the consent of the prime contractor, that it is in the Government's interest to provide assistance to the prime contractor in the settlement of a particular subcontract. In these situations, the Government, the prime contractor, and a subcontractor *may* enter into an agreement covering the settlement of one or more subcontracts. In these settlements, the subcontractor *shall* be paid through the prime contractor as part of the overall settlement with the prime contractor.

#### **49.108-8 Assignment of rights under subcontracts.**

(a) The *termination for convenience* clauses in [52.249](#), except the short-form clauses, obligate the prime contractor to assign to the Government, as directed by the TCO, all rights, titles, and interest under any subcontract terminated because of termination of the prime contract. The TCO *shall* not require the assignment unless it is in the Government's interest.

(b) The *termination for convenience* clauses (except the short-form clauses) also provide the Government the right, in its discretion, to settle and pay any *settlement proposal* arising out of the termination of subcontracts. This right does not obligate the Government to settle and pay *settlement proposals* of subcontractors. As a general rule, the prime contractor is obligated to settle and pay these proposals. However, when the TCO determines that it is in the Government's interest, the TCO *shall*, after notifying the contractor, settle the subcontractor's proposal using the procedures for settlement of prime contracts. An example in which the Government's interest would be served is when a subcontractor is a sole source and it appears that a delay by the prime contractor in settlement or payment of the subcontractor's proposal will jeopardize the financial position of the subcontractor. Direct settlements with subcontractors are not encouraged.

## **49.109 Settlement agreements.**

### **49.109-1 General.**

When a termination settlement has been negotiated and all required reviews have been obtained, the contractor and the TCO *shall* execute a *settlement agreement* on Standard Form 30 (Amendment of *Solicitation/Modification of Contract*) (see 49.603). The settlement *shall* cover-

(a) Any setoffs that the Government has against the contractor that *may* be applied against the terminated contract and

(b) All *settlement proposals* of subcontractors, except proposals that are specifically excepted from the agreement and reserved for separate settlement.

### **49.109-2 Reservations.**

(a) The TCO *shall*-

(1) Reserve in the *settlement agreement* any rights or demands of the parties that are excepted from the settlement;

(2) Ensure that the wording of the reservation does not create any rights for the parties beyond those in existence before execution of the *settlement agreement*;

(3) Mark each applicable *settlement agreement* with "This *settlement agreement* contains a reservation" and retain the contract file until the reservation is removed;

(4) Ensure that sufficient funds are retained to cover complete settlement of the reserved items; and

(5) At the appropriate time, prepare a separate settlement of reserved items and include it in a separate *settlement agreement*.

(b) A recommended format for settlement of reservations appears in 49.603-9.

### **49.109-3 Government property.**

Before execution of a *settlement agreement*, the TCO *shall* determine the accuracy of the Government property account for the terminated contract. If an audit discloses property for which the contractor cannot account, the TCO *shall* reserve in the *settlement agreement* the rights of the Government regarding that property or make an appropriate deduction from the amount otherwise due the contractor.

### **49.109-4 No-cost settlement.**

The TCO *shall* execute a no-cost *settlement agreement* (see 49.603-6 or 49.603-7, as applicable) if-

- (a) The contractor has not incurred costs for the *terminated portion of the contract* or
- (b) The contractor is willing to waive the costs incurred and
- (c) No amounts are due the Government under the contract.

#### **49.109-5 Partial settlements.**

The TCO *should* attempt to settle in one agreement all rights and liabilities of the parties under the contract except those arising from any *continued portion of the contract*. Generally, the TCO *shall* not attempt to make partial settlements covering particular items of the prime contractor's *settlement proposal*. However, when a TCO cannot promptly complete settlement under the terminated contract, a partial settlement *may* be entered into if-

- (a) The issues on which agreement has been reached are clearly severable from other issues and
- (b) The partial settlement will not prejudice the Government's or contractor's interests in disposing of the unsettled part of the *settlement proposal*.

#### **49.109-6 Joint settlement of two or more settlement proposals.**

(a) With the consent of the contractor, the TCO or TCO's concerned *may* negotiate jointly two or more termination *settlement proposals* of the same contractor under different contracts, even though the contracts are with different *contracting offices* or agencies. In such cases, accounting work *shall* be consolidated to the greatest extent practical. The resulting settlement *may* be evidenced by one *settlement agreement* covering all contracts involved or by a separate agreement for each contract involved.

- (b) When the *settlement agreement* covers more than one contract, it *shall*-
  - (1) Clearly identify the contracts involved,
  - (2) Assign an amendment modification number to each contract,
  - (3) Apportion the total amount of the settlement among the several contracts on some reasonable basis,
  - (4) Have attached or incorporated a schedule showing the apportionment, and
  - (5) Be distributed and attached to each contract involved in the same manner as other *contract modifications*.

#### **49.109-7 Settlement by determination.**

(a) *General*. If the contractor and TCO cannot agree on a termination settlement, or if a *settlement proposal* is not submitted within the period required by the termination clause, the TCO *shall* issue a determination of the amount due consistent with the termination clause, including any cost principles incorporated by reference. The TCO *shall* comply with [49.109-1](#) through [49.109-6](#) in making a settlement by determination and with [49.203](#) in making an adjustment for loss, if any.

Copies of determinations *shall* receive the same distribution as other *contract modifications*.

(b) *Notice to contractor*. Before issuing a determination of the amount due the contractor, the TCO *shall* give the contractor at least 15 days notice by certified mail (return receipt requested) to submit written evidence, so as to reach the TCO on or before a stated date, substantiating the amount previously proposed.

(c) Justification of *settlement proposal*.

(1) The contractor has the burden of establishing, by proof satisfactory to the TCO, the amount proposed.

(2) The contractor *may* submit vouchers, verified transcripts of books of account, affidavits, audit reports, and other documents as desired. The TCO *may* request the contractor to submit additional documents and data, and *may* request appropriate accountings, investigations, and audits.

(3) The TCO *may* accept copies of documents and records without requiring original documents unless there is a question of authenticity.

(4) The TCO *may* hold any conferences considered appropriate-

(i) To confer with the contractor,

(ii) To obtain additional information from Government personnel or from independent experts, or

(iii) To consult persons who have submitted affidavits or reports.

(d) *Determinations*. After reviewing the information available, the TCO *shall* determine the amount due and *shall* transmit a copy of the determination to the contractor by certified mail (return receipt requested), or by any other method that provides evidence of receipt. The transmittal letter *shall* advise the contractor that the determination is a final decision from which the contractor *may* appeal under the Disputes clause, except as shown in paragraph (f) of this section. The determination *shall* specify the amount due the contractor and will be supported by detailed schedules conforming generally to the forms for *settlement proposals* prescribed in 49.602-1 and by additional information, schedules, and analyses as appropriate. The TCO *shall* explain each major item of disallowance. The TCO need not reconsider any other action relating to the *terminated portion of the contract* that was ratified or approved by the TCO or another *contracting officer*.

(e) *Preservation of evidence*. The TCO *shall* retain all written evidence and other data relied upon in making a determination, except that copies of original books of account need not be made. The TCO *shall* return books of account, together with other original papers and documents, to the contractor within a reasonable time.

(f) *Appeals*. The contractor *may* appeal, under the Disputes clause, any settlement by determination, except when the contractor has failed to submit the *settlement proposal* within the time provided in the contract and failed to request an extension of time. The pendency of an appeal *shall* not affect the authority of the TCO to settle the *settlement proposal* or any part by negotiation with the contractor at any time before the appeal is decided.

(g) *Decision on the contractor's appeal*. The TCO *shall* give effect to a decision of the *Claims Court* or a board of contract appeals, when necessary, by an appropriate modification to the

contract. When appropriate, the TCO *should* obtain a release from the contractor. TCO's are authorized to modify the formats of *settlement agreements* in 49.603 to agree with this provision.

## **49.110 Settlement negotiation memorandum.**

(a) The TCO *shall*, at the conclusion of negotiations, prepare a settlement negotiation memorandum describing the principal elements of the settlement for inclusion in the termination case file and for use by reviewing authorities. *Pricing* aspects of the settlement *shall* be documented in accordance with 15.406-3. The memorandum *shall* be distributed in accordance with 15.406-3.

(b) If the settlement was negotiated on the basis of individual items, the TCO *shall* specify the factors considered for each item. If the settlement was negotiated on an overall lump-sum basis, the TCO need not evaluate each item or group of items individually, but *shall* support the total amount of the recommended settlement in reasonable detail. The memorandum *shall* include explanations of matters involving differences and doubtful questions settled by agreement, and the factors considered. The TCO *should* include any other matters that will assist reviewing authorities in understanding the basis for the settlement.

## **49.111 Review of proposed settlements.**

Each agency *shall* establish procedures, when necessary, for the administrative review of proposed termination settlements. When one agency provides termination settlement services for another agency, the agency providing the services *shall* also perform the settlement review function.

## **49.112 Payment.**

### **49.112-1 Partial payments.**

(a) *General*. If the contract authorizes partial payments on *settlement proposals* before settlement, a prime contractor *may* request them on the form prescribed in 49.602-4 at any time after submission of interim or final *settlement proposals*. The Government will process applications for partial payments promptly. A subcontractor *shall* submit its application through the prime contractor which *shall* attach its own *invoice* and recommendations to the subcontractor's application. Partial payments to a subcontractor *shall* be made only through the prime contractor and only after the prime contractor has submitted its interim or final *settlement proposal*. Except for undelivered acceptable finished *products*, partial payments *shall* not be made for profit or fee claimed under the *terminated portion of the contract*. In exercising discretion on the extent of partial payments to be made, the TCO *shall* consider the diligence of the contractor in settling with subcontractors and in preparing its own *settlement proposal*.

(b) *Amount of partial payment*. Before approving any partial payment, the TCO *shall* obtain any desired accounting, engineering, or other specialized reviews of the data submitted in support of the contractor's *settlement proposal*. If the reviews and the TCO's examination of the data indicate that the requested partial payment is proper, reasonable payments *may* be authorized in the discretion of the TCO up to-

(1) 100 percent of the contract price, adjusted for undelivered acceptable items completed before the termination date, or later completed with the approval of the TCO (see [49.205](#));

(2) 100 percent of the amount of any subcontract settlement paid by the prime contractor if the settlement was approved or ratified by the TCO under [49.108-3\(c\)](#) or was authorized under [49.108-4](#);

(3) 90 percent of the *direct cost of termination inventory*, including costs of raw materials, purchased parts, *supplies*, and direct labor;

(4) 90 percent of other allowable costs (including settlement expense and manufacturing and administrative *indirect costs*) allocable to the *terminated portion of the contract* and not included in paragraphs (b)(1), (2), or (3) of this section; and

(5) 100 percent of partial payments made to subcontractors under this section.

(c) *Recognition of assignments*. When an *assignment of claims* has been made under the contract, the Government *shall* not make partial payments to other than the assignee unless the parties to the assignment consent *in writing* (see [32.805\(e\)](#)).

(d) *Security for partial payments*. If any partial payment is made for completed end items or for costs of *termination inventory*, the TCO *shall* protect the Government's interest. This *shall* be done by obtaining title to the completed end items or *termination inventory*, or by the creation of a lien in favor of the Government, paramount to all other liens, on the completed end items or *termination inventory*, or by other appropriate means.

(e) *Deductions in computing amount of partial payments*. The TCO *shall* deduct from the gross amount of any partial payment otherwise payable under [49.112-1\(b\)](#)-

(1) All unliquidated balances of progress and advance payments (including interest) made to the contractor, which are allocable to the *terminated portion of the contract*; and

(2) The amounts of all credits arising from the purchase, retention, or sale of property, the costs of which are included in the application for payment.

(f) *Limitation on total amount*. The total amount of all partial payments *shall* not exceed the amount that will, in the opinion of the TCO, become due to the contractor because of the termination.

(g) *Effect of overpayment*. If the total of partial payments exceeds the amount finally determined due on the *settlement proposal*, the contractor *shall* repay the excess to the Government on demand, together with interest. The interest *shall* be computed at the rate established by the Secretary of the Treasury under [50 U.S.C. App.1215\(b\)\(2\)](#) from the date the excess payment was received by the contractor to the date of repayment. However, interest will not be charged for any-

(1) Excess payment attributable to a reduction in the *settlement proposal* because of retention or other disposition of *termination inventory*, until 10 days after the date of the retention or disposition, or a later date determined by the TCO, or

(2) Overpayment under cost-reimbursement research and development contracts without profit or fee if the overpayments are repaid to the Government within 30 days after demand.



(h) Certification and approval of partial payments.

(1) The contractor *shall* place the following certification on vouchers or *invoices* for partial payments:

The payment covered by this voucher is a partial payment on the Contractor's *settlement proposal* under contract No. \_\_\_\_\_ under part 49 of the Federal *Acquisition* Regulation.

(2) The TCO *shall* approve the *invoice* or voucher by noting on it the following:

Payment of \$ \_\_\_\_\_ is approved.

## **49.112-2 Final payment.**

(a) *Negotiated settlement.* After execution of a *settlement agreement*, the contractor *shall* submit a voucher or *invoice* showing the amount agreed upon, less any portion previously paid. The TCO *shall* attach a copy of the *settlement agreement* to the voucher or *invoice* and forward the documents to the disbursing officer for payment.

(b) *Settlement by determination.* If the settlement is by determination and-

(1) There is no appeal within the allowed time, the contractor *shall* submit a voucher or *invoice* showing the amount determined due, less any portion previously paid; or

(2) There is an appeal, the contractor *shall* submit a voucher or *invoice* showing the amount finally determined due on the appeal, less any portion previously paid. Pending determination of any appeal, the contractor *may* submit vouchers or *invoices* for charges that are not directly involved with the portion being appealed, without prejudice to the rights of either party on the appeal.

(c) *Construction contracts.* In the case of *construction* contracts, before forwarding the final payment voucher, the *contracting officer shall* ascertain whether there are any outstanding labor violations. If so, the *contracting officer shall* determine the amount to be withheld from the final payment (see subpart 22.4).

(d) *Interest.* The Government *shall* not pay interest on the amount due under a *settlement agreement* or a settlement by determination. The Government *may*, however, pay interest on a successful contractor appeal from a *contracting officer's* determination under the Disputes clause at 52.233-1.

## **49.113 Cost principles.**

The cost principles and procedures in the applicable subpart of part 31 *shall*, subject to the general principles in 49.201-

(a) Be used in asserting, negotiating, or determining costs relevant to termination settlements under contracts with other than educational institutions, and

(b) Be a guide for the negotiation of settlements under contracts for experimental, developmental, or research work with educational institutions (but see 31.104).

## 49.114 Unsettled contract changes.

(a) Before settlement of a completely terminated contract, the TCO *shall* obtain from the *contracting office* a list of all related *unsettled contract changes*. The TCO *shall* settle, as part of final settlement, all *unsettled contract changes* after obtaining the recommendations of the *contracting office* concerning the changes.

(b) When the contract has been partially terminated, any outstanding *unsettled contract changes* will usually be handled by the *contracting officer*. However, the *contracting officer* may delegate this function to the TCO.

## 49.115 Settlement of terminated incentive contracts.

(a) *Fixed-price incentive contracts*. The TCO *shall* settle terminated fixed-price incentive (FPI) contracts under the provisions of paragraph (j) of the clause at [52.216-16](#), Incentive Price Revision-Firm Target, and [52.249-2](#), *Termination for Convenience* of the Government (Fixed-Price).

(1) *Partial termination*. Under a partially terminated contract, the TCO *shall* negotiate a settlement as provided in the termination clause of the contract, and paragraph (j) of the clause at [52.216-16](#), Incentive Price Revision-Firm Target, or paragraph (1) of the clause at [52.216-17](#), Incentive Price Revision-Successive Targets. The *contracting officer shall* apply the incentive price revision provisions to completed items accepted by the Government, including any for which the contractor *may* request reimbursement in the *settlement proposal*. The TCO *shall* reimburse the contractor at target price for completed articles included in the *settlement proposal* for which a final price has not been established. The TCO *shall* incorporate in the *settlement agreement* an appropriate reservation as to final price for these completed articles.

(2) *Complete termination*. If any items were delivered and accepted by the Government, the *contracting officer shall* establish prices under the incentive provisions of the contract. On the *terminated portion of the contract*, the provisions of the termination clause (see [52.249-2](#), *Termination for Convenience* of the Government (Fixed-Price)) *shall* govern and the provisions of the incentive clause *shall* not apply. The TCO responsible for the termination settlement will ensure, on the basis of evidence considered proper (including coordination with the *contracting officer*), that no portion of the costs considered in the negotiations under the incentive provisions are included in the termination settlement.

(b) *Cost-plus-incentive-fee contracts*. The TCO *shall* settle terminated cost-plus-incentive-fee contracts under the clause at [52.249-6](#), Termination (Cost-Reimbursement).

(1) *Partial termination*. Under a *partial termination*, the TCO *shall* limit the settlement to an adjustment of target fee as provided in paragraph (e) of the clause at [52.216-10](#), Incentive Fee. The *settlement agreement shall* include a reservation regarding any adjustment of target cost resulting from the *partial termination*. The *contracting officer shall* adjust the target cost, if required.

(2) *Complete termination*. The parties *shall* negotiate the settlement under the provisions of [subpart 49.3](#) and the clause at [52.249-6](#), Termination (Cost Reimbursement). The fee *shall* be adjusted on the basis of the target fee, and the incentive provisions *shall* not be applied or considered.