

**SUBCHAPTER G—CONTRACT MANAGEMENT**

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**PART M849—TERMINATION OF CONTRACTS**

**M849.000 Scope of part.**

**M849.001 Definitions.**

*Termination Contracting Officer (TCO)* means a contracting officer who is settling terminated contracts. At VA a single contracting officer may be responsible for duties in any or all of areas of contracting (*i.e.*, the authority to enter into, administer, and/or terminate contracts and make related determinations and findings), commensurate with the authorities noted on their individual warrants. Reference in this manual to termination contracting officer does not require that terminations be performed by a TCO at a particular office or activity.

**M849.002 Applicability.**

This part provides procedures, guidance, and information relating to the complete or partial termination of contracts for the convenience of the Government or for default. This part does not apply to commercial item contracts awarded using FAR part [12](#) procedures. See FAR [12.403](#) for termination policies for contracts for the acquisition of commercial items. However, for contracts for the acquisition of commercial items, this part provides administrative guidance which may be followed unless it is inconsistent with the requirements and procedures in FAR [12.403](#), Termination, and the clause at [52.212-4](#), Contract Terms and Conditions—Commercial Items.

**M849.002-70 General termination concepts.**

(a) The government may terminate or end a contract at any time whether it is for the convenience of the government or due to the contractor's failure to perform or make progress, *i.e.*, default.

(b) The procedures for terminating a contract vary depending on which type of termination is used. The procedures also vary depending on whether the contract being terminated is a *commercial* or *noncommercial* contract.

(1) When the government terminates a contract for its convenience, whether the contract is commercial or noncommercial, it is called "Termination for Convenience."

(2) When a *noncommercial* contract is terminated due to contractor's failure to perform or to make progress, it is called "Termination for Default."

(3) The termination of a *commercial* contract due to any default by the contractor, or if the contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance is referred to as a "Termination for Cause."

### Subpart M849.1—General Principles

#### M849.101 Authorities and responsibilities.

(a) A VA contracting officer may terminate contracts for convenience or default to the extent of the authority provided on the Contracting Officer's Certificate of Appointment ([SF 1402](#)). All proposed terminations shall be coordinated through the supporting legal counsel and the head of the contracting activity (HCA), as set forth in this part.

(b) The Deputy Senior Procurement Executive (DSPE) shall be notified prior to terminating prime contracts in excess of \$5 million.

(c) Contracting officers should exercise the authority to terminate a contract only after proper authorization and instructions from the activity which requested that the contract be established.

(d) When requesting legal counsel concurrence, the contracting officer will provide all relevant documents to include a chronology of key events, cure and show cause notices and responses thereto. The request for legal review shall contain, at a minimum, the following—

- (1) The proposed termination notice set forth in [FAR 49.102](#);
- (2) An explanation of what necessitated the default, including the reasons why the contracting officer considers the contractor to be in default;
- (3) A statement that the factors set forth in [FAR 49.402-3\(f\)](#) have been fully considered; and
- (4) Final decision language and appeal rights.

#### M849.102 Notice of termination.

(d) *Reinstatement of terminated contracts.* The contracting officer may reinstate a contract only after documenting the decision via a Determination and Findings (D&F). The CO shall forward the D&F to the HCA for approval. The D&F must set forth the reasons why the contract was terminated and why it should now be reinstated. The reinstatement must demonstrate how reinstatement of the contract would be advantageous to the government. The D&F shall be coordinated with legal counsel.

**M849.106 Fraud or other criminal conduct.**

(a) If the contracting officer suspects fraud or other criminal conduct related to the settlement of a contract terminated by default or convenience the contracting officer shall:

(1) Immediately discontinue all negotiations.

(2) Prepare a written report of pertinent facts concerning the matter and submit the report and supporting documents as follows:

(i) For contracts, task and delivery orders awarded by a contracting officer from the Office of Construction and Facilities Management (CFM), submit the report and supporting documents to the HCA for CFM for review and concurrence. In turn, the HCA indicates concurrence/non-concurrence and submits the report and documentation to legal counsel and the Office of the Inspector General (OIG) for review and concurrence.

(ii) For all other actions submit the report and supporting documents through the cognizant HCA to the DSPE for approval prior to submission to legal and OIG.

(b) If the evidence indicates fraud or other criminal conduct, the DSPE or the Executive Director, CFM, must forward the report along with recommendations through appropriate channels to OGC and the OIG for action and potential referral to the Department of Justice (DOJ), as appropriate.

(c) The DSPE or the Executive Director, CFM, will advise the contracting officer as to any further action to be taken. Pending receipt of this advice, no VA employee may discuss the matter with the contractor.

(d) The contracting officer will not initiate a collection, recovery or other settlement action while the matter is in the hands of the DOJ without first obtaining the concurrence of the U.S. Attorney concerned, through OIG.

(e) If the contractor makes an inquiry, the contracting officer will advise only that the proposal has been forwarded to higher authority.

**M849.107 Audit of prime contract settlement proposals and subcontract settlements.**

When considering whether an audit is required, use the guidelines at FAR [49.002\(d\)](#) regarding action required based on the amount of the settlement proposal. Contracting officers will submit settlement proposals for review and audit prior to taking any further action, in accordance with the provisions and claim limitations applicable to prime and subcontractors as set forth in FAR [49.107](#). Contracting officers shall request

audits directly from the cognizant audit agencies where agreements have been established for their cognizant HCA or will request audits through the VA OIG, Office of Contract Review.

**M849.109 Settlement agreements.**

**M849.109-1 General.**

(a) The HCA shall establish internal procedures to ensure the independent review of proposed termination settlements. For settlement agreements, including those made by determination, the contracting officer shall submit a D&F to the HCA for approval. The D&F shall be coordinated with General Counsel.

(b) Use a [Standard Form 30 \(SF 30\)](#), Amendment of Solicitation/Modification of Contract, to settle a convenience termination by determination when:

(1) The contractor has lost its right of appeal because it failed to submit a timely settlement proposal; and

(2) To confirm the determination when the contractor does not appeal the contracting officer's decision to terminate the contract in part or as a whole.

(3) The effective date of the SF 30 shall be the same as the date of the letter of determination. Do not assign a supplementary procurement instrument identification number to the letter of determination.

**M849.110 Settlement negotiation memorandum.**

(a) VA's acquisition professionals are encouraged to utilize Attachment [M849-A](#), Settlement Memorandum Tables/Formats, for preparation of a settlement negotiation memorandum.

(1) *Fixed-price contracts.* Use the format in Table 849-1, for the termination contracting officer's settlement memorandum for fixed-price contracts terminated for the convenience of the Government. Contracting officers shall recommend that contractors and subcontractors use this format, appropriately modified, for subcontract settlements submitted for review and approval.

(2) *Cost-reimbursement contracts.* Use Part I of the format in Table 849-1 and Part II of the format in Table 849-2 Part II of the format in Table 49-2, Settlement Memorandum for Cost-Reimbursement Contracts, for the termination contracting officer's settlement memorandum for cost-reimbursement contracts:

**M849.111 Review of proposed settlements.**

**M849.111-70 Settlement Review Boards.**

The DSPE and the Executive Director, Construction and Facilities Management will each establish within its own organization a settlement review board. The board may be established on a permanent or temporary basis. More than one such board may be established if settlements are to be made at different locations, if personnel with different qualifications are needed for different contracts, or if for other reasons, the establishment of more than one review board is considered desirable. Each settlement review board should be composed of at least three qualified neutral employees without a vested interest in the settlement being reviewed. The membership of each board should include at least one representative from the supporting legal counsel and one representative from the supporting Finance Office.

**M849.111-71 Required review.**

(a) FAR [49.111](#) requires each agency to establish procedures, when necessary, for the administrative review of proposed termination settlements. Contracting officers shall submit proposed termination settlements or determinations of amounts due the contractor under a terminated contract for legal review. Settlement agreements valued at \$100,000 - \$5 million will be reviewed by the HCA (or at least one level above the contracting officer). Termination settlement agreements above \$5 million shall be submitted through the HCA to the DSPE for review and approval. Contracting officers shall not execute the settlement agreement or determination prior to receipt of the technical, legal review and final approval of the HCA or DSPE. The legal review of contracts awarded by or on behalf of the VA OIG will be conducted by the Counselor to the Inspector General.

(b) If the contracting officer declines to implement one or more of the recommendations or comments contained in the review memorandum, the contracting officer shall submit a written response to the HCA or DSPE, as applicable in accordance with M849.111-71(a), explaining why the recommendations or comments were not followed. For contracts awarded by or on behalf of the VA OIG, the response shall be submitted to the Counselor to the Inspector General.

**M849.111-72 Submission of information.**

(a) The contracting officer shall submit to the appropriate HCA a copy of the proposed settlement agreement or determination, supported by such detailed information as is required for an adequate review. This information should normally include copies of:

- (1) The contractor's or subcontractor's settlement proposal.
- (2) The audit report.

(3) The property disposal report and any required approvals in connection therewith.

(4) The contracting officer's memorandum explaining the settlement, and

(5) Any other relevant material that will assist the procurement analyst in the review. The procurement analyst may, at his or her discretion, require the submission of additional information.

(b) In the case of contracts awarded by or on behalf of the VA Office of Inspector General, review will be obtained from the Counselor to the Inspector General.

**M849.112 Payment.**

**M849.112-1 Partial payments.**

(a) The contracting officer shall prepare a D&F in response to a contractor's request for partial payment, for approval by the cognizant HCA. The D&F shall set forth all pertinent facts and circumstances resulting in the contracting officer's determination as to whether or not the partial payment should be authorized. The D&F shall be coordinated with a technical reviewer and legal counsel.

(b) Payments shall not be made by VA Finance Officer unless the contracting officer specifically approves an invoice/voucher for payment.

**M849.114 Unsettled contract changes.**

The contracting officer shall settle all unsettled contract changes as part of the final settlement process.

**Subpart M849.2—Additional Principles for Fixed-Price Contract Terminated for Convenience**

**M849.202 Profit.**

The contracting officer shall coordinate the Government's proposed profit position with General Counsel to ensure that it is fair and reasonable.

**M849.206 Settlement proposals.**

**M849.206-1 Submission of settlement proposals.**

After the initial notice of termination is transmitted to the contractor, the contracting officer shall follow it with instructions regarding how to submit a settlement proposal, including which forms are to be used.

**M849.206-2 Bases for settlement proposals.**

After the initial notice of termination is transmitted to the contractor, the contracting officer shall follow it with instructions regarding what basis ("inventory," "total cost," or "other") is preferred for any settlement proposal.

**M849.208 Equitable adjustment after partial termination.**

The contracting officer shall be responsible for negotiating any equitable adjustment in the price of the continued portion of the contract, except when the negotiation authority is delegated to the Termination Contracting Officer.

**Subpart M849.4—Termination for Default**

**M849.402 Termination of fixed-price contracts for default.**

**M849.402-370 Procedure for default—unique considerations.**

(a) Contracting officers should not terminate for default any contract with a small business firm to whom a Certificate of Competency was issued, or to whom loans were made with SBA's participation, without prior written approval of the HCA.

(b) When unliquidated progress payments, advance payments, guaranteed loans, or anticipated excess repurchase costs are involved, the contracting officer must:

(1) Prepare a statement of the value of the inventory that may be available for offset against the outstanding financing.

(2) Identify and state the approximate amount of the excess acquisition costs applicable.

(c) When a default termination is being considered, the contracting officer shall decide which type of terminating action to take and shall consider the following factors:

(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.

(d) Once the decision has been made to terminate for default, the contracting officer shall notify the contractor in writing of the possibility of the termination. The notice shall also call attention to the contractor's contractual liabilities, 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 at [FAR 49.607](#).

(e) 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.

(f) 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 liaison or VA Office of Small and Disadvantaged Business Utilization (OSDBU) representative and the Small Business Administration Office nearest the contractor. The contracting officer shall consult with the small business liaison before proceeding with a default termination.

**M849.402-6 Repurchase against contractor's account.**

(a) VA Form 2237, Request, Turn-in, and Receipt for Property or Services, or the file copy of the purchase order covering the purchase of supplies, equipment, or services against a defaulting contractor shall be annotated to show the name of the defaulted contractor, the contract number, the contract price, the name of the contractor from whom procurement is made, the price paid, the competition secured and the difference in cost, if any, to the Department of Veterans Affairs. When repurchase results in the payment of excess costs and the purchase is made through the Supply Fund, the excess cost, when collected, shall be deposited to the credit of the Supply Fund. In all other instances, the excess costs, when collected, shall be deposited to General Fund Receipts.

(b) Contracting officers, when purchasing against a defaulted contractor, shall procure the items in a manner that will protect the interests of the contractor as well as those of the Government.

(c) The contracting officer shall—

(1) Place a brief explanation for the repurchase in the contract file.

(2) If practical, use the original contract terms, conditions, and specification for the repurchase. Whether or not the original terms are used, obtain the advice of assigned legal counsel before issuing a solicitation for similar supplies or work (services and construction).

(3) If the reprocurement is delayed, protect the Government's rights to recover reprocurement costs by documenting the file to explain the circumstances of the delay.

**M849.402-7 Other damages.**

(a) Even if the repurchase price does not exceed the price of the terminated supplies or work (services and construction), the contracting officer shall include administrative costs incurred for the repurchase when determining the final purchase price. The contracting officer shall include all reprocurement costs in a single demand letter (see FAR [49.402-6\(c\)](#)). The contracting officer shall include detailed documentation in the contract file to support the Government's position that the additional administrative costs were a direct result of the default. The contracting officer shall provide a summary of the additional administrative costs in the demand letter.

(b) Administrative costs include, but are not limited to, the following:

(1) Salaries and fringe benefits paid to Government employees who perform work as a result of the default.

(2) Preaward survey expenses incurred by qualifying reprocurement contractors.

(3) Printing and distribution costs of the reprocurement solicitation and repurchase contract.

(4) Travel and per diem.

(c) For administrative labor costs, record each of the following:

(1) Name, position, and organization of each employee performing work activities as a consequence of the default.

(2) Date(s) of work and time(s) spent by each employee on the repurchase.

(3) Description of specific tasks performed (for example, solicitation preparation or clerical).

(4) Hourly rate of pay (straight time or overtime).

(5) Applicable fringe benefits.

(6) Explanation of how the time spent by the employees during the re-procurement would have been used on other projects but for the default.

(d) For other incurred administrative costs, the contracting officer shall include travel vouchers, invoices, printing requisitions, and other appropriate evidence of expenditures.

**M849.402-70 General.**

(a) Termination for default applies to noncommercial contracts only. It closely resembles a common law breach of contract in which one party fails to live up to its obligations. Termination for default is usually a difficult experience for both the contractor and Government who are likely to suffer significant economic and time losses. Therefore, the Government should only terminate a contract for default if it has clear grounds to do so. The Government is entitled to obtain various forms of damages from the contractor as relief and may also charge the contractor whatever additional costs result from reprocurement of the supply or service. When considering a potential termination (especially one based on default) the contracting officer should coordinate closely with the acquisition team including technical, financial, and customers or users and should consult with OGC before initiating a termination for default. Cure and Show Causes notices must be coordinated with legal counsel, the HCA and, if the contractor is a small business, with the local VA OSDBU prior to release.

**M849.402-71 Procedures for default and referral to Debarring and Suspending Official.**

If a contract is terminated either for default or for cause, the contracting officer shall review the cause for termination and evaluate whether it falls within one of the areas of FAR [9.406-2](#), Causes for Debarment. If any of the contractor's actions that contributed to the decision to terminate for default or for cause are of the types of actions described in FAR [9.406-2](#) that could lead to debarment, the contracting officer shall refer the matter to the suspending and debaring official for appropriate action. The referral shall include all of the pertinent facts, a written recommendation, and other information required under FAR [9.406-3](#), Procedures. Each such evaluation shall be prepared in writing and shall be included in the contract file along with the resulting referral (if any), regardless of whether or not the contracting officer's evaluation finds that the cause for termination requires referral for suspension or debarment. The contracting officer shall document the contract file with the reason(s) for referring or not referring the contractor for suspension or debarment. When past performance evaluation information is required by FAR subpart [42.15](#) to be reported in the Contractor

Performance Assessment Reporting System, the contracting officer's evaluation of the termination shall be submitted as part of the past performance evaluation information.

**M849.402-8 Reporting information.**

The contracting officer shall ensure that information relating to the termination for default notice and subsequent withdrawal or conversion to a termination for convenience of a contract is reported in accordance with FAR [42.1503\(f\)](#). The contracting officer shall ensure information is accurately reported in the Federal Awardee Performance and Integrity Information System module of the Past Performance Information Retrieval System within three calendar days after the contracting officer makes a withdrawal or conversion of a termination for default to a termination for convenience.

**Subpart M849.6—Contract Termination Forms and Formats**

**M849.601-70 Electronic email or facsimile Notice of Termination for Convenience.**

Notice of Termination for Convenience may be sent by electronic email or facsimile. Contracting officers should obtain confirmation from the contractor of the receipt date and time.

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