(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 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 con-
tractor in care of the surety. In this
case, the contractor must forward a
written request to the designated dis-
bursing officer specifically directing a
change in address for mailing checks.
(4) If the contractor is a small busi-
ness firm, the contracting officer shall
immediately provide a copy of any cure
notice or show cause notice to the con-
tracting office’s small business spe-
cialist and the Small Business Admin-
istration Regional Office nearest the
contractor. The contracting officer
should, whenever practicable, consult
with the small business specialist be-
fore proceeding with a default termi-
nation (see also 49.402–4).
(f) The contracting officer shall con-
sider the following factors in deter-
mining whether to terminate a con-
tact for default:
(1) The terms of the contract and ap-
plicable laws and regulations.
(2) The specific failure of the con-
tractor 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 acquisi-
tion program and the effect of a termi-
nation for default upon the contrac-
tor’s capability as a supplier under
other contracts.
(6) The effect of a termination for de-
fault on the ability of the contractor to
liquidate guaranteed loans, progress
payments, or advance payments.
(7) Any other pertinent facts and cir-
cumstances.
(g) If, after compliance with the pro-
cedures in paragraphs (a) through (f) of
this 49.402–3, the contracting officer de-
termines 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 constit-
tuting the default;
(3) That the contractor’s right to pro-
cede further under the contract (or a
specified portion of the contract) is
terminated;
(4) That the supplies or services ter-
minated may be purchased against the
contractor’s account, and that the con-
tractor will be held liable for any ex-
cess costs;
(5) If the contracting officer has de-
termined that the failure to perform is
not excusable, that the notice of termi-
nation constitutes such decision, and
that the contractor has the right to ap-
peal 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 deci-
sion 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 ter-
mination 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 con-
tractor. 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 con-
tact, pending further advice, which
should be furnished at the earliest
practicable time.
i) In the case of a construction con-
tact, promptly after issuance of the
termination notice, the contracting of-
icer 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 need-
ed.
j) If the contracting officer deter-
mines before issuing the termination
notice that the failure to perform is ex-
cusable, the contract shall not be ter-
minated for default. If termination is
in the Government’s interest, the con-
tracting 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.


49.402–4 Procedure in lieu of termination for default.

The following courses of action, among others, are available to the contracting officer in lieu of termination for default when in the Government’s interest:

(a) Permit the contractor, the surety, or the guarantor, to continue performance of the contract under a revised delivery schedule.

(b) Permit the contractor to continue performance of the contract by means of a subcontract or other business arrangement with an acceptable third party, provided the rights of the Government are adequately preserved.

(c) If the requirement for the supplies and services in the contract no longer exists, and the contractor is not liable to the Government for damages as provided in 49.402–7, execute a no-cost termination settlement agreement using the formats in 49.603–6 and 49.603–7 as a guide.

49.402–5 Memorandum by the contracting officer.

When a contract is terminated for default or a procedure authorized by 49.402–4 is followed, the contracting officer shall prepare a memorandum for the contract file explaining the reasons for the action taken.

49.402–6 Repurchase against contractor’s account.

(a) When the supplies or services are still required after termination, the contracting officer shall repurchase the same or similar supplies or services against the contractor’s account as soon as practicable. The contracting officer shall repurchase at as reasonable a price as practicable, considering the quality and delivery requirements. The contracting officer may repurchase a quantity in excess of the undelivered quantity terminated for default when the excess quantity is needed, but excess cost may not be charged against the defaulting contractor for more than the undelivered quantity terminated for default (including variations in quantity permitted by the terminated contract). Generally, the contracting officer will make a decision whether or not to repurchase before issuing the termination notice.

(b) If the repurchase is for a quantity not over the undelivered quantity terminated for default, the Default clause authorizes the contracting officer to use any terms and acquisition method deemed appropriate for the repurchase. However, the contracting officer shall obtain competition to the maximum extent practicable for the repurchase. The contracting officer shall cite the Default clause as the authority. If the repurchase is for a quantity over the undelivered quantity terminated for default, the contracting officer shall treat the entire quantity as a new acquisition. If the repurchase is for a quantity over the undelivered quantity terminated for default, the contracting officer shall treat the entire quantity as a new acquisition.

(c) If repurchase is made at a price over the price of the supplies or services terminated, the contracting officer shall, after completion and final payment of the repurchase contract, make a written demand on the contractor for the total amount of the excess, giving consideration to any increases or decreases in other costs such as transportation, discounts, etc. If the contractor fails to make payment, the contracting officer shall follow the procedures in subpart 32.6 for collecting contract debts due the Government.


49.402–7 Other damages.

(a) If the contracting officer terminates a contract for default or follows a course of action instead of termination for default (see 49.402–4), the contracting officer promptly must assess and demand any liquidated damages to which the Government is entitled under the contract. Under the contract clause at 52.211–11, these damages are in addition to any excess repurchase costs.