

PART 20
CONTRACT TERMINATION

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20.1 GENERAL DISCUSSION.

20.1.1 General Policies.

(a) It is BPA policy that all reasonable efforts will be made to achieve full and complete performance on all contracts. However, when circumstances dictate that contract performance is not possible or not in BPA's best interest, the directives of this BPI Part 20 shall be followed.

(b) General. The CO shall terminate contracts orally, or in writing. Oral terminations may be used when time is critical, but must be followed by a written contract modification. The written notice shall be sent by any method which provides a written acknowledgment of receipt.

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(c) Distribution of copies. The CO shall send the termination notice to the contractor, with copies to the same persons who received the basic contract.

(d) Amendment of termination notice. The CO may amend a termination notice as needed if circumstances change after the original notice was issued.

(e) Reinstatement of terminated contracts. The CO may, with the written consent of the contractor, reinstate the terminated portion of a contract in whole or in part by amending the notice of termination, if such an action is in the interest of BPA. The reasons for doing so shall be documented in the contract file.

20.1.2 Types of Termination Actions.

INFORMATION There are four types of termination actions described in this part. The CO may choose to include one or more clauses into any contract when it is desirable for BPA to reserve the right to terminate the contract under certain circumstances. Unless the CO inserts a clause into a contract reserving the right to terminate for convenience, that action may not be taken. The following types of termination actions are described in this Part::

- (a) Termination by mutual consent (See 20.2);
- (b) Termination for the convenience by either party (See 20.3);
- (c) Termination for the Convenience of BPA (See 20.4); and
- (d) Termination for Default (See 20.5).

20.1.3 Points to Consider Prior to Beginning Termination Action.

INFORMATION: Before initiating action to terminate a contract, the CO should consider the impact of such action. Factors to consider include:

- (a) Impact on the project completion schedule;
- (b) Impact on the contractor's work force, financial position, reputation, etc.;
- (c) Whether BPA contributed in a substantial way to problems encountered in contract performance;
- (d) Whether the contractor has made a good-faith effort to correct problems;
- (e) Whether permitting continued performance will result in a successful project; and
- (f) Maintenance of long term BPA-supplier relationships.

20.2 TERMINATION BY MUTUAL CONSENT.

(a) **INFORMATION:** A termination by mutual consent is an agreement between BPA and the contractor to cease work under the contract. Such a termination would be used in a situation where mutual problems make it undesirable to continue the work, but in which assessing responsibility to either party would not be fair or reasonable under the circumstances. There usually will not be a clear indication of failure on the part of either party, and thus a payment by one party to the other to cover the costs of termination is generally not appropriate. The CO should consider using such a termination in lieu of issuing a convenience or default termination

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when the contractor has not incurred costs for the terminated portion of the contract or the contractor is willing to waive the costs incurred. Since this type of termination is not a unilateral right of BPA under the contract, it must be negotiated between the parties, and no contract clause is used.

(b) **PROCEDURE:** Termination by mutual consent may be initiated by either party, by oral or written means. However it is initiated, the CO shall ensure that there is a mutual agreement to terminate before proceeding with the action. The CO shall document the contract file with the reasons for the termination and the basis for the settlement. The settlement shall be documented on form BPA 4220.06, Modification of Contract, and shall include the following information modified as appropriate to reflect partial or complete terminations:

(1) This supplemental agreement modifies the contract to reflect a partial termination by mutual consent.

(2) The terminated portion of the contract is as follows: (Specify item numbers, descriptions, quantity terminated, unit and total price of terminated items, and any other explanation necessary to avoid uncertainty or misunderstanding.)

(3) The Contractor unconditionally waives any claim against BPA arising under the terminated portion of the contract or by reason of its termination, including, without limitation, all obligations of BPA to make further payments or to carry out any further undertakings under the terminated portion of the contract.

(4) BPA acknowledges that the Contractor has no obligation to perform further work or services or to make further deliveries under the terminated portion of the contract.

(5) Under the terminated portion of the contract, the following rights and liabilities of the parties are reserved:

(List reserved or excepted rights and liabilities)

(End of agreement)

20.3 TERMINATION FOR CONVENIENCE BY EITHER PARTY.

INFORMATION: This form of termination may be used when the CO agrees with the contractor proposal for the need for such right to establish a viable business agreement, and when such an agreement is advantageous to BPA. This type of termination generally is not useful in the case of an off the shelf product or service, and should not be used when time is of the essence. This type of termination may be useful in some master agreements and master contracts. A clause must be inserted in the contract to reserve this right for both parties. The concept is the same as that described in 20.4, Termination for the Convenience of BPA, except that the contractor also has the right to unilaterally terminate. Because the situations where this concept could be used are quite varied, no prescription of situations where this concept should be used are provided. This concept may be used at the discretion of the CO, but should be used only if requested by the supplier.

20.3.1 Clause Usage Prescriptions.

PROCEDURE:

(a) The CO may include clause 20-1, Termination for Convenience by Either Party, in solicitations and contracts to specify the rights of the parties, unless clause 20-2, Termination for

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the Convenience of BPA, is used. The CO may change the number of days of written notice to suit the situation.

(b) No format is prescribed for the contractor to use in exercising this right under the contract, but the notice must be in writing. However, the CO shall formally document the termination and its terms and conditions by executing a contract modification including language similar to that shown in 20.4.6.1.

(c) The CO should use procedures similar to those described under 20.4, Termination for Convenience of BPA, when exercising the rights under this section.

20.4 TERMINATION FOR THE CONVENIENCE OF BPA.

INFORMATION: The CO may determine that for a specific contract BPA should retain the right to terminate the contract for its convenience. Most often this is done when it is possible that complete performance by the contractor may not be needed, or when it is possible that BPA's requirements may change to such an extent that continued performance is not in the interest of BPA. This right is generally not used for contracts less than \$100,000, for off-the-shelf items, or for contracts with short delivery times. When a contract is terminated for the convenience of BPA, the CO shall negotiate a settlement which compensates the contractor for work performed, and reimburses the contractor's termination expenses.

20.4.1 Clause Usage Prescriptions.

PROCEDURE: The CO shall include clause 20-2, Termination for the Convenience of BPA, in solicitations and contracts exceeding \$100,000 which are not for commercial supplies and services, including construction, and which have relatively lengthy delivery times, unless clause 20-1 is used.

20.4.2 Fixed-Price Contracts.

20.4.2.1 Profit.

POLICY:

(a) The CO shall allow profit on costs incurred by the contractor for the terminated portion of the contract, but not on the settlement expenses. Anticipatory profits and consequential damages shall not be allowed. Profit shall not be allowed the contractor for material or services that, as of the effective date of termination, have not been delivered by a subcontractor, regardless of the percentage of completion. The CO may use any reasonable method to arrive at a fair profit.

(b) In the negotiation or determination of any settlement, the CO shall not allow profit if it appears that the contractor would have incurred a loss had the entire contract been completed.

20.4.2.2 Completed End Items.

PROCEDURE:

(a) Promptly after the effective date of termination, the CO shall have all undelivered completed end items inspected and accepted if they comply with the contract requirements, and shall determine which accepted end items are to be delivered under the contract. The contractor shall invoice accepted and delivered end items at the contract price in the usual manner and shall not include them in the termination claim. When completed end items, though accepted, are not to be delivered under the contract, the contractor shall include them in the settlement proposal at the

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contract price, adjusted for any saving of freight or other charges, together with any credits for their purchase, retention, or sale.

(b) Work in place accepted by BPA under a construction contract is not considered a completed item until final acceptance of the item, even though that work may have been paid for at unit prices specified in the contract.

20.4.3 Cost-Reimbursement Contracts.

POLICY: Adjustment of fee. The CO shall determine the adjusted fee to be paid based on a percentage of completion of the contract or of the terminated portion. When this basis is used, factors such as the extent and difficulty of the work performed by the contractor (e.g., planning scheduling, technical study, engineering work production and supervision, placing and supervising subcontracts, and work performed by the contractor in (1) stopping performance, (2) settling claims of subcontractors, and (3) disposing of termination inventory) should be compared with the total work required by the contract or by the terminated portion. The contractor's adjusted fee should not include an allowance for fee for subcontract effort included in subcontractors' termination claims.

20.4.4 Settling Contracts Terminated for Convenience.

PROCEDURE: Consistent with the termination clause and the notice of termination, the CO shall-

- (a) Consider holding a conference with the contractor to develop a definite program for effecting the settlement.
- (b) Direct the action required of the prime contractor;
- (c) Examine the settlement proposal of the prime contractor and, when appropriate, the settlement proposals of subcontractors;
- (d) Determine disposition of BPA-furnished property and other property to which BPA is entitled;
- (e) Promptly negotiate settlement with the contractor and enter into a settlement agreement; and
- (f) Promptly settle the contractor's claim by determination for the elements that can not be agreed on, if unable to negotiate a complete settlement.

20.4.4.1 General Termination Settlement Principles.

(a) **INFORMATION:** A settlement should compensate the contractor fairly for the work accomplished and the preparations made for the terminated portions of the contract, including a reasonable allowance for profit. Fair compensation is a matter of judgment, and cannot be measured exactly. In a given case, various methods may be equally appropriate for arriving at fair compensation. The use of business judgment, as distinguished from strict accounting principles, is the heart of a fair settlement.

(b) **INFORMATION:** The COs primary objective is to negotiate a settlement by agreement. The parties may agree upon a total amount to be paid the contractor without agreeing on or segregating the particular elements of costs or profit comprising this amount.

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(c) **INFORMATION:** Cost and accounting data may provide guides, but are not rigid measures for ascertaining fair compensation. In appropriate cases, costs may be estimated, differences compromised, and doubtful questions settled by agreement. Other types of data, criteria, or standards may furnish equally reliable guides to fair compensation. The amount of record-keeping, reporting and accounting related to the settlement of termination claims should be kept to a minimum, compatible with the reasonable protection of the public interest.

(d) **PROCEDURE:** The CO shall estimate the funds required to settle the termination claim at the earliest practical date. Based on this estimate, the CO shall, because of possible budgeting impacts, coordinate with the program office on the estimated date of payment, ensuring the availability of funds to be paid as a result of the termination settlement.

(e) **PROCEDURE:** The CO shall maintain the termination documentation in the contract file, unless the volume requires that a separate case file be established.

(f) **PROCEDURE:** For terminated construction contracts, the CO shall direct action to ensure the cleanup of the site, protection of serviceable materials, removal of hazards, and other actions necessary to leave a safe and healthful site.

(g) **PROCEDURE:** If the CO suspects fraud or other criminal conduct related to the settlement of a terminated contract, the CO shall discontinue negotiations and report the facts to the HCA.

20.4.4.2 Audit of Settlement Proposals.

INFORMATION:

(a) The CO may refer settlement proposals to the BPA Internal Audit Staff or other Government auditors for review and recommendations. Referrals shall include any specific information or data the CO deems appropriate, including any facts and circumstances that will assist the Internal Audit Staff in performing its function.

(b) The audit report is advisory only, and is for the CO's 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 positions of BPA, the prime contractor, or a higher-tier subcontractor. Consistent with this, and when in BPA's interest, the CO may furnish audit reports to prime and higher-tier subcontractors for their use in settling subcontract claims.

20.4.4.3 Settlement of Subcontract Claims.

INFORMATION: A subcontractor has no contractual rights against BPA 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 termination claims of their immediate subcontractors. The contractor has the burden of establishing, by proof satisfactory to the CO, the amount claimed. The CO may request that the contractor submit additional documents and data, and may request appropriate accounting, investigations, and audits.

20.4.4.4 Settlement Agreements.

INFORMATION:

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

(b) When a termination settlement has been negotiated and all required reviews have been obtained, the contractor and the CO shall execute a settlement agreement on form BPA F 4220.06, Modification of Contract. The settlement shall cover (a) any setoffs and counterclaims that BPA has against the contractor that may be applied against the terminated contract and (b) all claims of subcontractors, except claims that are specifically excepted from the agreement and reserved for separate settlement.

(c) The CO 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 CO shall not attempt to make partial settlements covering particular items of the prime contractor's settlement proposal. However, if a CO 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 interest of BPA or the contractor in disposing of the unsettled part of the claim.

20.4.5 Settlement by Determination.

PROCEDURE:

(a) General. If the contractor and CO cannot agree on a termination settlement, or if a claim is not submitted within the period required by the termination clause, the CO shall issue a determination of the amount due consistent with the termination clause, including any cost principles incorporated by reference. The CO shall use this 20.4.5 and 21.3.8 as guides in making a settlement by determination. 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 CO shall give the contractor at least 15-days notice by a method of delivery which obtains a receipt documenting delivery to submit, on or before a stated date, and provides written evidence substantiating the amount claimed.

(c) Determinations. After reviewing the available information, the CO shall determine the amount due and transmit a copy of the determination to the contractor by certified mail (return receipt requested). The transmittal letter shall advise the contractor that the determination is a final decision, which the contractor may appeal under the Disputes clause. The determination shall specify the amount due the contractor, and shall be supported by detailed schedules and additional information, and other analyses as appropriate. The CO shall explain each major item of disallowance. The CO need not reconsider any other action relating to the terminated portion of the contract that was ratified or approved by the CO or another CO.

(d) 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 has failed to request a time extension. The existence of an appeal shall not affect the authority of the CO to settle the termination claim or any part by negotiation with the contractor at any time before the appeal is decided.

(e) Decision on the contractor's appeal. The CO shall effect a decision of the Court of Federal Claims, or a board of contract appeals, when necessary, by a supplement to the contract. When

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appropriate, the CO should obtain a release from the contractor. COs are authorized to modify the format of the typical settlement agreement in 20.4.6.1 to agree with this provision.

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20.4.6 Documentation of Settlement Decision.

PROCEDURE:

- (a) The CO shall retain in the contract file all written evidence and data relied upon in making a settlement or determination.
- (b) The CO shall, at the conclusion of negotiations, document the principal elements of the settlement or determination for inclusion in the contract file.
- (c) If the settlement or determination was based on individual items, the CO should describe the factors considered for each item. If the settlement was based on an overall lump-sum basis, the CO need not evaluate each item or group of items individually, but should support the total amount of the recommended settlement in reasonable detail. The memorandum should include explanations of matters involving differences and doubtful questions settled by agreement, and the factors considered.

20.4.6.1 Sample Settlement Agreement.

PROCEDURE: (Insert the following on form BPA F 4220.06, Modification of Contract. The contents should be tailored to each situation.)

- (a) This supplemental agreement documents the termination settlement resulting from the Notice of Termination dated
- (b) The parties agree to the following:
 - (1) The Contractor certifies that all contract termination inventory (including scrap) has been retained or acquired by the Contractor, sold to third parties, returned to suppliers, delivered to or stored for BPA, or otherwise properly accounted for, and that all proceeds and retention credits have been used in arriving at this agreement.
 - (2) The Contractor certifies that each immediate subcontractor whose proposal is included in the proposal settled by this agreement has furnished the Contractor a certificate stating (i) that all subcontract termination inventory (including scrap) has been retained or acquired by the subcontractor, sold to third parties, returned to suppliers, delivered to or stored for BPA, or otherwise properly accounted for, and that all proceeds and retention credits were used in arriving at the settlement of the subcontract, and (ii) that the subcontractor has received a similar certificate from each immediate subcontractor whose proposal was included in its proposal.
 - (3) The Contractor certifies that all items of termination inventory, the costs of which were used in arriving at the amount of this settlement or the settlement of any subcontract proposal included in this settlement, (i) are properly allocable to the terminated portion of the contract; (ii) do not exceed the reasonable quantitative requirements of the terminated portion of the contract, and (iii) do not include any items reasonably usable without loss to the Contractor in its other work. The Contractor further certifies that the Contracting Officer has been informed of any substantial change in the status of the items between the dates of the termination inventory schedules and the date of this agreement.
 - (4) The Contractor transfers, conveys, and assigns to BPA all the right, title, and interest, if any, that the Contractor has received or is entitled to receive, in and to subcontract termination inventory not otherwise properly accounted for.

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(5) The Contractor shall, within 10 days after receipt of the payment specified in this agreement, pay to each of its immediate subcontractors (or their respective assignees) the amounts to which they are entitled, after deducting any prior payments and, if the Contractor so elects, any amounts due and payable to the Contractor by those subcontractors.

(6)(i) The Contractor has received \$..... for work and services performed, or items delivered, under the completed portion of the contract. BPA confirms the right of the Contractor, subject to paragraph (7), below, to retain this sum and agrees that it constitutes a portion of the total amount to which the Contractor is entitled in settlement of the contract.

(ii) Further, BPA agrees to pay to the Contractor or its assignee, upon presentation of a proper invoice or voucher, the sum of \$..... (insert net amount of settlement), arrived at by deducting from the sum of \$..... (for proposals on an inventory basis insert gross amount of settlement; for proposals on a total cost basis, insert gross amount of settlement less amount shown in subdivision (6)(i), above), (A) the amount of \$.....for all unliquidated partial or progress payments previously made to the Contractor or its assignee and all unliquidated advance payments (with any interest) and (B) the amount of \$..... for all applicable property disposal credits (insert if appropriate, "and (C) the amount of \$..... for all other amounts due BPA under this contract except as provided in subparagraph (7) below").

(iii) The net settlement of \$..... in subdivision (ii), above, together with sums previously paid, constitutes payment in full and complete settlement of the amount due the Contractor for the complete termination of the contract and of all other claims and liabilities of the Contractor and BPA under the contract, except as provided in paragraph (7) below.

(7) Regardless of any other provision of this agreement, the following rights and liabilities of the parties under the contract are reserved:

(The following list of reserved or excepted rights and liabilities is intended to cover those that should most frequently be reserved and that should be scrutinized at the time a settlement agreement is negotiated. The suggested language of the excepted items on the list may be varied at the discretion of the CO. If accuracy or completeness can be achieved by referencing the number of a contract clause or provision covering the matter in question, then follow that method of enumerating reserved rights and liabilities. Omit any of the following rights or liabilities that are not applicable and add any additional exceptions or reservations required.)

(i) All rights and liabilities, if any, of the parties under those clauses inserted in the contract because of the requirements of Acts of Congress and Executive Orders, including, without limitation, any applicable clauses relating to: labor law, contingent fees, domestic articles, employment of aliens, and "officials not to benefit." (If the contract contains clauses of this character inserted for other reasons, the suggested language should be appropriately modified.)

(ii) All rights and liabilities of the parties arising under the contract and relating to reproduction rights, patent infringements, inventions, or applications for patents, including rights to assignments, invention reports, licenses, covenants of indemnity against patent risks, and bonds for patent indemnity obligations, together with all rights and liabilities under the bonds.

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(iii) All rights and liabilities of the parties, arising under the contract or otherwise, and concerning defects, guarantees, or warranties relating to any articles or component parts furnished to BPA by the Contractor under the contract or this agreement.

(iv) All rights and liabilities of the parties under the contract relating to any contract termination inventory stored for BPA.

(v) All rights and liabilities of the parties under agreements relating to the future care and disposition by the Contractor of BPA-owned property remaining in the Contractor's custody.

(vi) All rights and liabilities of the parties relating to BPA property furnished to the Contractor for the performance of this contract.

(vii) All rights and liabilities of the parties under the contract relating to options (except options to continue or increase the work under the contract), covenants not to compete, and covenants of indemnity.

(End of Agreement)

20.4.7 Procedures for Termination for Convenience of BPA.

PROCEDURE: Initial notice of a termination for the convenience of BPA may be given to the contractor orally or by fax, but must be followed up with a written Notice of Termination. This written notice may be the contract modification used to document the termination. The following sample notice should be modified by the CO to suit the specific situation. Modifications may have to be made to reflect partial terminations, differences between fixed price and cost-type contracts, and supply, service, and construction contracts. The notice should be sent by certified mail, return receipt requested.

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NOTICE OF TERMINATION

(At the top of the notice, set out all special details relating to the particular termination; e.g., name and address of company, contract number of terminated contract, items, etc.)

(a) Effective date of termination. This confirms BPA's oral (or fax) notice to you dated, 19...., terminating(insert "completely" or "in part") Contract No.(referred to as "the contract") for BPA's convenience under the clause entitled(insert title of appropriate termination clause). The termination is effective on(enter date).

(b) Cessation of work and notification to immediate subcontractors. You shall take the following steps:

(1) Stop all work, make no further shipments, and place no further orders relating to the contract, except for --

(i) The continued portion of the contract, if any;

(ii) Work-in-process or other materials that you may wish to retain for your own use; or

(iii) Work-in-process that the Contracting Officer authorizes you to continue (A) for safety precautions, (B) to clear or avoid damage to equipment, (C) to avoid immediate complete spoilage of work-in-process having a definite commercial value, or (D) to prevent any other undue loss to BPA. (If you believe this authorization is necessary or advisable, immediately notify the Contracting Officer.)

(2) Furnish notice of termination to each immediate subcontractor and supplier that will be affected by this termination. In the notice --

(i) Specify your BPA contract number;

(ii) State whether the contract has been terminated completely or partially;

(iii) Provide instructions to stop all work, make no further shipments, place no further orders, and terminate all subcontracts under the contract, subject to the exceptions in subparagraph (1) above;

(iv) Provide instructions to submit any settlement proposal promptly; and

(v) Request that similar notices and instructions be given to its immediate subcontractors.

(3) Notify the Contracting Officer of all pending legal proceedings that are based on subcontracts or purchase orders under the contract, or in which a lien has been or may be placed against termination inventory to be reported to BPA. Also, promptly notify the Contracting Officer of any such proceedings that are filed after receipt of this notice.

(4) Take any other action required by the Contracting Officer or under the termination clause in the contract.

(c) Settlements with subcontractors. You remain liable to your subcontractors and suppliers for proposals arising because of the termination of their subcontracts or orders. You are

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requested to settle these termination proposals as promptly as possible. For purposes of reimbursement by BPA, settlements will be governed by the provisions of Part 20 of the BPI.

(d) Completed end items.

(1) Notify the Contracting Officer of the number of items completed under the contract and still on hand, and arrange for their delivery or other disposal.

(2) Invoice acceptable completed end items under the contract in the usual way, and do not include them in the settlement proposal.

(e) Patents. If required by the contract, promptly forward the following to the Contracting Officer:

(1) Disclosure of all inventions, discoveries, and patent applications made in the performance of the contract.

(2) Instruments of license or assignment on all inventions, discoveries, and patent applications made in the performance of the contract.

(f) Other. Matters not covered by this notice should be brought to the attention of the Contracting Officer.

(g) Please acknowledge receipt of this notice as provided below.

.....
(Contracting Officer)
.....
(Name of Office)
.....
(Address)

Acknowledgment of Notice

The undersigned acknowledges receipt of a signed copy of this notice on

_____, two signed copies of this notice are returned.

(DATE)

.....
(Name of Contractor)
By.....
(Name)
.....
(Title)

(End of notice)

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20.5 TERMINATION FOR DEFAULT.

POLICY:

(a) BPA has the right to terminate the contract completely or partially for default if the contractor fails to make delivery of the supplies or perform the services within the time specified in the contract, fails to perform any other provision of the contract, or fails to make progress and that failure endangers performance of the contract. After a default determination, BPA may assess the contractor any excess costs incurred in repurchasing the contract items or services from another source.

(b) Depending upon specific circumstances, the following should be considered before proceeding with a default termination:

(1) If BPA has a continuing need for the goods or services provided under the contract, and it is likely that the contractor will adequately perform in the same period of time that it would take a procurement contractor to perform, the CO should consider continuing with the present contractor.

(2) If BPA no longer needs the goods or services provided under the contract, the CO should consider a convenience termination.

(c) Where there has been an actual breach, i.e., the time allotted for performance has expired and the contractor has not properly performed, BPA has the right (under the Default clause) to immediately terminate the contract without giving the contractor advance notice to cure the failure.

(d) If the contractor can establish that the failure to perform is excusable; i.e., that it arose from unforeseeable causes beyond the control and without the fault or negligence of the contractor, the default clauses provide that a termination for default will be considered to have been a termination for the convenience of BPA, and the rights and obligations of the parties governed accordingly.

(e) Failure to make progress constitutes grounds for termination if it becomes impossible, or highly unlikely, that the contractor can perform the contract on schedule. The timely performance of a contract is considered to be endangered when it is determined by the nature of the contract, the time normally required to perform, and the contractor's capacity to perform, that there is no reasonable possibility it can be completed on schedule.

(f) Terminations based upon the express repudiation of the contractor can be made without prior notice to the contractor.

(g) Terminations for progress failure must be preceded by a ten-day cure notice. (See BPI 20.5.4).

(h) Notwithstanding the provisions of this subpart, the contract may be reinstated by mutual agreement if such action is in BPA's interest.

20.5.1 Clause Usage Prescriptions.

PROCEDURE: The CO shall include clause 20-3, Termination for Default, in all solicitations and contracts exceeding \$100,000, including cost-reimbursable or time and materials contracts, unless the CO otherwise determines that BPA's interests are adequately protected regarding failure of the Contractor to perform, and documents the award file in writing of a determination to

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not include the default clause. Use the clause with its Alternate I for fixed-price contracts. When using the Alternate I, add paragraph (c) to the basic clause.

20.5.2 Effect of Termination for Default.

INFORMATION: Under a termination for default, BPA 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. BPA may elect, under the Default clause, to require the contractor to transfer title and deliver to BPA completed supplies and manufacturing materials, as directed by the CO.

20.5.3 Procedure for Default.

PROCEDURE:

(a) A CO's decision to terminate a contract for default is an important action. The CO must demonstrate that the matter has been carefully reviewed. Moreover, a thorough analysis of the matter by the CO in the findings of fact should provide an opportunity to objectively review all facts surrounding a dispute.

(b) The CO shall decide to pursue a termination for default only after review by contracting, technical, and Office of General Counsel personnel to ensure the propriety of the proposed action.

(c) The CO may wish to give the contractor an opportunity to show cause why the contract should not be terminated for default. A format for a show cause notice is in 20.5.5.

(d) When a termination for default appears imminent, the CO shall provide a written notification to the surety, if any.

(e) Default terminations shall be documented on form BPA F 4220.06, Modification of Contract. COs may provide advance notice of termination action by phone, fax or letter if desired.

(f) The CO shall distribute the termination notice and the CO's decision as the contract was originally distributed. A copy shall also be furnished to the contractor's surety, if any, when the notice is furnished to the contractor. The surety should be requested to advise BPA if it desires to arrange for completion of the work. In addition, in the case of fixed-price contracts, the CO may notify the disbursing officer to withhold further payments under the terminated contract, pending further advice. Such advice should be furnished at the earliest practicable time.

(g) In the case of a construction contract, promptly after issuance of the termination notice and the CO's decision, the CO shall determine the manner in which the work is to be completed and whether the materials and equipment that are on the site will be needed.

(h) If, before issuing the termination notice, the CO determines that the failure to perform is excusable, the contract shall not be terminated for default. If termination is in the best interest of BPA, the CO may terminate the contract for the convenience of BPA.

(i) If the CO has not been able to determine whether the contractor's failure to perform is excusable before issuing the notice of termination, the CO 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 the termination action.

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(j) If, after compliance with the procedures in this 20.5.3, the CO determines that a termination for default is proper, the CO shall issue a Notice of Termination stating --

- (1) The contract number and date;
- (2) The acts or omissions constituting the default;
- (3) That the contractor's right to proceed further under the contract (or a specified portion of the contract) is terminated;
- (4) That the supplies or services terminated may be purchased elsewhere, and that the contractor will be held liable for any excess costs;
- (5) That BPA reserves all rights and remedies provided by law or under the contract, in addition to charging excess costs; and
- (6) That the CO's final decision will be sent later.

20.5.4 Cure Notices.

PROCEDURE: If the CO is considering terminating a contract for default before the delivery date, the use of a "Cure Notice" is generally advisable. Before using this notice, it must be determined whether or not an amount of time equal to or greater than the period of "cure" remains in the contract delivery schedule. If the time remaining in the delivery schedule is not sufficient to permit a realistic "cure" period (generally 10 days, but the CO may specify other periods of time if circumstances warrant), the "Cure Notice" should not be issued. The "Cure Notice" may follow this format:

CURE NOTICE

You are notified that BPA considers your(specify the contractor's failure or failures) a condition that is endangering performance of the contract. Therefore, unless you provide a plan within ____ (CO specify an appropriate period of time) calendar days after receipt of this notice to cure this condition, BPA may terminate for default under the terms and conditions of the (insert clause title) clause of this contract.

(End of notice)

20.5.5 Show Cause and Stop Work Notices.

PROCEDURE:

(a) If the time remaining in the contract delivery schedule is not sufficient to permit a realistic cure period (see 20.5.4), or the CO is considering a default termination, and the CO wishes to allow the contractor an opportunity to show why the contract should not be terminated, the following show cause notice may be used. (See 14.12 regarding suspension and stop work orders.)

SHOW CAUSE NOTICE

Since you have failed to(insert "perform Contract No. within the time required by its terms", or "cure the conditions endangering performance under Contract No. as described to you in BPA's letter of(date)"), BPA is considering terminating the contract under the provisions for default of this contract. Pending a final decision in this

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matter, it will be necessary to determine whether your failure to perform arose from unforeseeable causes beyond your control and without fault or negligence on your part. Accordingly, you are given the opportunity to present, in writing, any facts bearing on the question to (insert complete address, including symbol, of activity where CO is located), with a copy to the Contracting Officer for information, within ___ (CO insert the appropriate period of time) calendar days after receipt of this notice. Your failure to present any excuses within this time may be considered as an admission that none exist. Your attention is invited to the respective rights of the Contractor and BPA under the terms and conditions of the Termination for Default clause and the liabilities that may be invoked if a decision is made to terminate for default.

Any assistance given to you on this contract or any acceptance by BPA of delinquent goods or services will be solely for the purpose of mitigating damages. It is not the intention of BPA to condone any delinquency or to waive any rights BPA has under the contract.

(End of notice)

(b) Stop work instructions. Stop work instructions may be used when it is definitely known that there are no further requirements for the items or services, but an investigation must be conducted to determine whether an actionable default exists in lieu of termination for convenience. In this situation, the following may be inserted as the final paragraph of the Show Cause Notice

"Pending decision, you are instructed to stop all work immediately and to make no further commitments under this contract. Advise all subcontractors and suppliers to do the same."

20.5.6 CO's Decision.

PROCEDURE:

(a) When a contract is terminated for default, the CO shall prepare a written decision explaining the reasons for the action taken. The decision shall demonstrate that the matter has been carefully considered. A thorough analysis of the matter by the CO should provide an opportunity to objectively review all facts surrounding a dispute. The CO shall make the same distribution of the CO decision as was made of the contract. The CO may include a copy of the American Arbitration Association and DOE Board of Contract Appeals rules with the decision.

(b) The CO's decision should generally be formatted as follows:

(1) Description of contract

(A) Item(s) or purpose

(B) Date

(C) Amount

(D) Applicable modifications, if any

(2) A description of the acts or omissions constituting the default, including where applicable:

(A) A brief statement of the claim or problem requiring decision

(B) A statement of all relevant facts and incidents leading up to claim

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- (C) A recital of, or reference to, all applicable contract and specification provisions
- (D) A discussion of facts of performance or nonperformance as related to contract provisions
- (3) A statement that the contractor's right to proceed further with performance of the contract (or a specified portion of the contract) is terminated.
- (4) If the CO has not determined whether the failure to perform is excusable, a statement that the supplies or services terminated may be repurchased and that the contractor may be held liable for any excess costs. (Firm fixed-price contracts only)
- (5) If the CO has determined that the failure to perform is not excusable, a statement that the notice of termination constitutes such decision, a statement that the contractor will be held liable for any excess costs, and a statement that the contractor has the right to appeal this decision under the Disputes clause.
- (6) A statement that BPA reserves all rights and remedies provided by law or under the contract, in addition to charging excess costs.
- (7) A statement that the notice constitutes a decision that the contractor is in default as specified, and that the contractor has the right to appeal under the Disputes clause. The following paragraph shall be included in the Decision:

"This is the final decision of the Contracting Officer. You may submit this decision to one of the following disputes resolution processes. If you decide to submit this decision to such processes, you must, within the time frames specified below, file the request to do so with the appropriate body. A copy of that request shall simultaneously be sent to the Contracting Officer that issued the decision.

(1) Within 90 days from the date of receipt of such decision the Contractor may initiate arbitration through the American Arbitration Association, 600 University Street, Suite 1020, Seattle, WA 98101-4111, telephone (206) 622-6435, facsimile (206) 343-5679; or

(2) Within 90 days from the date of receipt of such decision the Contractor appeals the decision to either the US Postal Service mailing address or the courier address, as follows:

US Postal Service (USPS) mailing address:

U. S. Department of Energy
Board of Contract Appeals
HG-50, Building 950
1000 Independence Avenue SW
Washington, D.C. 20585-0116

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Courier and other than USPS deliveries:

US Department of Energy
Board of Contract Appeals
950 L'Enfant Plaza, SW, Room 7115
Washington, DC 20024

Telephone: (202) 287-1900
Facsimile: (202) 287-1700; or

(3) Within 12 months from the date of receipt of such decision the Contractor brings an action thereon in the United States Court of Federal Claims.”

20.5.7 Repurchases Charged to the Contractor (Firm Fixed-Price Only).

PROCEDURES:

(a) When the supplies or services specified in the contract are still required after termination, the CO shall repurchase the same or similar supplies or services and charge them to the contractor as soon as practicable. BPA is under a legal obligation to mitigate the resulting costs when repurchasing goods or services which will be charged to the contractor. However, the mitigation is not required if it will impair BPA's program operations. The CO shall repurchase at as reasonable a price as practicable, considering the quality and delivery requirements.

(b) If repurchase is made at a price over the price of the supplies or services terminated, the CO 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 increase or decrease in other costs such as transportation, discounts, etc.

(c) However, an exception to this policy is permitted if it appears that a defaulting contractor may become, or already is, insolvent rendering it financially unable to pay. In these instances, at the CO's discretion, excess reprourement costs may be assessed at the time the repurchase contract is executed, thus protecting BPA's position as a general creditor. If adjustments are subsequently required, they shall be made when the reprourement contract is closed.

20.5.8 Other Damages.

PROCEDURE:

(a) If a contract is terminated for default or if a course of action in lieu of termination for default is followed, the CO shall promptly ascertain and make demand for any liquidated damages to which BPA is entitled under the contract. If the contract includes provisions for liquidated damages (clause 24-2, see 24.5.1), these damages are in addition to any excess repurchase costs.

(b) If BPA has suffered any other damages as a result of the contractor's default, the CO shall, on the basis of legal advice, take appropriate action to assert BPA's claim for the damages.

20.5.9 Termination of Cost-Reimbursement Contracts for Default.

PROCEDURE:

(a) Settlement of a cost-reimbursement contract terminated for default is subject to the principles in Subpart 20.1, in the same manner in which a contract is terminated for convenience, except

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that the costs of preparing the contractor's settlement proposal are not allowable; and the contractor is reimbursed the allowable costs, and an appropriate reduction is made in the total fee, if any.

(b) However a cost-reimbursement contract does not contain any provision for recovery of excess repurchase costs after termination for default.

20.5.10 Surety-Takeover Agreements.

PROCEDURE:

(a) The procedures in this section apply primarily, but not solely, to fixed-price construction contracts which require performance bonding terminated for default.

(b) Because of the surety's liability for damages resulting from the contractor's default, the surety has certain rights and interests in the completion of the contract work and application of any undisbursed funds. Accordingly, the CO shall carefully consider proposals by the surety concerning completion of the work. The CO shall take action on the basis of BPA's best interests, including the possible effect of the action upon BPA's rights against the surety.

(c) If the surety does not complete the contract, the CO normally will arrange for completion of the work by awarding a new contract based on the same plans and specifications. The CO shall exercise reasonable diligence to obtain the lowest price available for completion.

20.50 TEXT OF CLAUSES

The following clauses are referred to in Part 20:

- 20-1 Termination For Convenience by Either Party
- 20-2 Termination For the Convenience of BPA.
- 20-3 Termination For Default

Clause 20-1 TERMINATION FOR CONVENIENCE BY EITHER PARTY. (Sep 98)(BPI 20.3.1)

Either party may terminate all or any part of this contract at any time upon 30 days written notice to the other party. Termination costs will be negotiated between the parties. Notwithstanding the Disputes clause of this contract, if the parties are unable to agree upon the termination costs, the parties may utilize the services of the American Arbitration Association to assist in resolving the issue.

(End of Clause)

Clause 20-2 TERMINATION FOR THE CONVENIENCE OF BPA. (May 07)(BPI 20.4.1)

(a) BPA may terminate all or any part of this contract, at any time, upon written notice to the contractor. Upon receipt of the termination notice, the contractor shall stop work on the terminated portion of the contract.

(b) The contract amount shall be revised as a result of termination under this clause. On fixed-price contracts the revised amount shall not exceed the pre-termination contract price, excluding payments already received, plus reasonable termination expenses. On cost-reimbursement contracts it will not exceed the total of allowable and allocable costs of performance prior to

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termination, excluding payments already received, plus reasonable termination expenses, plus an adjustment of the fee on the terminated portion of the contract. No payment will be made for anticipated profits on the terminated portion, or consequential damages, of the contract. The contractor shall submit a settlement proposal within 30 days of the notice of termination.

(c) The Contracting Officer may direct the disposition of material produced or acquired for the work terminated, or any completed or partially completed items.

(End of clause)

Clause 20-3 TERMINATION FOR DEFAULT. (Sep 98)(BPI 20.5.1)

(a) BPA reserves the right to terminate any or all of any undelivered or unexecuted portion of this contract for cause if the contractor fails to make any delivery, fails to prosecute the work, or to perform as scheduled, or if any of the contract terms are breached. However, the contractor shall not be terminated for default if the failure to perform arises from unforeseeable causes beyond the

control and without the fault or negligence of the Contractor. Examples of those causes are: (1) acts of God or of the public enemy, (2) acts of the Government in its sovereign or BPA in its contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather.

(b) The Contracting Officer may direct the disposition of material produced or acquired for the work terminated, and the disposition of any completed or partially completed items.

(End of clause)

Alternate I (Oct 93)

(c) BPA may acquire, under the terms and in the manner the Contracting Officer considers appropriate, supplies or services similar to those terminated, and the Contractor will be liable to BPA for any excess costs for those supplies or services, including administrative costs.

(End of Alternate I)