

Federal Acquisition Regulation

49.108-4

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 part 45; 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.

[48 FR 42424, Sept. 19, 1983, as amended at 62 FR 237, Jan. 2, 1997]

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, generally using the requirements of 45.614, except that the disposition of the inventory shall not (A) be subject to review by the TCO under 49.108-3(c) or 45.607, or (B) be subject to the screening requirements in 45.608; 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 subparagraph (4) below, authority granted to a prime contractor under subparagraph (1) above by any TCO shall apply to all Executive agencies' prime contracts that are terminated, or modified by change orders.

(3) Except as provided in subparagraph (4) below, 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 subparagraphs (1), (2), and (3) above 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 subpara-

graph (3) above is involved, specify any subcontractor affected.

(b) Section 45.614 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 or 45.607, and without screening under 45.608, if 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 subparagraph (a)(1) above 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 subparagraph (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.

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(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.

[48 FR 42447, Sept. 19, 1983, as amended at 55 FR 52797, Dec. 21, 1990]

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 subparagraphs (a)(1) through (5) above 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 arbi-

tration 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) above.

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