49.404 Surety-takeover agreements.

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

(b) Since the *surety* is liable 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. Therefore, the *contracting officer must* consider carefully the *surety*’s proposals for completing the contract. The *contracting officer must* take action on the basis of the Government’s interest, including the possible effect upon the Government’s rights against the *surety*.

(c) The *contracting officer should* permit *surety offers* to complete the contract, unless the *contracting officer* believes that the persons or firms proposed by the *surety* to complete the work are not competent and qualified or the proposal is not in the best interest of the Government.

(d) There *may* be conflicting demands for the defaulting contractor’s assets, including unpaid prior earnings (retained percentages and unpaid progress estimates). Therefore, the *surety may* include a "takeover" agreement in its proposal, fixing the *surety*’s rights to payment from those funds. The *contracting officer may* (but not before the *effective date of termination*) enter into a written agreement with the *surety*. The *contracting officer should* consider using a tripartite agreement among the Government, the *surety*, and the defaulting contractor to resolve the defaulting contractor’s residual rights, including assertions to unpaid prior earnings.

(e) Any takeover agreement *must* require the *surety* to complete the contract and the Government to pay the *surety*’s costs and expenses up to the balance of the contract price unpaid at the time of default, subject to the following conditions:

(1) Any unpaid earnings of the defaulting contractor, including retained percentages and progress estimates for work accomplished before termination, *must* be subject to debts due the Government by the contractor, except to the extent that the unpaid earnings *may* be used to pay the completing *surety* its actual costs and expenses incurred in the completion of the work, but not including its payments and obligations under the payment bond given in connection with the contract.

(2) The *surety* is bound by contract terms governing liquidated damages for delays in completion of the work, unless the delays are excusable under the contract.

(3) If the contract proceeds have been assigned to a financing institution, the *surety must* not be paid from unpaid earnings, unless the assignee provides written consent.

(4) The *contracting officer must* not pay the *surety* more than the amount it expended completing the work and discharging its liabilities under the defaulting contractor’s payment bond. Payments to the *surety* to reimburse it for discharging its liabilities under the payment bond of the defaulting contractor *must* be only on authority of-

(i) Mutual agreement among the Government, the defaulting contractor, and the *surety*;

(ii) Determination of the Comptroller General as to payee and amount; or

(iii) Order of a court of competent jurisdiction.

Parent topic: Subpart 49.4 - Termination for Default