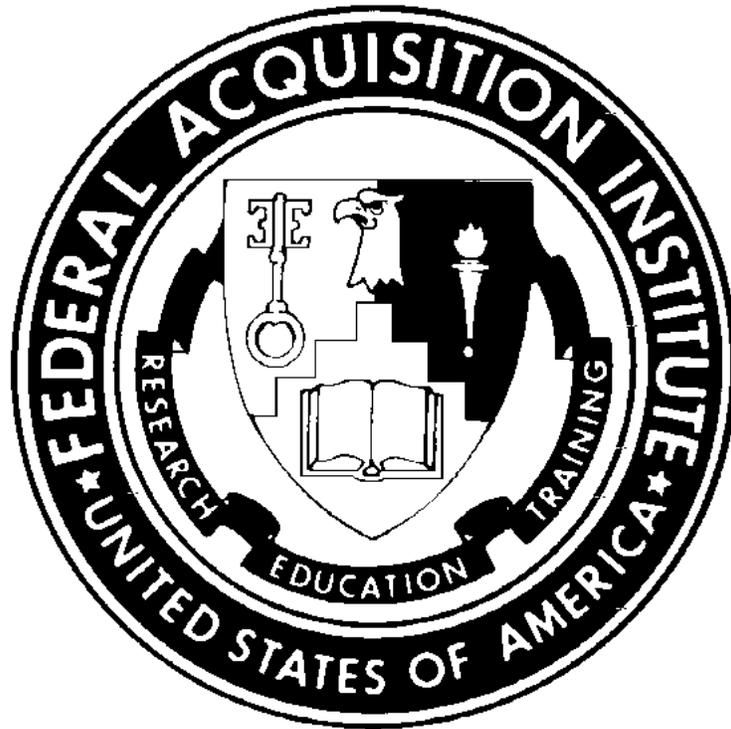


# BASIC CONTRACT ADMINISTRATION

TEXT REFERENCE

CURRENT THROUGH  
FAC 90 - 18



FEDERAL ACQUISITION INSTITUTE

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Monitoring Methods

Acronyms

# INTRODUCTION

## THE FEDERAL ACQUISITION INSTITUTE (FAI) CURRICULUM

### Courses

In FY91, the FAI provided acquisition trainers and educators with instructional materials for a new Contract Management curriculum. This curriculum includes the following courses, listed in a recommended order of attendance.

1. Introduction to Contracting\*
2. Procurement Planning\*
3. Small Purchases
4. Contracting By Sealed Bidding\*
5. Price Analysis\*\*
6. Contracting By Negotiation\*\*
7. Cost Analysis\*\*
8. Contract Negotiation Techniques
9. Contract Administration\*
10. Contract Law
11. Types of Contracts
12. Source Selection
13. Managing the Contract Office
14. Advanced Cost and Price Analysis
15. Advanced Contract Administration
16. Termination

### **Specialized Courses**

*(in alphabetical order)*

1. ADP Contracting
2. Contracting for Architect/Engineer Services
3. Construction Contracting\*\*

### Offerors

Each of the above courses will be offered by the GSA Interagency Training Center. Other Federal acquisition trainers and educators may incorporate FAI instructional materials in their respective curricula (generally under different course titles than the above).

\* Currently available.

\*\* Available in Fiscal Year 1992.

## INTRODUCTION

### THE PURPOSE OF THE FAI CURRICULUM

Help you accomplish the goals of the Federal Acquisition Process

As a Contract Specialist, your primary goals are to:

1. Obtain the optimum market response to requirements for supplies and services, in terms of:
  - Quality.
  - Timeliness.
  - Price.While -
  - Accomplishing socioeconomic objectives.
  - Minimizing business and technical risks.
  - Maximizing competition.
  - Maintaining integrity.
2. Assure that purchased supplies and services are:
  - Delivered or performed when and where specified in the contract.
  - Acceptable, in terms of conforming to the contract's specifications or statement of work.
  - Promptly and properly reimbursed.
  - Furnished in compliance with other terms and conditions of the contract.

Help you perform your duties

To accomplish these goals, Contract Specialists perform more than 75 principal duties. Collectively, these duties constitute the Federal acquisition process. Exhibit I-1 on pages I-4 and I-5 maps the acquisition process and relates each duty to the overall process. The FAI curricula has been designed to systematically develop your skill at every duty in Exhibit I-1, in the context of accomplishing the overall goals of the Federal Acquisition Process.

Your challenge

Your challenge is to become proficient at the duties in Exhibit I-1. Granted, you may presently perform only a subset of the duties. In terms of your career, however, learning the entire range of duties will improve your competitiveness for a great variety of contracting positions, including managerial positions. From the standpoint of the Government, you will be better able to perform any one duty if you have first hand knowledge of how the duty affects, and is in turn affected by, the performance of the other duties.

## CHARACTERISTICS OF THE FAI CURRICULUM COURSES

- Each course in the curriculum will build on the skills and knowledge taught in prior courses.
- Each course covers specific duties and is designed to provide skill in performing those duties.
- Generally, there is a separate lesson for each duty, with a corresponding chapter in the Text/Reference.
- In most cases, the instructor will introduce the duty, its purpose (learning objective), applicable policies, and standards for performance.
- Next, the instructor will walk you through a flowchart of the steps in performing the duty.
- You will perform selected steps in-class, using case studies and other such exercises.
- You will be tested.
- For each duty, the Text/Reference will serve as a desk reference, with flowcharts, steps in performance, and job aids.
- Practicums (i.e., self-instructional exercises) will be available at a later date to reinforce the in-class learning back on-the-job.
- Specialized courses will not reteach the basic acquisition process but will rather concentrate on the unique regulations and procedures for procuring ADP, A&E, or Construction.

# INTRODUCTION

## PRESOLICITATION PHASE

<b>Determination of Need</b>	<b>Initiating the Procurement</b>	<b>Analysis of Re-requirement</b>	<b>Sourcing</b>
<p><b>Determining Needs</b></p> <ol style="list-style-type: none"> <li>1. Forecasting Requirements</li> <li>2. Acquisition Planning</li> </ol>	<p><b>Processing the PR</b></p> <ol style="list-style-type: none"> <li>3. Purchase Requests</li> <li>4. Funding</li> </ol> <p><b>Market Research</b></p> <ol style="list-style-type: none"> <li>5. Market Research</li> </ol>	<p><b>Analyzing Requirements</b></p> <ol style="list-style-type: none"> <li>6. Specifications</li> <li>7. Statements of Work</li> <li>8. Services</li> </ol>	<p><b>Extent of Competition</b></p> <ol style="list-style-type: none"> <li>9. Sources</li> <li>10. Set-Asides</li> <li>11. 8(a) Procurements</li> <li>12. Competition Requirements</li> <li>13. Unsolicited Proposals</li> </ol> <p><b>Selection Factors</b></p> <ol style="list-style-type: none"> <li>14. Lease vs. Purchase</li> <li>15. Price Related Factors</li> <li>16. Technical Evaluation Factors</li> </ol> <p><b>Method and Plan for the Procurement</b></p> <ol style="list-style-type: none"> <li>17. Method of Procurement</li> <li>18. Procurement Planning</li> </ol>

## SOLICITATION-AWARD PHASE

<b>Solicitation</b>	<b>Evaluation— Sealed Bidding</b>	<b>Evaluation— Negotiation</b>	<b>Award</b>
<p><b>Terms and Conditions</b></p> <ol style="list-style-type: none"> <li>19. Contract Types</li> <li>20. Letter Contracts</li> <li>21. Contract Financing</li> <li>22. Use of Government Property and Supply Sources</li> <li>23. Need For Bonds</li> <li>24. Solicitation Preparation</li> </ol> <p><b>Soliciting Offers</b></p> <ol style="list-style-type: none"> <li>25. Publicizing Proposed Procurements</li> <li>26. Preaward Inquiries</li> <li>27. Prebid/Preproposal Conferences</li> <li>28. Amending Solicitations</li> <li>29. Cancelling Solicitations</li> </ol>	<p><b>Bid Evaluation</b></p> <ol style="list-style-type: none"> <li>30. Processing Bids</li> <li>31. Bid Acceptance Periods</li> <li>32. Late Offers</li> <li>33. Bid Prices</li> <li>34. Responsiveness</li> </ol>	<p><b>Proposal Evaluation</b></p> <ol style="list-style-type: none"> <li>35. Processing Proposals</li> <li>36. Technical Evaluation</li> <li>37. Price Objectives</li> <li>38. Cost and Pricing Data</li> <li>39. Audits</li> <li>40. Cost Analysis</li> <li>41. Evaluating Other Terms and Conditions</li> <li>42. Competitive Range</li> </ol> <p><b>Discussions</b></p> <ol style="list-style-type: none"> <li>43. Factfinding</li> <li>44. Negotiation Strategy</li> <li>45. Conducting Negotiations</li> </ol>	<p><b>Selection for Award</b></p> <ol style="list-style-type: none"> <li>46. Mistakes in Offers</li> <li>47. Responsibility</li> <li>48. Subcontracting Requirements</li> <li>49. Preparing Awards</li> </ol> <p><b>Executing Awards</b></p> <ol style="list-style-type: none"> <li>50. Award</li> <li>51. Debriefing</li> </ol> <p><b>Protests</b></p> <ol style="list-style-type: none"> <li>52. Protests</li> </ol> <p><b>Fraud and Exclusion</b></p> <ol style="list-style-type: none"> <li>53. Fraud and Exclusion</li> </ol>

*Exhibit I-1. Federal Acquisition Process Chart.*

**POST-AWARD ADMINISTRATION PHASE**

<b>Start-Up</b>	<b>Quality Assurance</b>	<b>Payment and Accounting</b>	<b>Closeout</b>
<p><b>Planning</b></p> <p>54. Contract Administration Planning</p> <p>55. Post-Award Orientations</p> <p><b>Ordering</b></p> <p>56. Ordering Against Contracts and Agreements</p> <p><b>Subcontracting</b></p> <p>57. Consent to Subcontracts</p>	<p><b>Monitoring and Problem Solving</b></p> <p>58. Monitoring, Inspection, and Acceptance</p> <p>59. Delays</p> <p>60. Stop Work</p> <p>61. Remedies</p> <p><b>Property</b></p> <p>62. Property Administration</p> <p><b>Reporting Performance Problems</b></p> <p>63. Reporting Performance Problems</p>	<p><b>Payment</b></p> <p>64. Limitation of Costs</p> <p>65. Payment</p> <p>66. Unallowable Costs</p> <p>67. Assignment of Claims</p> <p>68. Collecting Contractor Debts</p> <p>69. Progress Payments</p> <p>70. Price and Fee Adjustments</p> <p><b>Accounting</b></p> <p>71. Accounting and Cost Estimating Systems</p> <p>72. Cost Accounting Standards</p> <p>73. Defective Pricing</p>	<p><b>Closeout</b></p> <p>74. Closeout</p>

**POST-AWARD ADMINISTRATION PHASE (Con't)**

<b>Contract Modification</b>	<b>Termination</b>	<b>Claims</b>	
<p><b>Modifications/Options</b></p> <p>75. Contract Modifications</p>	<p><b>Termination</b></p> <p>76. Termination</p> <p>77. Bonds</p>	<p><b>Claims</b></p> <p>78. Claims</p>	

*Exhibit I-1. Federal Acquisition Process Chart (continued)*

## INTRODUCTION

### OVERVIEW OF PROCUREMENT PLANNING

#### Duties

The following duties are covered in this course:

- Developing a Contract Administration Plan
- Conducting Post Award Conferences
- Placing Orders against Contracts/Agreements
- Establishing Performance Monitoring Methods
- Resolve Problems
- Issue Contract Modifications and Exercise Options
- Pursue Contract Remedies
- Process Contractor Invoices and Make Payment
- Closeout Contract

The five remaining chapters in this text reference will be covered in-depth in Advanced Contract Administration courses. The chapters are being made available to your to make this text a more complete and useful desk reference.

#### Length

One weeks (5 days)

#### Daily Hours

8:00 to 4:30. The time from 3:30 to 4:30 is reserved for reading assignments and/or one on one questions with the instructor. You may leave at 3:30 if necessary, but you are expected to complete all reading assignments.

#### Who Should Attend

Contract Specialists (GS-5 to GS-7)

**USING THE TEXT / REFERENCE IN THE CLASSROOM**

Performance-Oriented	This Text/Reference and the related classroom materials are performance-oriented. The Text/Reference provides a step by step guide to performing the duties. In the classroom, you will have You will opportunities to practice performance of the duties - using the Text/Reference as your guide - through the use of such instructional techniques as interactive viewgraphs and case studies.
Interactive Viewgraphs	An interactive viewgraph is a slide on the overhead projector that requires a response from the class. For example, if the instructor is showing a decision table, the “then” side would be empty and you would help fill out the answers. Or perhaps the slide asks a particular question about a list of conditions shown on the slide. Most viewgraphs are represented in the Text/Reference as an Exhibit.
Case Studies	Case studies are written as scenarios or stories about particular procurement situations. There are several questions that follow the scenarios relating to the case and the particular lesson. Sometimes you have to use information in the Text/Reference to complete a case study.
Reading Assignments	There will be an in-class lesson for every chapter in this Text/Reference. You are responsible for assigned readings from the chapter. You will spend minimal time listening to lectures. Our philosophy is that you learn best by doing the tasks under simulated conditions.
Testing	There will be one, closed book written test. It will contain approximately 50 questions and will be administered on the last day of class. The test should take no more than 75 minutes. All test questions were developed to verify the learning acquired from the course learning objectives which appear on the second page of each chapter in the Text/Reference.

**USING THE TEXT / REFERENCE AT YOUR JOB SITE**

Ease of Use	The Text/Reference was developed to be used at your job site as well as in the classroom. Its step by step approach, FAR references, structured writing, and index are all designed for the easy and quick retrieval of information about the contracting process. Each Text/Reference is "dated" by indicating which FAC of the FAR system it is current through. This lets you know <u>exactly</u> how up to date it is. You may contact the FAI for updates or annotate your own copy as FAR policy changes.
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## INTRODUCTION

### FAR References

Most FAR references are boxed and appear in the left column opposite related text. Where appropriate FAR references also appear in Exhibits.

The book has not yet been written that does not contain some typos, incorrect citations, missing information, or technical inaccuracies. If this book is helpful to you, and you would like to help make it better, please send any corrections you recommend to the FAI in care of:

General Services Administration-VF  
18th and F Sts., NW  
Washington, DC, 20405.

The training materials used in this course were developed by the Federal Acquisition Institute using the Macintosh II family of computers, Aldus PageMaker 4.0 for the Text/Reference, and Word 4.0 for the Class Exercises.

# CHAPTER 1

## CONTRACT ADMINISTRATION PLANNING

### JOANNE'S FIRST DAY

*Joanne Davidson was nervous. It was her first day on the job. Her boss, Eric Schmidt, was tough. He was the agency's top contracting officer. Joanne met everyone on the staff that morning and had settled in her new office. Now Eric had her first assignment.*

*Two years ago, the agency replaced some thirty small supply depots with three totally automated warehouses. Each warehouse was made up of 20 bays, each bay was ten bins high. All materials to be dispensed by the warehouse were stored on pallets in individual bins. The bin operation was efficient and sophisticated. However, there was a problem with the pallets. The material used to fabricate the pallets was not sufficiently pliable to withstand the flexing caused by the continual movement in and out of the bins. Continual movement was necessary to fill the ongoing flow of material in and out of the warehouse. Both the manufacturer of the automated warehouse system and the agency's laboratory were trying to find a solution to the constant replacement problem. The solution had to be cost-effective eliminating many desirable materials. Until a solution could be found, a continuing flow of pallets to the three warehouses would be needed.*

*Eric had recently awarded two contracts covering the pallets to be used by the three warehouses. The larger contract was awarded to the company that had been fabricating the pallets under other contracts for both the manufacturer of the automooted warehouse system and the agency. The second contract was awarded to a small business concern, Angkor Wat Enterprises.*

*"Joanne," Eric said as he handed her the Angkor Wat file, "I'd like you to develop the contract administration plan for the pallet contract with Angkor Wat Industries. I signed the contract yesterday. You know nothing about the requirement or the company. You can give me a fresh look at a program I've been involved with for several years. Read the contract file carefully and develop your plan based on the information in it. We'll meet tomorrow morning to go over what you have done. I have set up a meeting for two o'clock tomorrow with people involved in the program whom I want you to meet. After that meeting, we will finalize your plan."*

*Eric expressed concern to Joanne about Angkor Wat's ability to meet the somewhat critical delivery schedule, but was abruptly called into a meeting with the Director before he explained why.*

*Joanne was left by herself with the contract file to draft her contract administration plan.*

## COURSE LEARNING OBJECTIVES

At the end of this course, you will be able to:

**Overall:** Develop a contract administration plan and instruct personnel on their roles.

**Individual:**

- 1.1 Review the contract file to identify critical contract clauses and requirements.
- 1.2 Assign a criticality designator to the contract.
- 1.3 Identify, from acquisition history, previous issues and problems with the same contractor or contracts for similar requirements.
- 1.4 Meet with requiring activity to discuss performance monitoring.
- 1.5 Determine the extent of performance monitoring.
- 1.6 Determine which contract administration functions will be delegated and to whom.
- 1.7 Develop a contract administration plan.
- 1.8 Provide notice and instructions to technical representatives and other support personnel of their roles, responsibilities, and limits of authority.
- 1.9 Provide formal notice to the contractor of names, roles, responsibilities, and limits of technical representatives and other support personnel.

# INTRODUCTION TO CONTRACT ADMINISTRATION PLANNING

## **Definition of Contract Administration Planning**

Contract administration planning is all activity involved in setting up systems and procedures to ensure compliance with the contract terms and conditions during contract performance. While the administration of any contract should be first considered during the acquisition planning period, finalizing an administrative plan is done once the contract has been awarded. Planning initially involves reading the contract you will be charged with administering. Failure to read the contract is a frequent cause of contract administration problems. Another problem area is a failure to understand what a contract is.

A contract is a mutually binding legal relationship obligating the seller to furnish supplies or services and the buyer to pay for them.

Therefore, when you plan contract administration monitoring systems, you not only must design systems to ensure that the contractor lives up to its promises, but also that the Government fulfills its responsibilities to the contractor.

## **Policy on Contract Administration Planning**

Your job in contract administration planning is to set up systems to mitigate the risk to both the Government and the contractor when problems surface.

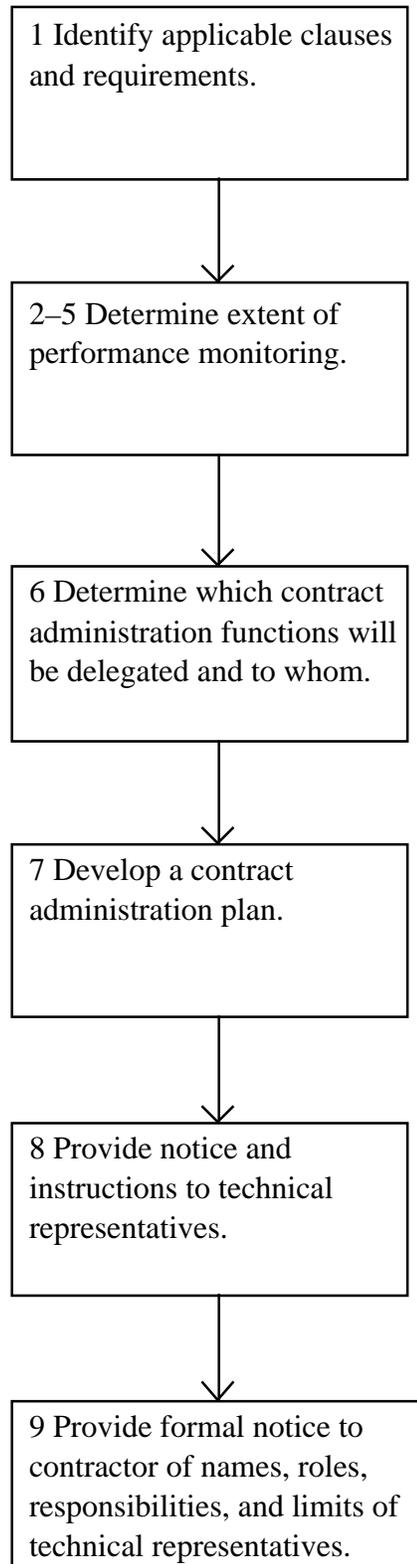
Such contract performance monitoring systems collectively constitute a contract administration plan and may include the support of a quality assurance specialist, a contracting officers' representative (COR)/ Contracting officers' technical representative (COTR), or other appointed Government representatives.

The key to effective contract management is a flexible contract administration plan that permits updates over the contract's duration as problems arise or conditions change. This chapter tells you how to draw one up.

## **Steps in Performance**

The steps in planning for contract administration are charted on the next page. Following the flowchart, each step is discussed in turn.

## STEPS IN CONTRACT ADMINISTRATION PLANNING



# STEPS IN CONTRACT ADMINISTRATION PLANNING

## 1.1 Identify Clauses and Requirements

Every contract requires some planning to ensure successful completion. Planning can be as simple as identifying the milestone date for checking on the delivery status or as detailed as monitoring and reporting on a contractor's performance daily. The amount of planning you need to do is based on the amount of administration required to effectively manage a specific contract.

The first task in the contract administration process is for you, the contract administrator, to review the contract file to identify critical contract clauses and requirements. Concentrate your review on areas that usually have the most relevance for contract administration activities, but **read the whole contract**.

Language derives its meaning largely from the context in which it appears. So you must read all parts of the contract, not as isolated statements, but as integral pieces of the whole unified document.

Do not neglect to review the documents incorporated by reference. Among the documents more commonly incorporated into contracts by reference are detailed specifications and the contractor's own proposal.

Perform this contract file review even if you awarded this contract. If you look at the file strictly from a contract administration point of view, it will give you a fresh prospective for contract administration planning.

## Areas for Detailed Review

A thorough review of the contract file will turn up any clauses that are critical to contract performance and any other requirements that may have an impact on your planning decisions. Exhibit 1-1 lists areas of prime importance.

<b>Areas in the Contract File To Study in Detail</b>	
FAR 42.2	The delegation of contract administration functions
FAR 42.1105	Criticality designator
FAR 4.4	Security requirements
FAR 42.11	Production surveillance requirements
FAR 42.2	Supporting contract administration requirements
	Special contract requirements, including:
	<ul style="list-style-type: none"><li>• Specifications</li><li>• Data requirements</li><li>• First article testing</li><li>• Government property</li><li>• Inspection and acceptance</li><li>• Special Section H clauses</li><li>• Contractor's Proposal</li><li>• Delivery Schedule (or Period of Performance)</li></ul>

*Exhibit 1-1*

Contract File Checklist      Exhibit 1-2 provides an example of items found on a contract file checklist that simplifies the review of any contract file.

Write in the “comment” column references to items that have particular or unusual importance to contract administration planning. For example, you might note a paragraph number in the preaward survey that casts doubt on the contractor’s plant capacity, warranting an increased level of monitoring for your contract administration team.

## Contract File Checklist

FAR 4.803

<u>Item</u>		<u>Yes</u>	<u>No</u>	<u>Comment</u>
1.	Purchase request, acquisition planning information, and other presolicitation documents.			
2.	Justifications and approvals, determinations and findings, and associated documents.			
3.	Evidence of availability of funds.			
4.	A copy of the solicitation.			
5.	Security requirements and evidence of required clearances.			
6.	Contractor's contingent fee representation and other certifications and representations.			
7.	Preaward survey reports or references relied upon.			
8.	Contracting officer's determination of the contractor's responsibility.			
9.	Statement of facts justifying waiver of SBA request to suspend award action per FAR 19.505(f).			
10.	Packaging and transportation data.			
11.	Cost or price analysis.			
12.	Audit reports or reasons for waiver.			
13.	Record of negotiation.			
14.	Authority for deviations from regulatory, statutory requirements, and other restrictive requirements.			
15.	Notice of award.			
16.	The original of the signed contract, all contract modifications, and supporting documents.			
17.	Bid, performance, payment, or other bond documents, or a references to them, and notices to sureties.			

*Exhibit 1-2*

## CONTRACT ADMINISTRATION PLANNING

### Scan Preaward Data

It is important that you carefully scan preaward file documentation. This is particularly crucial when another person performed the purchasing function. For instance, if you had not attended a prebid or preproposal meeting, you might find some information in the minutes of that meeting that addresses an interpretation of a special contract clause. If you do not read the minutes, you might interpret this clause differently. In fairness to the contractor, you must be consistent with prebid information provided to all offerors .

After you have completed your review of the contract file, you should have identified all critical areas that bear on performance and monitoring. With this knowledge you can now determine:

- How critical is the requirement to the Government;
- How much time and effort is needed to ensure success

### **1.2 Determine Criticality**

#### Use of Designators

The Government simply does not have enough resources to evaluate a contractor's every action on each contract it awards. Prioritizing every contract based on how critical the contract is to the Government is one indicator of proper allocation of contract administration resources.

FAR 42.1104 42.1105
------------------------

The contracting officer is required to assign a designator based upon the criticality of the requirement for all contracts for supplies and services (except facilities, construction, or Federal Supply Schedule contracts). Criticality refers to the degree of overall importance that the contract has to the Government. The criticality designation is shown on the contract when this decision is made prior to the issuance of the solicitation.

In a busy contract administration office, you may be called upon to recommend a criticality designator. Your recommended choices will be either "A," "B," or "C." The criterion for each of these designators is shown in Exhibit 1-3.

The criticality designators indicate where to concentrate surveillance efforts. These designators become particularly important when contract administration resources are spread thin.

### Selection of Criticality Designator

<u>Criticality Designator</u>	<u>Criterion</u>
A	Critical contracts, including DX-rated contracts, contracts containing an unusual or compelling urgency, and contracts for major systems.
B	Contracts (other than those designated “A”) for items needed to maintain a Government or contractor production or repair line, to preclude out-of-stock conditions or to meet new needs for nonstock items.
C	All contracts other than those designated “A” or “B.”

*Exhibit 1-3*

#### WHICH DESIGNATOR?

*Joanne noticed that Eric had not yet assigned a criticality designator to the two contracts she was reviewing. She made a note to recommend a “B” designator. The pallets are necessary to maintain the Government production line.*

#### DX and DO Ratings

Although the A-B-C designators your contracting officer assigns have significance within your office, be aware that a certain class of criticality designated “A” contracts, those designated “DX” prior to award, also have a potential impact for work in process within the contractor’s plant.

#### FAR 12.3

Persons who have special authorization under the Defense Production Act can apply either a DX or a DO rating to a contract that supports the national defense. The ratings are assigned prior to issuance of the solicitation and will appear on the contract.

“DX” rated contracts become first priority in the “pecking order” within a contractor’s plant in the event of material shortages, strikes, and similar problems that impact the normal processing of production orders within the plant. This “pecking order” includes any commercial

work in process as well as other Government contract requirements within the plant that are not rated “DX.”

The other rating is “DO.” When a contractor is behind in its production scheduling, it is legally bound to give second priority to “DO” rated Government contracts after all DX rated orders.

#### Legal Significance

It is important that you realize that a contractor is legally bound to expedite these two classifications of Government contracts.

Even if you do not administer any contracts that support the national defense, be aware that contractors may not be able to expedite delivery for your order if they have received rated orders from other agencies. The DX or DO orders have preference.

### 1.3 Identify Previous Issues and Problems

You also need to consider the amount of time and effort that is necessary to ensure successful completion. How much time and effort depends on such factors as:

- **Type of Contract** (What type of contract is this? Did the type of contract change since the previous procurement?)
- **Past experiences with this type requirement** (Has this requirement ever been purchased before? What are the current problems associated with this product/service?)
- **Past experiences with this contractor** (Did this contractor deliver on time previously? Did the contractor perform as expected?)
- **Type of specification** (What type of specification was used to describe the requirement: design, function, performance, or combination of types? Have there been any changes in the specifications? Are there any other types of specifications that were used on other similar contracts? Does this type of specification require more monitoring to ensure compliance?)
- **Type of requirement** (Does this type of requirement—service or supply—necessitate extensive monitoring to ensure compliance?)

- **Warranty provisions** (Does the contract include any warranty provisions? Are they the same as offered commercially? Were there problems in the past with reliability beyond the warranty period?)
- **Urgency of the requirement** (How soon is this requirement needed and what would happen if the delivery was delayed? Were there any previous problems with contractors meeting the delivery terms? Has this contractor established they can expedite delivery if needed?)

## Information to Review

Focus your review on:

- Patterns of performance
- Previous remedies and the contractor's reaction to them
- Past performance data on key personnel identified in the immediate contract.

Identify indicators of a contractor's past performance by reviewing:

1. Files in your office covering contractors' performance history files
2. The contract file itself

## Step 1

FAR 4.801(c)(3)

**Review contractor's performance history.** One important source of information for identifying potential problem areas is the general contractor performance file that your office maintains. The data included in this file is considered confidential and is not available to non-Government personnel. Agencies file the data by contractor name and should include the following information:

- Contracts awarded
- Items purchased
- Contract dollar amount
- Key personnel involved with the contract
- Delivery/performance results

It represents an experience history of the contractor's performance over a period of time on individual contracts.

## CONTRACT ADMINISTRATION PLANNING

If your office has had previous experience with this contractor, past problem areas would be documented within this file. These areas will require special attention on this contract. Generally, when a contractor has demonstrated an inadequacy on a past contract, it will have a tendency toward similar deficiencies in future work.

Deficiencies in a contractor's performance include:

- Missed delivery dates
- Labor problems
- Shortfalls in technical capabilities
- Financial difficulties
- Reporting requirements (progress reports, submission of subcontracting reports, etc.)

Using this file, you should be able to identify any remedies that were used and the contractor's reactions..

### Step 2

**Review other available indicators of past performance.** Normally, records of past performance within your office will be sufficient for your planning effort. However, if your office has not had any previous experience with this contractor, you may want to look in the contract file for other indicators of past performance. Responsibility information in the contract file may contain information from:

- Other Government offices
- Contractor's commercial clients

This information may indicate some problem areas, even though they may not have been of sufficient magnitude to warrant a nonresponsibility determination.

It is important to keep information provided by both Government and non-Government personnel strictly confidential. The contractor should never be given access to these records or told of their contents. Use any indicators you find for your own surveillance planning only.

## ERIC'S CONCERN

*It was in these records of Eric's preaward contacts with previous customers of Angkor Wat Enterprises that Joanne found Eric's cause for concern. Angkor Wat had been in business for several years, had an excellent reputation, but had not produced the quantities required on a monthly basis under any one previous contract. Financially, the firm was sound. Business was good, almost too good. The company's capacity to meet all of its scheduled deliveries would have to be carefully monitored to ensure timely delivery.*

#### **1.4 Meet With Requiring Activity To Discuss Performance Monitoring**

Another important technique used in developing your contract administration plan is to meet with the requiring activity. This discussion should include:

- Sharing of acquisition history concerning the contractor and the supplies and services required
- Identifying and ranking the requiring activity's priorities regarding the contract

#### **Focus on User's Priorities**

It is important to focus your discussion for monitoring the contract on the priorities of the requisitioner. Do not spend too much time on contract requirements that the end-user is not overly-concerned about and ignore his or her vital concerns. The ultimate goal of any contract, Government or commercial, is to satisfy the needs of the end user. Fashion your contract administration plan, as much as possible and practical, to meet those priorities.

#### **Meeting Objectives**

In sophisticated or complex requirements, the use of meetings with requiring activity personnel is beneficial to ensure that:

- The Government is working as a team
- Priorities or potential problem areas are understood by all
- Contract progress is measured by foresight, not hindsight

**1.5 Determine the  
Extent of Performance  
Monitoring**

FAR 42.1104

A contract is a tool that the Government uses to acquire goods and services, and contract administration is an attempt to manage this tool effectively. A vital part of this management process is the monitoring of contractor performance. There are two steps involved in determining how much monitoring is necessary. These are:

1. Assess factors that indicate the appropriate level;
2. Select the best method for that level.

**Step 1**

FAR 42.1104(a)

**Assess factors that indicate the appropriate monitoring level.** Many factors are involved in determining how much monitoring is necessary. They are listed in Exhibit 1-4.

**Factors in Determining the Monitoring Level**

- Level of the Contractor's Own Inspection System
- Criticality of the Requirement
- Contract Requirements for Reporting Progress and Performance
- Contract Performance Schedule
- Contractor's Production or Performance Plan
- Contractor's History of Contract Performance
- Contractor's Experience with Providing the Contract Supplies or Services
- Contractor's Financial Capability
- Contractor's Risks Involved in Performance (e.g. Type of Contract)

*Exhibit 1-4*

## Contractor's Inspection

FAR 46.202-1 thru 3
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Standard Government clauses specify the type of inspection system that the Government requires the contractor to maintain for the performance of the contract. For example:

- FAR 52.246-1, Contractor Inspection Requirements relies on the contractor's own internal inspection procedures and industry standards.
- FAR 52.246-2, Inspection of Supplies—Fixed-Price requires a contractor to establish and maintain an inspection system not otherwise defined except that it must be acceptable to the Government. This standard clause can be the only inspection clause in a contract, or it can be the foundation upon which other Government inspection specifications are based. It contains our basic rights of inspection.
- FAR 52.246-11, Higher-Level Quality Requirements (Government Specification) requires a contractor to comply with specific Government inspection system or quality control system or quality program.

## Contractor Reporting

You must first determine what type of inspection system is required in the contract before you can decide to rely on it.

You will note that the third factor listed in Exhibit 1-4 is reporting data on progress and performance. The Government has no right to require the contractor to submit data for monitoring purposes when the contract does not give the Government such a right. Any data that you want must be specifically authorized within the schedule, specification, or by a contract clause.

## Contract Risk

FAR 16.103
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The risks of performance, the last factor listed in Exhibit 1-4, determines, in part, your level of monitoring and administrative effort. Because both the Government and the contractor promise to do something or keep from doing something, both are potentially "at risk" if one or the other, for whatever reason, fails to live up to the terms of the contract.

The Government stands to lose the benefit of the product or service at the price it agreed to pay, if, for example, performance as outlined in the contract's terms is physically impossible or if the contractor does not have the capability to complete the work.

## CONTRACT ADMINISTRATION PLANNING

The contractor potentially stands to lose as well. The contractor may lose money if, for example, its performance costs exceed the fixed price it agreed to, or if it is assessed damages for its failure to perform. It may also lose good standing if it fails to live up to the contract terms.

### Allocating the risks

The contract is basically an instrument that allocates and defines risk between the contractor and the Government. Its terms and conditions spell out each party's obligations to the other, as well as each party's rights if the other should fail to carry out its obligations. It is essential, therefore, that you understand how the terms and conditions—those that are standard and those that are unique to this contract—affect the contractor's risk. When you have identified what the risk is, you will understand what the contractor might do to cover those risks, and what you might have to do in the way of monitoring to ensure that the Government's interests are protected.

For instance, if stiff liquidated damages for late delivery are to be assessed in a production contract and you know progress is lagging in the last month of the contract, a stepped up level of inspection is probably warranted to ensure that the contractor will not cut corners on quality procedures to make the delivery.

### Step 2

**Select the most appropriate monitoring method(s).** The type of monitoring effort that is appropriate depends on the complexity and scope of the contract, as well as the contract's specific requirements for submission of progress reports, schedules, and other reports.

### Ways to Monitor Performance

Numerous techniques and procedures for determining, in a timely manner, whether satisfactory delivery or contract completion will take place include:

- Reliance on the contractor's inspection system
- 100% inspection
- Sample inspection
- Inspection by exception
- Monitoring production schedules
- Monitoring schedules drawn up by Government personnel to measure contract performance.

## Key Factors

Make your choice based on two key considerations:

1. How much can you rely upon the contractor's own system; and
2. How much confidence you have that contract problems will receive necessary management attention.

## Typical Monitoring Examples

Progress on production work is generally easier to measure than progress on a research or development contract. For production work, a Government inspector can visit the plant to see if the widgets are, in fact, coming off the assembly line, as scheduled and examine one for contract compliance.

In the developmental phase of a research and development acquisition, many of the unknowns inherent in the research phase are gone. Although the work is not yet repetitive and detailed specifications are still lacking, the experience gained on earlier contracts provides some standard for comparison. Nevertheless, the work still depends on the contractor's ability to cope with obstacles not encountered before. Monitoring is a necessity.

FAR 42.1104(c)

Generally, interim monitoring of standard commercial and commercial-like products and services are not administratively cost effective. You need only monitor timely delivery or performance and inspect the delivered items or work performed. You may rely on the contractor's inspection system, production control or data management system for these types of products or services.

## Goals of Monitoring

You should select a method which is most likely to bring to your attention:

- **Actual or potential default situations.** You must act promptly and carefully in these situations to take action to initiate immediate improvements while preserving the Government's right to future remedies available under the contract.
- **The need for Government action.** Although Government action may supplement but not supplant the contractor's own efforts to solve performance problems, you need to be aware early if Government action will be needed. For example, the unsuitability of Government-furnished equipment would require immediate Gov-

**1.6 Delegate  
Contract  
Administration  
Functions**

**Contracting Officers**

**FAR 2.101**

ernment action. Other situations may not be as obvious.

Now that you know how the contract will be monitored, the next question is WHO will be responsible for its administration. This effort may be performed by the contracting officer, the contract administrator (you), the COR/COTR, or other appointed Government representatives. Some of the officials are authorized to perform contractual actions, others are limited to providing input.

The contracting officer (CO) is the official authorized to enter into, administer, and terminate contracts. A single contracting officer may be responsible for duties to specialized contracting officers, that is:

- Administrative Contracting Officers (ACOs): The official authorized to perform any post award contractual action assigned by the CO. Some agencies have set up separate offices called Contract Administrative Offices (CAO) to handle postaward functions as prescribed by that agency. ACOs would be assigned to the CAO.
- Terminating Contracting Officers (TCOs): The official authorized to perform postaward actions limited to the termination of contracts.

Your office may refer to the contracting officer as the Procuring Contracting Officer (PCO). Generally, this distinction is made when the CO has assigned or delegated postaward duties to an ACO.

For purposes of providing clarity, all text references to a “contracting officer” will refer to the PCO, that is, the contracting officer responsible for all duties, regardless of whether those duties have been delegated to other contracting officers.

The contracting officer determines how contract administration will be handled. The contracting officer must determine whether or not to:

- Retain the contract and perform all applicable contract administration functions
- Retain the contract and perform the administrative functions with the assistance of other Government personnel
- Assign the contract to a contract administration office (CAO)
- Assign the contract to a CAO with specific limitations and/or specific additions

### When a CO Keeps Administration

FAR 42.203

The contracting officer retains a contract and is responsible for the performance of all administrative functions unless such performance:

- Must be performed at or near the contractor's facility
- Is required of other organizations by agency-specific regulations and may be based on such issues as:
  - Dollar thresholds (Some agency's CAOs may not have to accept contracts below an established amount)
  - Type of requirement (CAOs may not accept contracts covering off-the-shelf commercially available products)
  - Organization (Agencies may require administration by CAOs available to an agency)
- Substantial assistance for supporting contract administration has been approved one level above the CO.

### CAO Responsibilities

FAR 42.202(e)

When a contracting officer assigns a contract to a contract administrative office, the CAO is responsible to:

- Perform 67 baseline functions
- Serve as the focal point for inquiries
- Advise the contracting office of all pertinent matters
- Request supporting contracting administration
- Reassign contract administration if required.

### Typical Functions

FAR 42.302(a)

The 67 functions listed in the FAR as contract administration functions represent the baseline functions of a contract administration office. Some examples of typical functions are:

- Attempts to resolve issues in controversy using ADR procedures
- Conducts postaward orientations
- Performs production support, surveillance and status reporting
- Ensures timely submission of required reports
- Consents to subcontracts
- Issues administrative changes
- Determines contractor's compliance with cost accounting Standards and disclosure statements.

## CONTRACT ADMINISTRATION PLANNING

The contracting officer, however, may withhold any of the functions when:

- The CO determines the contracting office can better handle the performance of the function(s); and
- It is approved by one level above the contracting officer.
- Required by agency regulations/interagency cross servicing agreements

Any decision to withhold administrative functions should be made after consulting with the CAO.

### Additional Functions

In addition to the 67 baseline functions, the contracting officer may also assign the following additional functions, including administering:

#### **FAR 42.302(b)**

- Supplemental agreements incorporating contractor proposals submitted under a clause addressing contract changes
- Prices and priced exhibits for unpriced orders under basic ordering agreements (BOAs)
- Supplemental agreements changing contract delivery schedules
- Supplemental agreements providing for the deobligation of unspent dollar balances considered excess to known contract requirements
- Changes to interim billing prices
- Adjustments to contract prices resulting from the exercise of an economic price adjustment clause
- Supplemental agreements incorporating contractor proposals resulting from the issuance of amended shipping instructions
- Changes under contracts for ship construction, conversion, or repair
- Reduced quantities on firm-fixed price contracts based on consequential delivery shortages
- A change in place of inspection at origin for contractors that are nonmanufacturers

Unless specifically assigned, these functions **cannot** be performed by

the CAO.

Keep in mind, though, that these are a menu of potential functions that can be assigned to a CAO. Rarely would any contracting officer be required to actually perform all of them. In fact, some of the functions may not even be applicable to the contract involved, such as monitoring industrial labor relations matters on a contract for commercial products or maintaining surveillance of flight operations on a contract that does not involve aircraft.

There are also functions that are dependent, to some extent, on the events that occur in contract performance. For example, your office may have the responsibility of negotiating supplemental agreements changing contract delivery schedules. However, if no change in contract delivery schedules is required during the performance of the contract, you will not have to perform this function.

#### Additional Support

The CAO also has the authority to request supporting contract administration from another CAO for any function that has been assigned by the contracting officer. The CAO can even reassign the contract when another office is in a better position to perform the functions.

#### Terminating Support

The contracting officer or the CAO can recall a delegated function at any time when:

- There has been a change in circumstances; and
- The recall has been approved by a higher level.

#### **Other Government Personnel**

In addition to specialized contracting officers, delegations of contract administration functions can be made to other Government personnel, resulting in the formation of a contract administration team.

#### The Team Concept

The contracting officer always heads up the contract administration team. The definition of contracting officer contained at FAR 2.101 "...includes certain authorized representatives of the contracting officer acting within the limits of their authority as delegated by the contracting officer." FAR does not specify any official names for such authorized representatives, nor does it specifically state how these authorized representatives obtain their authority. As a result, these issues are addressed by agency FAR supplements, are not standard, and generally reflect organizational practicality.

In practice, the only contracting officer's representative that is always officially designated is the contracting officer's technical representative (COTR). Some agencies use the term "contracting officer's representative (COR)" instead of COTR. Most agencies use one term or the other to identify that individual who is specifically given the chief role in monitoring aspects of the contract that relate to the statement of work or specification. However, a few reserve the COTR designator for these representatives, while using the COR label for individuals who have other contract administration duties.

This course uses the terms "COTR" and "COR" interchangeably to parallel the practice within the majority of Government agencies. COR/COTRs generally perform their contract administration duties as secondary responsibilities to their primary job in a functional area not related to contract administration.

Follow your own agency's practice. The most common places for listing this practice is in your agency's FAR 1.6 or 42.2 supplementation.

### Team Members

Although they may not be specifically designated, other Government officials available to perform various contract administrative tasks include:

- Contract administrators/contract specialists
- Project inspectors
- Quality assurance specialists
- Property control administrators
- Legal counsel
- Patent counsel
- Auditors
- Cost and price analysts
- Engineers
- Scientists

Various key players of a contract administration team are depicted in

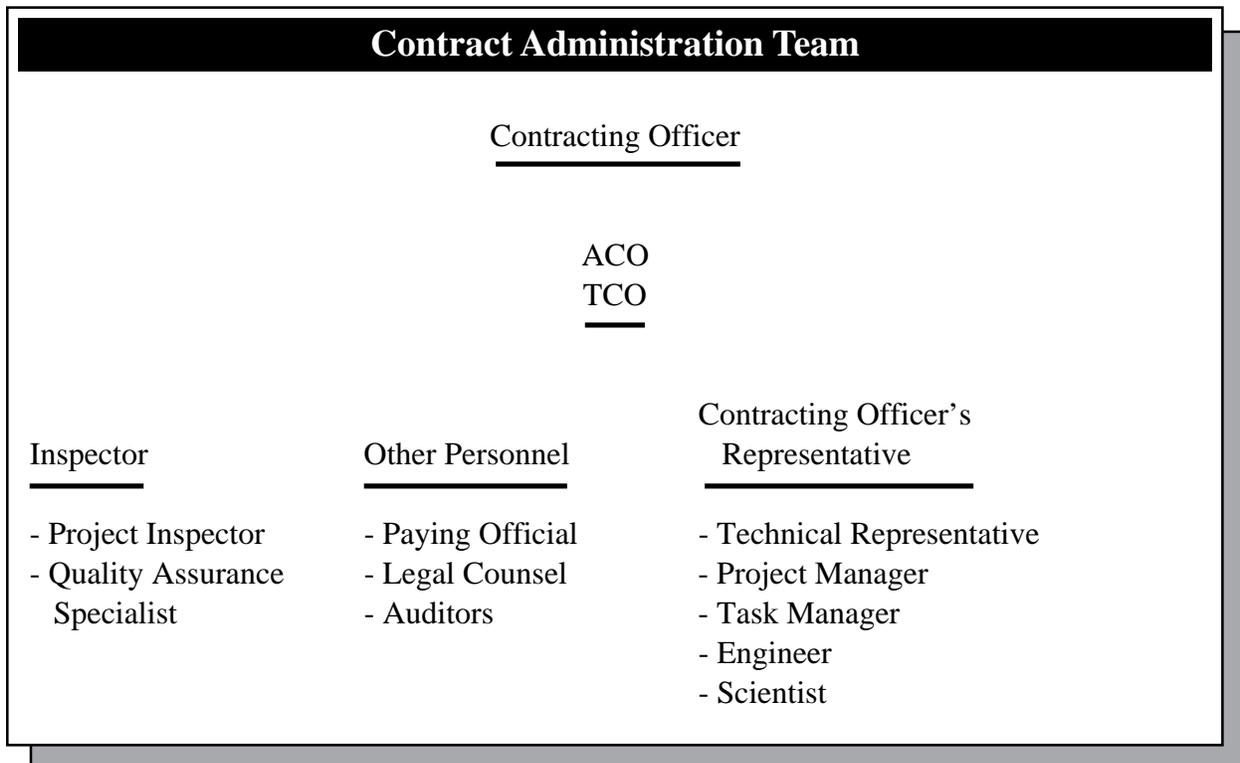
*Exhibit 1-5*

Exhibit 1-5.

#### Team Roles

The roles and authorities of these team players depend on the size of the Government organization and the size of the contract. For instance, an engineer may be the representative for the requiring activity for a purchase order for testing services and may not only have written the technical specifications, but also may perform COR/COTR functions, project inspector functions, and property control administration func-

tions.

Typical functions of key contract administration personnel are generally as follows:

**Contracting Officer Responsibilities.** The contracting officer (or ACO/TCO when so delegated) is responsible for the business relationship that exists between the Government and the contractor including:

- Interpreting and implementing diverse contract terms and conditions
- Analyzing costs
- Auditing the contractor's books and records
- Issuing changes and negotiating modifications to the contract
- Organizing and coordinating the efforts of all the functional specialists who comprise the contract administration team.

Being an effective contracting officer involves more than the application of expertise to specific problems. A successful contracting officer must also have leadership qualities to ensure that the Government's representatives work well together as a team and do not exceed their delegated authority.

**Responsibilities of a COR/COTR.** A COR is usually an official with expertise in the area of the contract effort who possesses the necessary background to monitor technical aspects of contract performance. Typical primary responsibilities of the COR include:

- Monitoring performance
- Evaluating work as it progresses
- Inspecting and accepting completed work for the Government

**Exhibit 1-6 on the next page** provides more specific COR/COTR duties related to individual contract performance that **may** be assigned.

**Project Inspector Responsibilities.** Project inspectors can report to either the contract administrator, contracting officer, or COR/COTR, depending on how you have set up the contract administration plan for each project, or depending on how your agency has set up these reporting procedures among its organizations. At any rate, their responsibilities are usually restricted to monitoring and inspection duties, such as:

- Monitoring the contractor's efforts to measure appropriate progress levels
- Reviewing the contractor's progress reports
- Inspecting all work performed by the contractor for contract compliance
- Advising the COR/COTR or contracting officer of any unusual problems—such as schedule slippage, requests for changes, and nonconformance with technical specifications or quality control requirements—which actually or potentially affect contract compliance
- Performing on-site checks to ensure that the contractor and any subcontractors are complying with labor standards and practices
- Maintaining a list of subcontractors on the project
- Maintaining a daily diary
- Submitting daily reports to the contracting officer or COR/COTR

**Roles of Other Government Personnel.** Depending on the complexity of the contract, other people may also become involved in contract administration. They include:

- Program or requiring activity personnel
- Administrative support personnel
- Legal counsel
- Cost and price analysts
- Auditors

These individuals will provide their input as requested by the contracting officer.

## COR/COTR Delegations

1. Administration
  - a. Act as the Government technical representative for contract administration.
  - b. Supervise all technical and clerical personnel assigned to assist the COR/COTR in his or her duties.
  - c. Assists the Contracting Officer conducting the postaward orientation conference.
  - d. Represent the Government in conferences with the contractor and prepare memorandums for the record of pertinent facts.
  - e. Confer with representatives of the requesting office and other user groups on performance matters.
  - f. Maintain a filing system.
  - g. Prepare a project diary.
  - h. Keep a current set of drawings and specifications by noting all changes or deviations.
2. Labor
  - a. Ensure that equal opportunity in employment posters are prominently displayed at the job site.
  - b. Report violations of the labor standards provisions to the contracting officer.
  - c. Monitor time and recordkeeping.
3. Inspection and Acceptance
  - a. Inspect all work for full compliance with contract requirements.
  - b. Promptly reject all work that does not comply with contract requirements and immediately notify the CO.
  - c. Advise the contracting officer if the contractor fails to remove, correct, or replace rejected work promptly.
  - d. Provide technical guidance (not direction), advising the contractor of formal appeal rights when there is disagreement.
  - e. Prepare and maintain a running list of items that remain at variance with contract requirements, apprising both the contractor and the contracting officer of corrective action or the need for it.
  - f. Maintain a master copy of the official list of defects and omissions.
  - g. Ensure that all defects and omissions are corrected or completed.

*Exhibit 1-6 (continued on next page)*

**COR/COTR Delegations (continued)**

4. Changes
  - a. Administer contract changes previously authorized by CO.
  - b. Ensure that the contractor provides formal proposals for contemplated changes.
5. Payments

Review and approve the contractor's invoices, determining the Government agreement or nonagreement with the contractor's percentage of physical completion for progress reports and cost vouchers.
6. Schedule
  - a. Review and forward to the contracting officer the contractor's schedule or project management chart with a recommendation for acceptance or rejection.
  - b. Require the contractor to submit, if specified in the contract, a progress chart showing the actual progress at the end of each accounting or payment period.
  - c. Advise the contracting officer of any delay factors (strikes, weather, etc.) and record their impact.
7. Submissions
  - a. Determine (from the contract) and list the number and types of submittals required from the contractor.
  - b. Monitor the contractor's submission of required samples, shop drawings, reports, etc., for timeliness.
  - c. Monitor the Government's timely and complete response to the contractor's submission of samples, shop drawings, reports, and so forth.
  - d. Maintain a record of submittals on a current basis.
  - e. Approve or reject submittals as provided in the contract documents.
8. Safety

Enforce all safety and health requirements.

*Exhibit 1-6 (continued)*

While other Government personnel can be assigned many of the surveillance and acceptance duties, there are some functions that should

<b>Actions Not To Be Delegated</b>
Award, agree to, or execute a contract or contract modification
Obligate, in any way, the payment of money by the Government
Make a final decision on any matter that would be subject to appeal under the Disputes clause of the contract
Redesignate any of their assigned duties unless specifically authorized to do so
Cause the contractor to incur costs not specifically covered by the contract with the expectation that such costs will be reimbursed by the Government
Terminate for any cause the contractor's right to proceed

*Exhibit 1-7*

**1.7 Develop a Contract Administration Plan**

not be delegated to them. These are listed in Exhibit 1-7. Although the FAR does not require the CO to prepare a formal contract administration plan, the CO is responsible for ensuring that the parties have complied with all terms and conditions of the contract. At a minimum, contracting officers track receipt of the deliverable (or performance of the service), acceptance, and payment under the contract. This is true, for example, when contracting for the furnishing and delivery of standard commercial items.

**Need for a Formal Plan**

A formal contract administration plan is essential when the contract involves large dollar amounts or complex technical requirements. Such contracts typically place many duties and responsibilities on both parties. Ideally, you had an opportunity to prepare a tentative contract administration plan during the solicitation stage of the procurement. Immediately after contract award, you must either finalize that plan or if you have no tentative plan, prepare a full plan. The plan should provide for:

- An appropriate level of surveillance or monitoring of contractor performance
- Timely and proper performance of the Government's responsibili-

## Key Elements of the Plan

ties

All members of the Government contracting team identify and plan for key contract administration decisions even before a solicitation is issued. Some implementation of these key decisions may be necessary in the solicitation. For example, any decision to monitor through a contractor reporting procedure would need an implementing procedure in the contract itself. Key elements of a contract administration plan are identified in Exhibit 1-8.

## Need for Flexibility

Although you finalize the contract administration plan at contract award, it needs to be a flexible working document to fulfill its purpose of providing:

- A baseline for project management and scheduling,
- A simple way of tracking the extent of contract completion, and
- An aid for postaward orientation.

As the contract progresses, you may find it necessary to shift responsibilities or add tasks that could not have been anticipated at the time of award. Therefore, over the life of the contract, you will need to update your plan to reflect all developments.

### **Key Elements of the Contract Administration Plan**

- A listing of contract administration terms and conditions related to administration
- Contract milestones
- Contractor reporting procedures
- Quality assurance guidelines (from requiring activity)
- Inspection and acceptance process (from requiring activity)
- Names, roles, authorities and limitations of authority for contract administration team members
- Milestones for reports from contract administration team members

*Exhibit 1-8*

## Planning Steps

There are several steps to follow in devising a workable contract administration plan:

1. Identify contract terms and conditions related to administration
2. Identify contractor reporting procedures
3. Ensure your plan provides for the inspection and acceptance process and conforms to quality assurance requirements
4. Identify contract administration team members and define their roles
5. Develop key milestones
6. Document your decisions

### Step 1

#### **Identify contract terms and conditions related to administration.**

Make an outline all major tasks contained in all sections of the contract. The outline will be more useful if you divide it into four parts:

Part 1—Contract administration preliminaries (delegation of responsibility, postaward conferences)

Part 2—Contract performance (monitoring, progress payments)

Part 3—Inspection and acceptance

Part 4—Post-contract activity (duties under warranty or patent provisions, transmittal of final technical data, audit, contract closeout activities)

Be sure to list only the major tasks. If you decide to hold a postaward orientation conference, for instance, you would want to list it as a major task, but would not list the subtask of preparing an official record of the conference. Design checklist formats comprised of key tasks within these four phases. Your goal is to identify what must be done, when it must take place, who must do it, and as necessary, how and where it is to be accomplished.

Exhibit 1-9 summarizes some common areas you should consider. Note, however, that you may wish to expand the checklist—particularly in the quality assurance area—tailoring it to unique contract requirements, as detailed in Step 3.

**Common Elements of a Contract Administration Checklist**

After you have reviewed your contract and identified major tasks for your checklist, run through this list of common contract administration functions to see if there are others you wish to include.

Applies	Does not Apply	
_____	_____	Hold a postaward orientation
_____	_____	Furnish Equal Employment Opportunity poster
_____	_____	Ensure contractor submits insurance and bond certifications to the CO
_____	_____	Provide Government-furnished property
_____	_____	Monitor contractor material submittals
_____	_____	Verify subcontracting plan submission
_____	_____	Verify first article submission
_____	_____	Obtain OSHA standards certification
_____	_____	Give first article approval
_____	_____	Obtain quarterly reports of prime contractor subcontracts with small and minority-owned businesses
_____	_____	Monitor contractor-conducted testing procedures
_____	_____	Monitor Government-conducted testing procedures
_____	_____	Review and approve contractor technical deliverables and reports
_____	_____	Review and approve deliverables required for interim payment
_____	_____	Establish acceptance procedures and conduct acceptance
_____	_____	Obtain instruction/maintenance manuals on newly acquired equipment
_____	_____	Arrange for/participate in contract audit
_____	_____	Notify contractor of decision on exercising options
_____	_____	Obtain warranty

*Exhibit 1-9*

Step 2

**Identify contractor reporting procedures.** Some agencies use a special form as a contract attachment in Section J of the contract to identify contract deliverables including reports. Others insist that all contract deliverables, including reports and technical data submissions, be given distinct contract line items in the contract schedule. If your agency does one or both of these, identification of contractor reports will be much simpler. Otherwise, you must compile your own list.

Note procedures and due dates that are pertinent to the reports. It is a part of your contract administration plan to ensure that these are complete, on time, and otherwise comply with contract terms.

Step 3

**Ensure your plan provides for the inspection and acceptance process and conforms to quality assurance requirements.** The requisitioner will have had some input into the inspection and acceptance process by identifying unique requirements that affect it. These unique requirements will be in the contract's terms and conditions. For example, a unique inspection requirement might be a performance test. This is not covered by most agency's standard inspection and acceptance procedures. Your contract administration plan should include a checklist of required performance test parameters as well as when and where the test would be performed and by whom. Examples of some common areas that should be addressed are:

- The standard in the contract that establishes an acceptable product or service, such as:
  - A requirement that a piece of equipment must run for 100 hours at a specific level of operating efficiency establishes that operating efficiency as the standard.
  - Food on cafeteria lines set up no more than 30 minutes before opening” establishes 30 minutes as a performance standard.
  - The contractor must respond to on-call repair service within 6 hours from receipt of a telephone call from an authorized Government representative” establishes six hours as a performance standard.

- Allowable variations from the standard authorized within the specifications or other contract terms, such as those for:
  - Calibration requirements which contain a range within which calibration is acceptable;
  - Many service contracts, which recognize human error as a fact of life for some kinds of service, and state an “Acceptable quality level” of, for example, 5%, meaning that if a contractor only meets the performance standard 95% of the time, it will still provide “acceptable” service.
- A required or otherwise reasonable method to document test results, using, for example:
  - An outside testing laboratory, or
  - A standard agency form or format.
- Deviations that would indicate “conditional” approval rather than rejection, for things such as:
  - Tests on a first article of production that cite easily correctable defects as an unacceptable reason for rejection.

FAR 52.209-3(b)

FAR 52.209-4(b)

Step 4

FAR 2.101

**Identify contract administration team members and define their roles.** The roles and authorities of these team players depend on the size of the Government organization and the size of the contract.

In the previous steps you identified all the necessary tasks for administering this contract. You must now identify who will have responsibility for those tasks. Make sure that each task is clearly defined and any overlapping of functions will not result in confusion among the team members. In addition to specific tasks associated with the contract, you need to identify who has been delegated overall responsibility for normal contract administration functions. Each member of the team should receive a copy of the list of participants and their roles and responsibilities. This will help avoid any member duplicating the effort of others.

Being an effective contracting officer involves more than the application of expertise to specific problems. A successful contracting officer must also have leadership qualities to ensure that the Government’s representatives work well together as a team.

Step 5

**Develop key contract milestones.** Assign a timeframe for the completion of each task. These tasks include those performed by both Government and contractor personnel, from contract award to contract closeout. You need to identify which tasks are crucial to the performance of another task. This is especially true when the tasks are assigned to different team members.

Exhibit 1-10, “A Format for Phase I Milestones,” provides a typical format for documenting answers to the other questions: WHAT, WHEN, AND BY WHOM.

<b>A Format for Phase I Milestones</b>		
Task	Milestone Date	Person Responsible
1. Write COR delegation letters	Jan. 15, 1991	Ida Juan, Contract Administrator
2. Notify contractor of delegations	Jan. 15, 1991	Ida Juan, Contract Administrator
3. Submit quality control plan	Jan. 23, 1991	The ABC Company, Contractor
4. Review quality control plan	Jan. 31, 1991	Sherlock Holmes, Inspector
5. Hold postaward orientation conference	Jan. 31, 1991	Jane Justice, Contracting Officer
6. Provide Government-furnished tools	Feb. 6, 1991	Harry Altogether, Program Manager

Note: Additional columns could be added as necessary to specify where and how tasks are to be carried out, as well as a column for when the tasks were actually completed.

*Exhibit 1-10*

## Step 6

**Document your decisions.** You are now ready to present your decisions in a formal plan. There is no set format you must follow in preparing your contract administration plan. At a minimum you need to cover all issues necessary to ensure all parties understand their roles and due dates for assigned tasks. A suggested format is shown in Exhibit 1-11.

### Typical Contract Administration Plan Format

- Title of the contract, related identifiers, and criticality
- Identity of the contractor and key contractor personnel
- Location of files on the contract and the contractor
- Brief description of the work to be performed
- Place of performance and/or delivery points
- Reporting requirements
- The contractor's milestones for such critical events as:
  - First article testing and reporting
  - Performance or delivery
  - Submission of progress reports
  - Submission of invoices and other data related to payment
- Identity of the CO's Representative (COR/COTRs)
- Tasks to be performed by Government personnel and milestones for each such task, with respect to such functions as:
  - Monitoring the contractor's quality assurance program
  - Furnishing Government property and monitoring its use
  - Reviewing and responding to contractor reports/requests
  - Receiving, inspecting, and accepting the work
  - Certifying costs incurred or physical progress for payment purposes
  - Monitoring compliance with the small business subcontracting plan
- Tasks delegated to each COR/COTR (including any limits on their authority.)
- Potential problem areas

*Exhibit 1-11*

**1.8 Provide Notice and Instructions**

Step 1

**Review qualifications of COR/COTRs prior to issuing notices.** Make sure any individual proposed as COR/COTR has the training, qualifications, and experience commensurate with the authority the contracting officer is delegating. If he or she does not, recommend that the contracting officer request a qualified substitute, unless immediate training is available to qualify the proposed individual for the COR/COTR appointment. An example of a situation to avoid is having an organization nominate an administrative coordinator on a highly technical service contract. The technical adviser to the administrative coordinator may be a better choice as your COR/COTR.

Step 2

**Write designation letters.** There is only one **Government-wide** notice to individual Government employees that contains instructions and outlines specific responsibilities in relation to a single contract: the COR/COTR delegation or appointment letter. The essential elements of such a letter are outlined in Exhibit 1-12. Only the contracting officer can sign designation letters to the COR/COTR, project inspector or other contract administration team member.

**Essential Elements of a Letter of Designation**

- Address the individual by name and position title.
- Specify the contract number that applies to the delegation.
- Specify the authorities being delegated.
- Specify the tasks being delegated.
- Emphasize limitations of the delegation.
- Specify if the designee may redesignate any authority or task.
- Specify any recordkeeping requirements and the disposition of those records.
- Include a requirement for the individual to certify that he or she has read and will abide by your agency's procurement integrity or conflict of interest requirements.

*Exhibit 1-12*

## Need for Specific Instruction

When the designee is to act for the contracting officer on more than one contract, write a separate designation for each contract. Do this because limitations, authorities and tasks will vary, depending on the contract terms.

When instructions and responsibilities addressed to individuals in the contract administration process are contained in regulations, office procedures, and job descriptions of contract administration team players, you may not need to prepare any designation letters.

COR/COTRs are from a wide variety of organizations whose main function is usually not to act in a contract administration supporting role. Therefore, guidelines and other instructional documentation within their organizations do not normally cover contract administration support activities.

Project inspectors may also be in organizations where contract administration duties are secondary to their normal responsibilities. When such is the case, instructions in this paragraph for COR/COTR notices apply to project inspectors as well. More typically, however, contract administration inspection duties are the main job functions of a project inspector.

## Step 3

Exhibit 1-13 provides a sample of a COR/COTR appointment letter.

**Set up a system for changing or terminating designations.** You will probably need to set up a system to make sure you are aware of when changes or terminations need to be made on lower priority projects. This is particularly true when you have no routine contact with the COR/COTR. So you might, for example, make it a point to call each COR/COTR each Friday. If you have too many to call, you may arrange to have the COR/COTR's supervisor provide you with copies of personnel reassignments, long term travel, or extensive leave approvals that affect your COR/COTR.

Whatever the method, assure that you are aware of any situation having a potential effect on the performance of contract administration duties that have been delegated to others.

Terminate or change designation letters in writing. When possible, issue the termination letter before the termination and specify the date on which the termination will become effective. Send the contractor either a copy of the termination letter or a separate letter advising of the termination.

## COR Designation Letter

TO: Tom Jones, Project Engineer

FROM: Jane Justice, Contracting Officer

SUBJECT: Contracting Officer's Representative (COR) Designation, Contract No. ARN 91-7028

I am hereby designating you as contracting officer's representative (COR) on Contract No. ARN 91-7028 awarded to the ABC Corporation, Our Town, WI, for the production of a new concept in Super Duper Widgets.

In this capacity you have the specific responsibilities detailed below, but perhaps the most important aspect of this authority is its limitations. Under no circumstances are you to make changes that would affect the cost or duration of the contract. You will have the following responsibilities which you may not redesignate to any other individual:

1. To furnish the contractor with technical assistance and guidance in all aspects of the contract. You may formalize your guidance to the contractor in a written change order provided the order does not affect price or duration of the contract and provided the order contains both a signed acknowledgment from the contractor and the following statement:

In accepting this change order, the contractor agrees that the price and all other terms and conditions of the contract remain unchanged.

2. To provide me with a copy of all change orders issued under paragraph 1 above within 48 hours of issuance.
3. To provide me with written notification of any dispute that cannot be resolved between you and the contractor regarding performance of the contract.

*Exhibit 1-13 (continued on next page)*

4. To keep accurate records of all interim and final contract testing procedures outlined in Section 2B of the statement of work, and send a report within five working days of any tests to the contractor's project manager and to me.
5. To keep a daily log of all contract-related activities while you are on-site at the contractor's plant.
6. To verify invoices and, upon receipt, promptly certify them for prompt payment. After verification, send me a copy of the certified invoice and send the original to Finance.
7. To turn over all records pertaining to this contract to the successor COR if this COR designation is terminated for any reason before completion of the contract, and to notify me that you have taken such action.

Please note that you may not redesignate any of the contractual authority listed above, except for clerical tasks associated with that authority.

I am providing you with two copies of this letter of designation. Please sign one copy in the space provided below to indicate your acceptance, and return that copy to me. In addition, please sign the following certification to indicate that you have read and will abide by the Code of Ethical Conduct (copy attached).

ACCEPTED: \_\_\_\_\_  
Contracting Officer's Representative

DATE: \_\_\_\_\_

I have read the Integrity Awareness Act for Government Employees and will abide by its requirements in conducting all my responsibilities as contracting officer's representative.

CERTIFIED: \_\_\_\_\_  
Contracting Officer's Representative

DATE: \_\_\_\_\_

Attachment: Agency's Code of Ethical Conduct

**1.9 Provide Formal**

**Notice to the Contractor**

Notify the contractor, in writing, of the names of individuals designated as CORs/COTRs. Include in this notification what authority the COR/COTR has in relation to this particular contract. Provide a similar written notice outlining the roles of any other Government employees having a direct contract administration role. This is especially necessary when the contract itself has not identified these officials.

Such a notice must include some key information. These essential elements are listed as Exhibit 1-14.

<b>Essential Elements of a Contractor's Notice of a Contracting Officer's Delegation</b>	
1.	Specify the name and position title of the COR, COTR or other person receiving the delegation.
2.	Cite the contract number for which authority has been delegated.
3.	Specify the extent of the delegation.
4.	Emphasize the limitations of the authority delegated.

*Exhibit 1-14*

Exhibit 1-15 provides a sample COR notification letter to the contractor.

## Notification Letter to the Contractor

TO: Alvin Johnson, Chief Project Officer  
 The ABC Corporation  
 123 Main Street  
 Our Town, WI XXXXX-XXXX

FROM: Jane Justice, Contracting Officer

SUBJECT: Contracting Officer's Representative (COR) Designation, Contract No. DSN-079-2241

This officially notifies you that Tom Jones, Project Engineer, Your Agency, will be my on-site representative for this contract.

Perhaps the most important aspect of his authority is its limitations. Under no circumstances can he make changes that would affect cost or duration of the contract. Please contact me directly at (XXX) 123-4567 when you anticipate changes that would affect price or overall time of performance.

Mr. Jones is authorized to act in my behalf in:

1. Furnishing technical assistance and guidance to you in all aspects of the contract and formalizing this guidance in a written change order, as long as the change does not affect price or duration of the contract.
2. Verifying and certifying all invoices. You should submit invoices directly to Mr. Jones.

I am providing you with two copies of this notice and request that you acknowledge one copy in the space provided below and return it. Thank you for your cooperation.

ACKNOWLEDGED: \_\_\_\_\_  
 Contractor

DATE: \_\_\_\_\_

**THE BEST LAID PLANS**

*Joanne hoped that her agency had a production specialist who could function as a member of the contract administration team. For the purposes of preliminary designation letters, she left the name blank, but otherwise drafted a letter to a production specialist listing designated tasks needed for contracting support by a person in that role. If they could not get a production specialist's assistance, she would need to transfer these tasks to another member of the contract administration team before finalizing the contract administration plan.*

## CHAPTER 2

# POSTAWARD ORIENTATION

### ASSESSING THE NEED

*“So, Joanne, do you think we need a postaward orientation with Angkor Wat Enterprise?” Eric asked.*

*“Well,” Joanne replied slowly, “I’ve read the detailed review of the company and I’m a little concerned about its ability to deliver on time, considering all the other business it has. Do we have a production specialist?”*

*“No,” Eric responded. “Engineering has continually maintained that we don’t have enough production contracts to warrant having a specialist on staff.”*

*“Well, that means we definitely need a postaward conference, and it’s probably best to make it face-to-face rather than by teleconference. I think we should try to find someone to sit in with us who has a good background in production rates.”*

*We have an excellent quality control manager,” Eric noted. “We’ll make sure Jake can make the meeting.”*

*“Would he be the one to test the pallet material for flexibility?” Joanne asked. “Paragraph 7.3.2 in the specifications calls for a test. Since we’ve had so much trouble with rigid materials in the past, I would think we’d want to make darn sure we don’t get pallets that are any more rigid than the ones we have now.”*

*“No, we use an independent testing laboratory for that,” Eric told her. He was pleased that she had identified the two key issues that would likely cause trouble in the performance of the contract. He was particularly pleased that he didn’t have to ask her specifically to do it. He desperately needed an independent thinker with a good business sense for the increasing workload.*

*He glanced down at the draft agenda she had put on his desk. Sure enough, delivery and testing were listed separately for discussion.*

*“You’ve apparently given this some thought, Joanne,” he said. “Why don’t you prepare a position paper on these issues? It will help in our preliminary meetings with our in-house group, to make sure we’re all focused on what’s really important. It’ll be a handy way to brief the Director too. The plant manager for the automated warehouses will be over here screaming if he even gets a hint of delivery or flexibility problems. We have to make sure that we keep the Director aware of what’s going on.”*

## COURSE LEARNING OBJECTIVES

At the end of this course, you will be able to:

**Overall:** Conduct postaward orientations for contractors.

**Individual:**

- 2.1 Determine the need for a postaward orientation.
- 2.2 Determine the type of orientation.
- 2.3 Plan the orientation.
- 2.4 Conduct the orientation.
- 2.5 Prepare a report of the postaward conference.
- 2.6 Select a course of action when agreement on a key issue cannot be reached.
- 2.7 Identify the need for unilateral or bilateral contract modifications, if any.
- 2.8 Document the contract file.
- 2.9 Provide information to interested parties on the contract and its performance.
- 2.10 Obtain any executed contractual documents or bonds from the contractor within the time specified.

# INTRODUCTION TO POSTAWARD ORIENTATION

## **Definition of a Postaward Orientation**

Postaward orientation is planned, structured discussions between Government and contractor that focuses on:

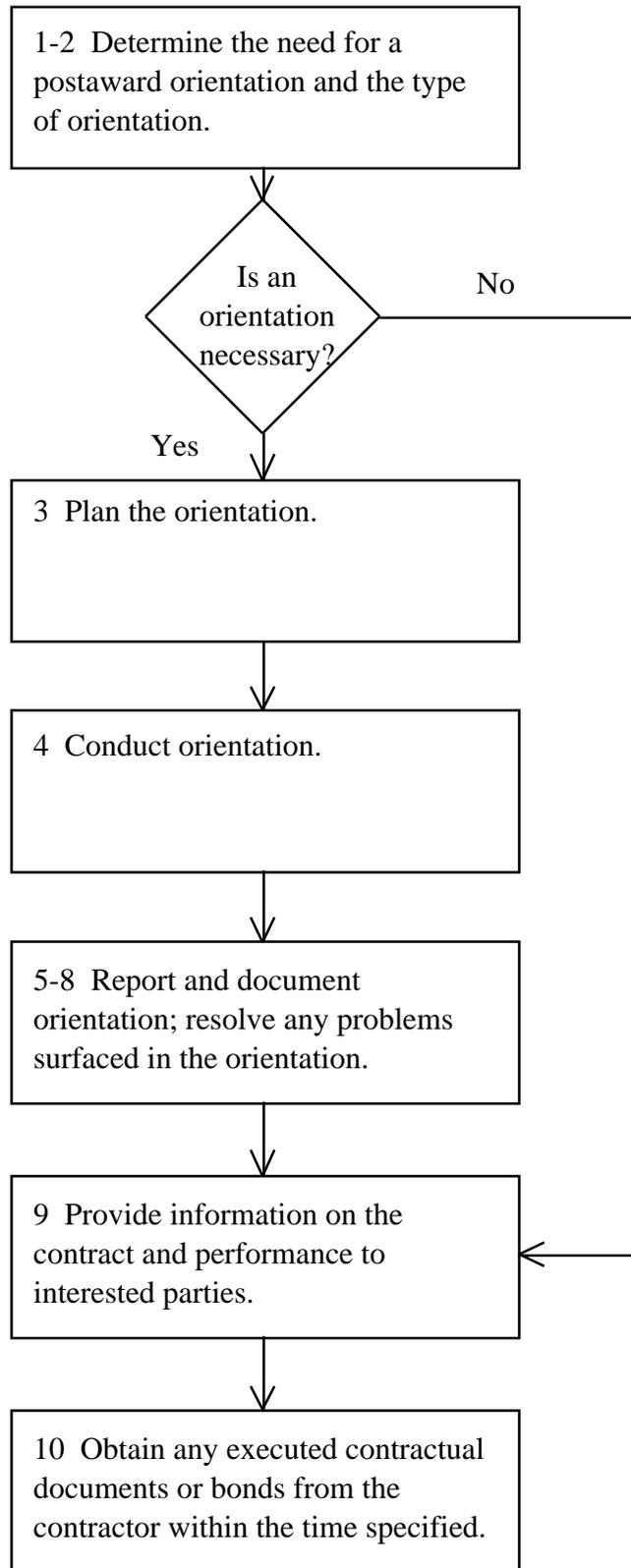
- Understanding the technical aspects of the contract
- Identifying and resolving oversights
- Preventing problems
- Averting misunderstandings
- How to solve problems that may occur later
- Reaching agreement on common issues

## **Policy on Postaward Orientation**

**FAR 42.501**

The contracting officer decides whether postaward orientation is necessary, but it is generally encouraged to assist small and small-disadvantaged businesses. When used, postaward orientation should be conducted promptly after award to achieve maximum benefits.

## STEPS IN POSTAWARD ORIENTATION



## 2.1 Determine the Need for Postaward Orientation

FAR 42.502

### Identify Issues Impacting Performance

#### Step 1

In some contracts, performance by the contractor and administration by the Government can begin smoothly and proceed without incident after contract award without preliminary communications between the Government and the contractor. For instance, in small purchases, this is almost always the case.

In most large contracts, however, immediate administrative action is needed to make sure that the work starts off on the right track. You determine the need for postaward orientation as a part of the contract administration planning process that was outlined in Chapter 1. The success of a postaward orientation as well as your correct assessment of the need for one, depends on your ability to identify the issues impacting contract performance during the contract administration planning effort.

**Identify a need to review specific key contract requirements and milestones.** Postaward orientations are most vital when potential risks to the contractor or the Government have not been addressed within the contract itself. In these cases, the postaward orientation identifies these risks and addresses ways to reduce the possibility that they will result in serious problems during contract performance.

For example, risk is diminished when the contract states that the Government-furnished Equipment (GFE) will be “available 60 days after contract award at the contractor’s plant.” If the contract did not state where and when GFE would be delivered, there would be additional risk if the contractor assumed that it would have the GFE within the first couple of weeks of contract performance and planned on using it at that time. The risk would be delay and disruption to the contractor’s planned schedule. In order to meet the delivery, for instance, it may have to run two shifts because of the local plant capacity. Because the contract did state when the GFE would be delivered, the risk is isolated to what would happen if the Government does not deliver as promised. So, you address the risk by making timely GFE delivery an item on the contract administration planning checklist for internal Government monitoring, as Chapter 1 detailed. It does not warrant the contractor’s participation. On the other hand, if the contract had not specified when and where GFE would be delivered, it would be a discussion item. You would want to learn when the contractor needed the GFE, determine if the Government could provide it at that time, and investigate what the impact would be if the GFE arrived later than the contractor said it was needed.

## POSTAWARD ORIENTATION

Analyze any administrative requirement you identify as a result of your planning for the contract to determine if you really need some form of postaward orientation. You need to consider issues such as:

- Did the contract fully explain the requirement?
- Would an incorrect interpretation of a performance requirement damage the Government?
- Would potential problems endanger tight scheduling?
- Do contract requirements rely on close interaction between Government and contractor personnel?

### Step 2

#### **Identify a need for a general briefing on one or more aspects of contract administration.**

The postaward goals of any contract are to assure that purchased supplies and services are:

- Delivered or performed when and where specified in the contract;
- Acceptable, in terms of conforming to the contract's specifications or statement of work;
- Furnished in compliance with other terms and conditions of the contract.

Compliance with other terms and conditions include requirements such as:

FAR 4.403

FAR 4.7

FAR 22.10

FAR 22.101-1

FAR 22.102

FAR 22.901(c)

FAR 22.902

- Security classifications and requirements;
- Record retention requirements;
- Service Contract Act requirements;
- Federal and state agencies responsible for enforcing labor requirements;
- Federal and state employment services;
- Federal policies on non-discrimination because of age.

You may question the need for briefing a contractor on terms and conditions it should have understood prior to receiving the award. Even though ignorance of contract terms does not excuse responsibility for complying with them, many contractors overlook the finer points of the requirement in the preaward stages. Postaward briefings ensure that the contractor now fully understands all details of the Government requirement, including those incorporated by reference, that it agreed to perform when it signed the contract.

### The Extent of the Briefing

The extent of the information you provide depends on:

1. A contractor's past experience with Government contracts. Small businesses with little Government experience will generally need more guidance.
2. The degree of difficulty encountered by experienced contractors on similar requirements.

Exhibit 2-1, "Should I Hold a Postaward Orientation Conference?" provides a menu of items to consider in your analysis.

### Should I Hold a Postaward Conference?

Some common considerations in deciding whether to hold postaward orientation conferences are listed below. This checklist will help you crystallize your thoughts. The “Yes” answers favor a conference.

Yes	No	
_____	_____	Is this the contractor’s first Government contract?
_____	_____	Has the contractor had little previous experience with this type of product or service?
_____	_____	If the contractor had previous Government contracts, were an unusual number of problems associated with them?
_____	_____	Can you foresee specific potential problems on this contract?
_____	_____	Is any aspect of this contract urgent or critical to the Government?
_____	_____	Does the contract type require a relatively high degree of administration?
_____	_____	Is the requirement relatively complex and of a relatively high dollar value?
_____	_____	Have you had little previous conversation with the contractor on the aspects of this particular contract? (In contrast, you may have had detailed conversations during an on-site preaward survey, during negotiation sessions, and so forth.)
_____	_____	Is there any indication that misunderstandings exist?
_____	_____	Does the procurement history of the required supplies or services reveal recurring problem areas?
_____	_____	Is a lengthy production cycle planned?
_____	_____	Does the contract involve spare parts and related equipment?
_____	_____	Is the contractor a small or minority business concern?
_____	_____	Is extensive subcontracting involved?
_____	_____	Are safety factors involved in the contract work?
_____	_____	Are progress payments or other interim financing arrangements involved?
_____	_____	Can you anticipate contract changes that would require the contractor to use specialized accounting procedures?

*Exhibit 2-1*

## Step 3

**Document the decisions you make.** It is a good idea to include the Exhibit 2-1 checklist as a part of your contract file. It provides an easy way to record the basis for your decision. This is particularly important if you decide that you don't want to hold a conference. If things go wrong later, it provides evidence that you were exercising good judgment in your early contract administration decisions. If you do hold a conference or conduct some other form of postaward orientation, you will supply additional documentation to the file on these activities. See paragraph 2-8.

## 2.2 Determine the Type of Orientation

You may accomplish postaward orientation in three ways:

### Face-to-Face

Hold a face-to-face orientation conference when you believe the contractor does not have a clear understanding of the:

FAR 42.503

- Scope of the contract,
- Contract's technical requirements, OR
- Rights and obligations of the parties in any area.

### Letter

Generally, you can use a letter as an alternative to the formal postaward conference when:

FAR 42.504

- Only minor details need to be conveyed to the contractor;
- The contractor has had previous experience in producing the items or providing the services; AND
- The procurement is not particularly complex.

For example, a letter may suffice if you need only communicate specifics on site availability, instructions for paperwork submissions, and so forth. You can include a notice of the COR/COTR's designation, as outlined in Chapter 1, within this letter as well.

Exhibit 2-2, "An Alternative: The Postaward Orientation Letter," provides a sample postaward orientation letter.

## An Alternative: The Postaward Orientation Letter

TO: Gary Green, Project Manager  
FROM: Al Jones, Contracting Officer  
SUBJECT: Contract No. 104230-90-C-XXXX

To avoid any potential difficulties, I am writing to point out a requirement of this contract that has led to problems in other contracts. Also, I would like to clarify the contract completion date and identify the Government personnel who will play a role in the contract.

To install the four pieces of equipment required in contract line item #4, you will need to have a power outage in the west wing of Building #XYZ, a heavily populated office building. Please note that paragraph 2.a(1) of the statement of work requires that this power outage take place on Sunday, a Federal holiday, between the hours of midnight and 6:00 a.m. In addition, paragraph 2.a(5) of the statement of work requires that you provide me with a full seven calendar days' notice of your need for this outage (send the original notice to Mr. Smith-see below).

The reason for the preceding requirement is that we have computers on-line 24 hours a day in that wing of the building, as well as other operations that cannot be disrupted.

Since performance time is expressed in the contract as 120 calendar days after contract award, I would like to paraphrase that now into a milestone date for contract completion: January 30, 1991.

Mr. Howard Smith is my representative in the technical aspects of this contract. Accordingly, he is referred to as the contracting officer's representative (COR). He is not authorized to make any changes to the contract as written. He does have the authority to inspect and accept the equipment for the Government.

You will receive any changes to the contract as an official modification to the contract signed by me or another Government contracting officer.

*Exhibit 2-2 (continued on next page)*

## An Alternative: The Postaward Orientation Letter (continued)

The list below summarizes your paperwork submissions and identifies the individuals to whom you should send them:

<p>Final quality control plan (you provided a draft plan at the preaward survey)</p>	<p>Ms. Jane Doe Quality Assurance Specialist Dept XXX - Room 829 Your Agency 123 Main Street Our Town, PA XXXXX-XXXX</p>
<p>Request notice for the power outage, request for interim inspection required by paragraph 10.a(7) of the statement of work, and technical reports required by contract line item #7</p>	<p>Mr. Howard Smith Plant Manager Your Agency Dept. XYZ - Room 117 123 Main Street Our Town, PA XXXXX-XXXX</p>
<p>All other submissions and correspondence (in- cluding nontechnical questions) should be addressed to me</p>	<p>Mr. Al Jones Contracting Officer Dept. ABC - Room 401 Your Agency 123 Main Street Our Town, PA XXXXX-XXXX</p>

Don't hesitate to call me if you want to discuss any aspect of this contract. My office number is XXX-123-1234, and I'm usually here between the hours of 7:30 a.m. and 4:00 p.m.

*Exhibit 2-2 (continued)*

## POSTAWARD ORIENTATION

### Phone

You may find a telephone conference is sufficient when:

- You have had good prior experience with the contractor;
- Matters for discussion are relatively straightforward; OR
- You do not anticipate problems for other sound reasons.

Your choice can be a combination of these methods. For instance, you may have an uncomplicated procurement with a new contractor whose contract does not require performance at your installation. In this case, and especially if the contractor is not located near your installation, you may find the use of a letter to convey a few important points useful. However, you may also decide to use a telephone conference to establish a personal working relationship.

### 2.3 Plan the Orientation

Once you establish the need for an orientation, plan it carefully to make certain that the orientation accomplishes its goals. Detailed planning is particularly important when you use a formal postaward conference. It is also important, however, to plan what will be addressed in a letter or telephone orientation.

Addressing the steps listed in Exhibit 2-3, Orientation Planning Tasks, ensures that you are thoroughly prepared for the orientation and have considered all potential problem areas.

### Step 1

**Prepare the Government's position.** You may recognize the need to make judgments on issues such as:

- Government-furnished property procedures (if the contract does not outline them),
- Ambiguous or unclear contract specifications or clauses, or
- Testing or quality control procedures (if they are incomplete in the contract or otherwise need supplementation).

Problems with issues such as these might affect the quality of the product or work performed, cause delays in contractor delivery, increase the scope of work and the contract cost, and require a contract modification to remedy the situation.

## Orientation Planning Tasks

1. Prepare the Government's position on, or understanding of, key issues.
2. Prepare a conference agenda and determine the time and place for the conference.
3. Designate the Government's participants in the orientation, including the chairperson.
4. Brief the Government's participants on their roles, emphasizing the chairperson's role.
5. Provide a copy of the agenda to the contractor.
6. Obtain the contractor's response to the agenda.
7. Finalize the Government's position.

*Exhibit 2-3*

### THE FLEXIBILITY TEST PLAN

*You will remember that Eric asked Joanne to prepare a position paper for the Government contract administration team and the Director on the potential delivery problem and the flexibility test.*

*The one for the flexibility test was quite detailed. The contract specifications allowed the Government to inspect and test at any time. Joanne's Government position was to randomly pick out two samples of the pallet material as soon as they were ready—before production got under way. They could probably do this six weeks into the contract. They'd have to firm up the milestone for that with Angkor Wat, but at any rate, it would be early. The bottom line position was hard line. If the material didn't pass the test, they'd be given four weeks to cure performance by providing material that did pass the test. There'd be no more chances if it failed the second time around. The Government would terminate for default and could reprocur with the original manufacturer to meet any critical deadlines.*

*The position paper on the potential delivery problem detailed the reasons for concern and called for weekly reports from the COR/COTR, with the idea of getting Eric involved quickly if there was any suspicion of a schedule slippage.*

## POSTAWARD ORIENTATION

### Step 2

**Prepare the agenda and set the conference time and place.** Include in the conference agenda all matters needing clarification or otherwise requiring discussion with the contractor now to avoid misunderstanding later.

### Possible Agenda Items

Items to consider for the agenda include:

- Special contract clauses,
- Critical milestones,
- Contractor’s quality control procedures,
- Contractor’s reporting requirements,
- Billing and payment procedures,
- Roles of the Government’s contract administration team members, and
- Roles of the contractor’s contract administration team members.

### Tailor the Agenda

Use the checklist at Exhibit 2-4, Checklist/Record For Postaward Orientation Conference, as the initial basis for outlining your agenda. It provides a menu for your agenda list. The less complicated the procurement, the more you will use the “N/A” column on the checklist. Tailor your agenda from the appropriate topics that remain. Don’t discuss everything—just those topics that have the most critical potential impact on contract performance. Add any necessary items that do not appear on this general list.

Don’t include agenda items that are strictly internal and have no effect on what the contractor has to do. Discuss those when you brief Government participants. See Step 4.

The length and complexity of your agenda item list will influence your timing decisions. Conversely, timing constraints will, as a matter of practicality, restrict your agenda list. You may need to break the conference into two or more sessions, but you should need to resort to multiple sessions only on the most complex contracts. It is generally more efficient to address high-priority items in the meeting and follow the meeting up with a letter or teleconference to address lower-priority items.

When

**Time.** There are really only two concerns about the timing of the conference:

FAR 42.501(d)

- Hold the conference as soon as it is practical after contract award.
- Make sure the time is mutually agreeable before you firm it up.

Where

**Location.** Be sensible in your choice of conference sites. Certain locations will typically have advantages, for example:

- Contract performance sites offer ready access to physical conditions that may have a bearing on issues being discussed.
- Conference rooms near or within your office area offer convenience for your contract administration team's busy schedule.

You will sometimes have to analyze tradeoffs of one site advantage in relation to another to make the best conference choice. Try to minimize travel time for all participants.

Before you finalize your choice of sites, get an idea on the number of contractor attendees and take a head count of likely participants among your own contract administration team to make sure the site can physically accommodate the group.

Unless you can guarantee no interruptions, always discard the temptation to have smaller conferences in your own or the contracting officer's office. The convenience will not be worth the ill-will and frustration of other attendees, both Government and contractor, for wasting their time with your other unrelated business.

POSTAWARD ORIENTATION

<b>Checklist/Record for Postaward Orientation Conference</b>			
PART I—GENERAL			
1. Contract No.	2. Total Amount	3. Type of Contract	4. Date of Conference
5. Preaward Survey?		6. Contractor Name	7. Contractor Address
<input type="checkbox"/> YES	<input type="checkbox"/> NO		
PART II—CONFEREES			
1. Government		2. Contractor	
PART III—CONFERENCE PROGRAM			
Subject	Check if Applicable	Clause No. if Applicable	Significant conclusions; further action to be taken (attach additional sheets if necessary)
<b>A. GENERAL</b>			
1. Function and authority of assigned personnel			
2. Routing of correspondence			
3. Omissions of conflicting provisions			
4. Other (specify)			
<b>B. REPORTS: PREPARATION AND SUBMITTAL</b>			
1. Work progress			
2. Financial			
3. Other (specify)			
<b>C. SUBCONTRACTS</b>			
1. Consent to placement			
2. Prime's responsibility for administration			
3. Cost or pricing data			
4. Source inspection			
5. Other (specify)			
<b>D. SMALL BUSINESS SUBCONTRACTING</b>			
1. Contractual requirements			
2. Program to facilitate			
<b>E. CONTRACT MODIFICATIONS</b>			
<b>F. GOVERNMENT PROPERTY</b>			
1. Use of facilities and tooling			

Exhibit 2-4 (continued on next page)

<b>Checklist/Record for Postaward Orientation Conference (continued)</b>			
Subject	Check if Applicable	Clause No. if Applicable	Significant conclusions; further action to be taken (attach additional sheets if necessary)
2. Maintenance and Preservation			
3. Property procedure approval			
4. Property disposal procedures			
5. Other (specify)			
<b>G. SPECIAL CLAUSES</b>			
1. Repricing			
2. Liquidated damages			
3. Government financing			
4. Special tooling			
5. Overtime			
6. Bill of Materials			
7. Data rights			
8. Warranties			
9. Work Performed at Government installations			
10. Other (specify)			
<b>H. GENERAL CLAUSES</b>			
1. Limitation of cost			
2. Allowability of cost			
3. Other (specify)			
<b>I. DELIVERY SCHEDULES</b>			
<b>J. TRANSPORTATION</b>			
<b>K. INVOICING AND BILLING INSTRUCTIONS</b>			
<b>L. PROCESSING OF COST AND PRICE PROPOSALS</b>			
<b>M. LABOR</b>			
1. Actual and potential labor disputes			
2. Davis-Bacon Act			
3. Work Hours Act			
4. Walsh-Healey Act			
5. Copeland Anti-Kickback Act			

Exhibit 2-4 (continued on next page)

POSTAWARD ORIENTATION

<b>Checklist/Record for Postaward Orientation Conference (continued)</b>			
Subject	Check if Applicable	Clause No. if Applicable	Significant conclusions; further action to be taken (attach additional sheets if necessary)
N. QUALITY ASSURANCE AND ENGINEERING			
1. Quality control system			
2. Waivers and deviations			
3. Drawing/design approval			
4. Manuals			
5. Preproduction sample			
6. Qualifications and environmental tests			
7. Inspection and acceptance			
8. Specification interpretation			
9. Laboratory facilities			
10. Value engineering clause			
11. Other (specify)			
O. PRODUCTION			
1. Production planning			
2. Milestones and other monitoring devices			
3. Production surveillance			
4. Safety			
(Additional Notes)			

*Exhibit 2-4 (continued)*

## Step 3

**Designate Government’s participants to attend a preliminary meeting.** Invite Government representatives who will interact with the contractor during contract performance to attend, if possible. Invite people who will have a significant role only, individuals such as:

- COR/COTR
- Program manager(s)
- Project inspectors
- Quality assurance specialists
- Other appropriate subject matter experts

To save time, one group meeting is usually sufficient. However, if you anticipate lengthy discussions with one Government representative, hold a separate one-on-one meeting with him or her.

### GETTING JAKE ON THE TEAM

*In this chapter’s opening vignette Joanne recognized the need for a subject matter expert, the Government production specialist, Jake Richards, to help her deal with an excessive production workload, which might affect Angkor Wat’s ability to deliver on time. Joanne called Jake to set up a time to brief him on the potential contract problem. She also invited him to attend the preliminary group conference and the postaward orientation conference with Angkor Wat. She wanted to explore how he could most effectively participate in making sure that this potential problem would not become a real one.*

You might invite using organizations if the work will take place in their office area and if one of their office employees is not participating in another capacity. If the nature of the conference would result in a discussion of price or cost issues, invite your price analyst. For a smooth transition from preaward to postaward when contract administration functions are delegated, invite the PCO. Questions might be raised that only the PCO could adequately answer.

## Step 4

**Brief Government participants on their roles.** On larger contracts, it may be useful to hold a preliminary meeting with appropriate Government personnel to ensure that the Government’s expectations

## POSTAWARD ORIENTATION

are clearly expressed and understood. You may have some strong personalities on your contract administration team. Emphasize who is in charge and is chairing this meeting. It is either you (the contract administrator), or the contracting officer. The COR/COTR might also chair this meeting if the contract administrator and the contracting officer could not attend. Also, the COR/COTR could chair a preliminary meeting covering only technical issues. Final decisions affecting contract terms and conditions, however, must be made by the contracting officer.

### Purpose of Internal Briefings

Distribute your contract administration plan at this preliminary meeting and conduct a page-by-page review of its contents. The purpose of this preliminary meeting, or individual briefings, is to:

- Identify all actions that must be taken by the Government;
- Ensure that all Government personnel involved have a clear understanding of the contract's terms and clauses and their respective responsibilities;
- Establish a "common front" in relation to the contractor's responsibilities;
- Identify which Government participants will be making a presentation at the postaward orientation conference and restrict the time and subject matter of each presentation;
- Otherwise finalize agenda items with Government participants, if appropriate.

### **THE NEED FOR PRODUCTION INFORMATION**

*In her preliminary meeting with Jake Richards, Joanne showed him the language in the preaward survey that was causing concern. “Yeah, we could have a real problem with this one,” Jake agreed. “If I could get some specific scheduling information, I might be able to suggest some ways for reducing the possibility of blowing our delivery date.” Jake went into detail on the kind of information he wanted.*

*“The contract does require a performance schedule,” Joanne informed him. Unfortunately, it doesn’t require all the information you want.”*

*“Okay, then just tell them to include this other information on the schedule too,” Jake suggested.*

*“I can’t require any information that’s not in the contract, Jake, and anyway, I’m not so sure if we really need it in writing,” she countered. “After all, we’re really just trying to assess the risk for delay at this point. Once we figure out what the odds are, we should be able to adjust our monitoring techniques accordingly. Will you be able to help us out with that?”*

*Jake agreed that he could. They also agreed that Jake would attend the postaward orientation conference and would ask questions about the schedule when Eric, who would be chairing the meeting, gave him his cue. Jake agreed to be friendly in his approach, playing the role of interested advisor. He also agreed to limit his questions to fifteen minutes.*

- Step 5                      **Provide a copy of the agenda to the contractor.** When you do this, ask for feedback by a specific calendar date.
- Step 6                      **Obtain the contractor’s response to the agenda.** If you don’t get a response by the time you asked for feedback, provide the contractor with a written or oral notice that the agenda provided earlier is the final conference agenda.
- If you do get a response, discuss this input. Make changes to your agenda as necessary. Provide the contractor and the Government attendees with copies of the final agenda.
- Step 7                      **Finalize the Government’s position.** If preliminary conference discussions point out the need for a possible change to the contract or to the Government’s normal method of operations, get agreement among appropriate Government personnel prior to the meeting. Also discuss and finalize the handling of potential problems you identify. You need to show a united Government front at the orientation meeting.

### RETESTING LEAD TIME

*Eric and Joanne held a preliminary meeting with all of the Government contract administration team members. The plant manager for all the automated warehouses attended and voiced the only disagreement with either of the Government positions that Joanne had written. He contended that it would take only two weeks, at the most, for Angkor Wat to get a material sample for retesting—if the first test failed.*

*“I think two weeks might be real tight, Mr. Harrison,” Eric told the plant manager. “This is a small business. We want them to succeed. They would be a great second source. Remember too, the original manufacturer’s contract was awarded three weeks earlier than Angkor Wat. So you’ll be getting some relief on your pallet shortage.”*

*Mr. Harrison had held firm to his convictions. “We gave them everything they need—even the formula from the original manufacturer. Now it’s up to them to deliver. It doesn’t make good business sense to coddle them,” he said.*

*Eric finally agreed to give Angkor Wat three weeks, instead of four weeks, to provide satisfactory material if the first failed the flexibility test, but Mr. Harrison was still unhappy. Eric knew that his Director would be hearing about it.*

*He was glad he had showed his Director Joanne’s position papers at this morning’s staff meeting and had gotten a nod of approval.*

## 2.4 Conduct the Orientation

Your goals in conducting a postaward orientation, whether by letter, telephone or in person are the same. See Exhibit 2-5, Your Orientation Goals.

### Your Orientation Goals

1. Clarify informal procedures to implement contract requirements smoothly.
2. Clarify roles of both Government and contractor key personnel.
3. Detail the more critical or complex requirements to ensure understanding.
4. Invite questions from the contractor on any requirement that still needs clarification.

#### *Exhibit 2-5*

#### Steps to Attain Goals

Any orientation conference agenda should allow you to take a logical step-by-step approach to fulfill these goals. The steps are outlined as follows.

#### Step 1

**Introduce the participants.** At the opening of the conference, the chairman introduces each attendee at the conference table by name and title or with a one-sentence explanation of the role that person will play in contract administration. Go into these roles in more detail later on. But first, just make sure that everyone knows who is speaking during the entire session. If you are the chairman and don't know all the contractor attendees, ask the contractor to make those introductions.

#### Step 2

FAR 42.503-2

**Explain the purpose of the conference.** Go over the points outlined in Exhibit 2-5, but also emphasize that the purpose of the conference is not to change the contract in any way. Emphasize that the only way the contract will be changed is by a written modification signed by the contracting officer.

#### Step 3

**Summarize the roles of Government key personnel.** You already introduced everyone. Now clarify the limits, authorities, roles and responsibilities of each Government representative, and ask the contractor to advise the Government of the roles, responsibilities, limits, and authorities of each contractor representative.

## POSTAWARD ORIENTATION

Emphasize that the contracting officer makes commitments, gives direction within the scope of his or her authority, puts decisions in writing, and signs any commitment or direction, whether or not it changes the contract. The only exception is when the contracting officer specifically authorizes the COR/COTR to sign change orders. The use of change orders is generally restricted to technical direction for highly technical service work or construction. Conference participants without authority to bind the Government should take no action that in any way alters the contract.

Further advise the contractor that the Government is not obligated to make any contract adjustments as a result of actions taken by the COR/COTR or project officer unless the action has been specifically authorized in the letter of designation or under the contract itself.

### Step 4

**Provide general instructions.** General contract administration instructions include information necessary for the contractor to mitigate its risk as well as the Government's risk, and address contractor responsibilities pertaining to:

- Management and supervision of the work force,
- Protection and control of Government property, data, and reports,
- Contract clauses, or
- Other areas of concern, as appropriate.

Advise contractors of the proper routing of correspondence. Explain that matters pertaining to the technical performance of the contract may be addressed directly to the COR/COTR, or project officer, but that matters pertaining to questions of fact on contract terms and conditions must be sent to the contracting officer.

### Step 5

FAR 22.805(b)

FAR 22.1020

FAR 22.1304

FAR 22.1404

**Provide the contractor with posters, notices and other data.** Labor law implementation will sometimes require that the contractor post equal employment opportunity posters at the job site, including posters that outline the rights of handicapped individuals. If this contract requires posting labor-related notices, the Government is responsible for providing them. The Government may also need to provide seniority lists from incumbent service contractors ranking its current employees to new follow-on contractors for new service periods. Often Government publications are listed as Government-furnished material. Consider distributing these and other data you need to provide at this postaward meeting.

## Step 6

**Secure agreement on milestones or interpretation of terms and conditions.** Your contract administration plan solidified the Government goal on interim milestones. For milestones that require the contractor's input, seek the contractor's agreement now. If you identified ambiguities in key contract terms when drawing up your contract administration plan, get agreement on these now. If not, emphasize significant and critical terms. Key discussion items would be any uncertainty on terms that would affect:

- Performance
- Interim delivery
- Payment terms

During the conference, request any information or response from the contractor to ensure a uniform understanding of key terms and conditions.

#### **THE TEST MILESTONE**

*At the Angkor Wat postaward orientation meeting, Eric discussed the interim delivery of the pallet material for testing with Angkor Wat's project manager. Eric said that he'd like to do the material testing as soon as it was available. "We're assuming that will be sometime within the next six weeks. Can you give us an exact date?" he asked.*

*Angkor Wat had deferred until they could get back to the plant and confer with material suppliers. The Angkor Wat project manager promised to call Joanne the next day with a milestone date.*

### **2.5 Prepare a Postaward Orientation Conference Report**

FAR 42.503-3

Use any convenient format as long as it contains all of the necessary information to document the events of the meeting. Common key elements of a conference report are contained in Exhibit 2-6.

Make sure that the contracting officer, the COTR/COR, the contractor, and others as appropriate, receive copies of the report. Include a copy in your contract file. If the contracting officer does not write this report, it is a good practice to have him or her review initial it to ensure his/her awareness of any problems or need for future action.

### **Key Elements of a Postaward Conference Report**

1. The names and affiliations of all participants.
2. The main points discussed and all agreements reached.
3. Areas requiring resolution.
4. Names of participants assigned responsibility for further actions.
5. Completion dates for the actions.

*Exhibit 2-6*

Exhibit 2-7, "Report for the Record," is an example of a brief memorandum that can be attached to the checklist in Exhibit 2-4. It may also be used to record specific problems resolved during the conference.

## Report for the Record

September 26, 1991

I chaired a postaward orientation conference on Contract No. ISR 91-2498-NR for repairs to a conveyor system in the Federal Building on Main Street in Our Town, PA. A detailed list of the points we covered and the names of those in attendance is attached to this record.

The most pressing problem that surfaced was that none of the Government attendees knew the location of the Government-furnished replacement parts that the Government is to provide, per paragraph 1.2.3a of the statement of work. The building superintendent, Mr. Howard Ames, one of the attendees, went back to check his records after the conference. He advised me on September 25 that the parts in question had been ordered through a Federal Supply Schedule and had not yet been received. Our small-purchases supervisor, Ms. Janet Doe, found the order (Order ISN 91-9424-SP) and advised me today that it was shipped on September 19, so Mr. Ames should be receiving it any day.

This is not holding up performance, since the parts will not be needed until the second week in November.

Sam Smart  
Contract Administrator

Concurred: Jane Justice  
Contracting Officer

### *Exhibit 2-7*

#### **2.6 Select a Course of Action When an Agreement on a Key Issue Cannot Be Reached**

The events that occur when the Government and the contractor discover a point of disagreement during the conference depends on the nature of the problem. A key factor is whether the problem can be easily resolved. Remember that each contract problem is different, and no one approach can be used to resolve every disagreement that may arise, but in general, there are some basic administrative steps involved.

#### **Step 1**

**Document the contractor's position in detail.** During the conference, delve into the reasons for the contractor's position and include it in the conference report. If disagreement results in an emotionally-charged

atmosphere at the conference, consider deferring its resolution, promising the contractor prompt resolution if that is possible. If the problem requires joint contractor/Government problem solving, set up an early time for a separate meeting with only those who need to be in attendance.

Step 2

**Take appropriate action to resolve the problem.** Seek technical or legal advice when necessary. Look at all possible solutions.

Step 3

**Select the best solution to the problem and seek agreement on it.** It is important that you resolve each issue in a fair and equitable manner, as quickly as possible. Although not always practical, it is best to resolve all problems before the contractor begins any work under the contract. In seeking a mutual agreement, your actions can include:

- Further discussions with the contractor's top management, or
- Consideration and negotiation of a contract modification.

Step 4

FAR 43.103(b)

FAR 43.2

**When agreement cannot be reached, take appropriate unilateral action.** If a contract clause allows the contracting officer to issue a unilateral modification, this action is a likely Government solution to the stalemate.

## 2.7 Identify Need for Contract Modification

FAR 43.1

FAR 43.2

If a contract change seems necessary, you must clearly define the extent of the proposed change and implement it promptly. The contracting officer must sign an official contract modification in all cases. A later chapter in this course is devoted entirely to contract modifications.

## 2.8 Document the Contract File

Include the conference report detailed in paragraph 2-5 as well as all other material, correspondence, or actions developed or acquired as a result of the postaward orientation conference.

In the event of any subsequent disagreements with the contractor, this material can be used to reconstruct facts and events as they occurred. A well-documented contract file will identify and verify the Government's initial position on any performance problems that were anticipated during the conference or in the early stages of implementation.

## 2.9 Provide Information to Interested Parties

FAR 24.202

Provide any documentation to members of your contract administration team as well as the contractor when that information affects their role in contract performance.

You may also get requests for information from other interested parties, such as other companies who had provided offers, but who did not get the contract award. Release of any information is subject to the Freedom of Information Act (FOIA). Examples of information you may not release are:

- Classified information;
- Contractor's proprietary data, including trade secrets

Your agency will have an organization tasked with providing advice on information that is or is not releasable under FOIA. Your own procurement organization may have a staff analyst to help you in these decisions. FOIA imposes a response time on answering requests for information. So initiate action on them quickly.

## 2.10 Obtain Executed Contractual Documents, Bonds, or Insurance

FAR 28.103

Generally, nonconstruction contracts do not require payment or performance bonds. The contracting officer may include bonds in solicitations for services under certain circumstances.

FAR 28.301

Another contract requirement may be the submission of insurance certificates.

FAR 28.102-3(c)

Since bonds and certificates of insurance must be executed before performance begins, the deadline for submission should be stated in the contract. It is usually within 10 days after award. When bonds and certificates are required, request them immediately, normally in the letter accompanying contract award. Reference the contract clause that requires the submission and establish a time for receipt, if the contract does not provide a date.

FAR 28.202

When you receive the forms, review them and, in the case of bonds, check the Treasury Department list to be sure that the surety company has the requisite bonding authority. Bonding companies have limits on the amount they may bond.

POSTAWARD ORIENTATION

*NOTES*

## CHAPTER 3

# ORDERS AGAINST CONTRACTS / AGREEMENTS

### MONDAY MORNING ASSIGNMENTS

*It was Monday morning and Eric was going through the pile of new purchase requests on his desk. Several covered some sophisticated research and development requirements and two were for recurring procurements covering a variety of agency supply and service requirements. He decided to give these last two to Joanne. "These should be a challenge for her," he thought.*

*The first requirement called for maintenance and custodial services at an agency laboratory, and was estimated at \$75,000. It included everything from cleaning offices to maintaining the grounds surrounding the laboratory. Eric knew that there was a Federal Supply Schedule for maintenance and custodial services.*

*The second requirement called for the repair of a pump at the Headquarters building. It was apparently causing some major plumbing problems. Eric's agency had hundreds of these pumps scattered throughout its major installations. There were at least a dozen things that could go wrong with them and there was no way to determine what the problem was until the pump was disassembled and thoroughly checked out. Historic data showed that the annual quantities requiring repair could fluctuate as much as 50%, and the average repair cost was about \$20,000. Since this was a recurring requirement, Eric had established a Basic Ordering Agreement (BOA) with the pump manufacturer to provide the replacement parts. He also had several BOAs with pump service contractors for emergency repair service in each state where the agency had major installations*

*"In the good old days, BOAs were much simpler to use," Eric mused. Now the Competition in Contracting Act (CICA) and its requirements for full and open competition make the ordering procedure more complex. BOA orders now have to be synopsized unless otherwise justified.*

*He decided to assign this requirement to Joanne also even though he recognized that she would have to do something with that Headquarters building pump repair fast.*

## COURSE LEARNING OBJECTIVES

At the end of this course, you will be able to:

**Overall:** Determine when it is appropriate to issue orders against indefinite-delivery contracts and Basic Ordering Agreements and issue them.

**Individual:**

- 3.1.1 Determine if a requirement is covered by an indefinite-delivery contract.
- 3.1.2 When use is optional, decide whether to place a delivery order.
- 3.1.3 Determine which multiple-award Federal Supply Schedule contractor offers the lowest delivered price.
- 3.1.4 Prepare and forward the delivery order.
- 3.2.1 Determine if a requirement is within a BOA's scope.
- 3.2.2 Establish the extent of competition.
- 3.2.3 Negotiate an agreement for your specific requirement.
- 3.2.4 If you fail to reach a timely price agreement, consider issuing an unpriced order.
- 3.2.5 Prepare and issue the order.
- 3.2.6 Confirm acceptance of the order by the contractor.
- 3.3.1 Prepare and issue an order to another agency.
- 3.3.2 Pay the servicing agency.

## INTRODUCTION TO PLACING AN ORDER

**Definition of an Order** Orders are the documents you, the contract administrator, issue to activate purchases under existing indefinite-delivery contracts, basic ordering agreements (BOAs), or interagency agreements. These orders may be described by various adjectives. For example, when ordering services, the contract or agreement may specify the issuance of “task orders” or “work orders” as opposed to “delivery order” or “orders.” This is merely a more descriptive term for services. The principles discussed in this chapter apply to all of these types of orders.

**Policy on Order Replacement**

FAR 16.506(d)

Orders issued under indefinite-delivery contracts must contain:

- The date of the order
- Contract number and order number
- Item number and description, quantity, and unit price
- Delivery or performance date
- Place of delivery or performance
- Packaging, packing and shipping instructions, if any
- Accounting and appropriation data
- Any other pertinent information.

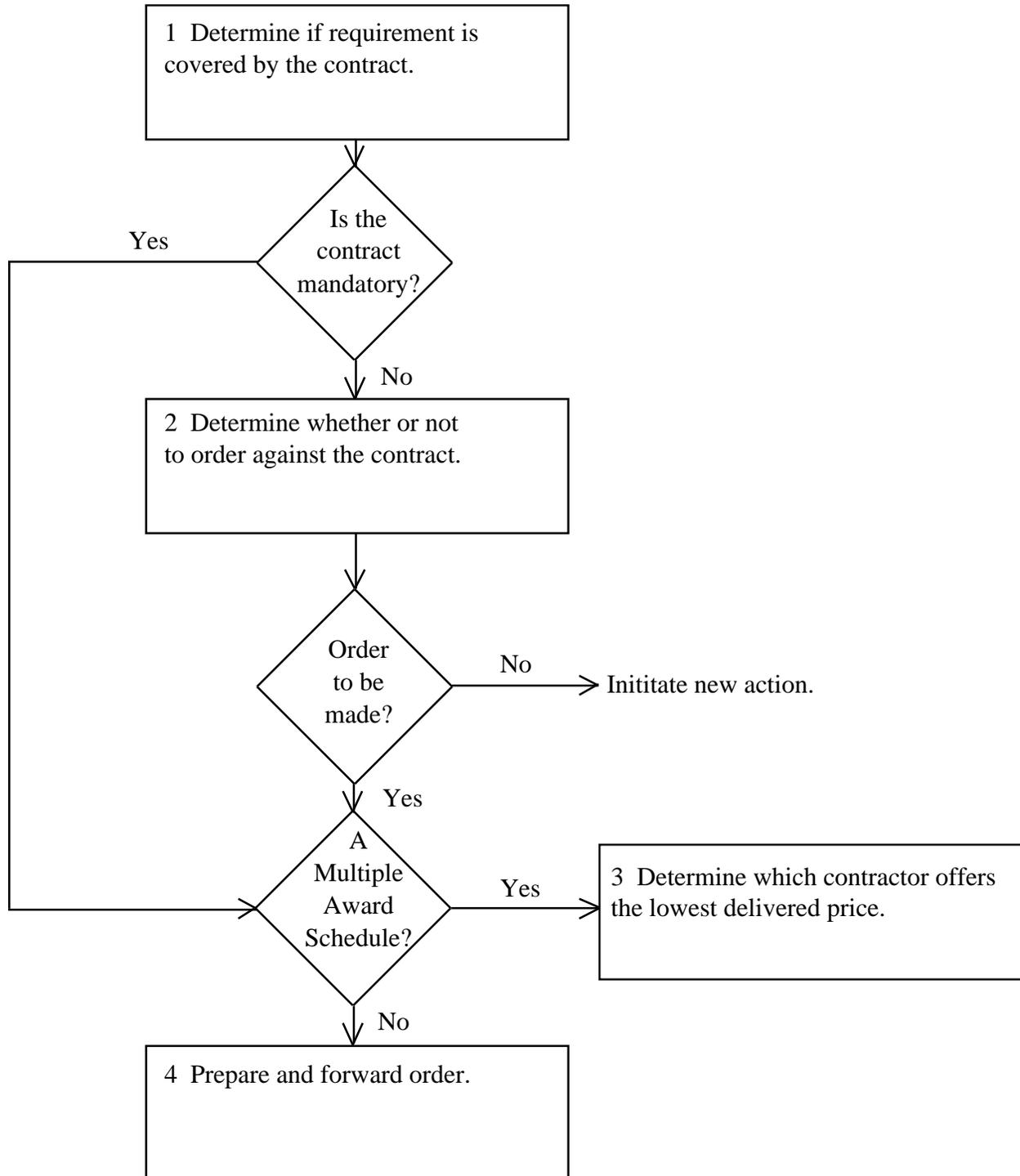
The Government encourages the placement of orders under existing contracts or agreements to save administrative time in obtaining a needed product or service. However, you have the responsibility for promoting full and open competition and avoiding unauthorized short-cuts. This chapter will help you understand those responsibilities.

**Steps in Performance**

The steps in correctly placing orders under existing contracts or agreements are charted on the next page. Following the flowchart, each step is discussed in turn.

# STEPS IN ORDERING AGAINST CONTRACTS / AGREEMENTS

## 1. Orders Against Federal Supply Schedules and Other Indefinite Delivery Contracts



## STEPS IN ORDERING AGAINST CONTRACTS OR BASIC ORDERING AGREEMENTS

### 3.1. Placing Orders Against Contracts

#### Definite Quantity, Definite Delivery Contracts

The contract itself states all of the basic terms and conditions covering applicable to the requirement, but may not specify all the administrative details, such as delivery and billing information. This is especially true when this information is voluminous. A delivery order issued against a definite quantity, definite delivery contract can be used to provide this information. Delivery and billing information includes such items as:

- Accounting classifications and other budgeting/payment codes
- Delivery or performance addresses beyond city and state
- Contact points
- Shipping information

The contractor must have this information before the requirement can be shipped or service performed. The delivery order must reference the contract, provide administrative data not included in the contract and not change any of its terms and conditions.

#### Indefinite Delivery Contracts

Indefinite-delivery contracts, however, are awarded when the general need for supplies or services does exist but exact times, quantities, users, or locations of future deliveries are not known. Indefinite-delivery contracts include:

FAR 16.502

- **Definite quantity contracts** when exact quantities are known at time of award, but delivery locations or performance sites are unknown;

FAR 16.504

- **Indefinite quantity contracts** when a recurring need is identified but exact quantities cannot be identified. However, a minimum quantity is guaranteed to the contractor even if no requirements become available. The contractor also is guaranteed all actual requirements up to a maximum quantity will be order under its contract.

FAR 16.503

- **Requirements contracts** when only a total estimated quantity can be provided. While no specific quantity can be guaranteed for the life of the contract, all actual requirements (without limitation) will be ordered from the contractor.

Federal Supply Schedules are an example of indefinite-delivery contracts since neither the quantities nor the delivery terms are known at the time the contracts are awarded. Federal Supply Schedules are available for use Government wide. Many agencies have established agency specific contracts covering the issuing of task or work orders for temporary help services. Only that agency can use the contract. In fact, the contract may limit use to specific offices within the agency. This is also an example of an indefinite delivery contract.

**3.1.1 Determine if Requirement Is Covered by the Contract**

Before you issue an order, you must determine that the:

1. Contract covers the types of product/service you need
2. Terms and conditions are acceptable
3. Authorized to use the contract

Indefinite-delivery contracts are established to meet your agency's recurring requirements. Your use of these contracts depends not only on the general category of supply or service covered under the terms and conditions of the contract, but also on whether the specific products or services offered meet your minimum or actual needs.

For instance, you may have a requirement for a wooden desk. After researching the market, you discover, yes, there is a Federal Supply Schedule for desks; however, the only type of desks offered under the terms of the contract is metal desks. Therefore, the contract does not meet your needs.

The basic steps you take to determine if your requirement is covered by the contract are:

1. Obtain the contract (or ordering information is published separately).
2. Determine general applicability.
3. Determine if the contract product or service meets your needs.

## Step 1

**Obtain the contract or schedule ordering information.** Each indefinite-delivery contract has its own ordering requirements. Therefore, it is essential that you obtain a copy of the contract or schedule before placing any order.

## Step 2

**Determine general applicability.** Once you have the actual contract or schedule, you must make sure that the requirement you are ordering is covered by its terms and complies with its conditions. This means that your requirement is “within the scope of the contract.” You may not use a delivery order to make any changes to the contract. Carefully review the contract to determine if:

- Your agency is authorized to use the contract;
- The terms and conditions of the contract are acceptable as written.

First, determine if you are authorized to use the contract or schedule. Indefinite-delivery contracts will specify which agencies (and even offices within an agency) must use the contract (mandatory user) and which may use it (optional user) for filling their requirements.

Mandatory users have agreed to place all of their orders with the indefinite-delivery contractor. Optional users are free to consider its use, placing an order if they think it is in their best interest. You may not be able to use it at all if it does not identify you as an authorized mandatory or optional user. Verify your agency’s status with the contracting office letting the contract if you are uncertain.

FAR 14.201-2
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Restrictive language might appear anywhere in the contract. Pay particular attention to Section F, Deliveries or Performance, Section G, Contract Administration Data, and Section H, Special Contract Requirements.

Federal Supply Schedules have a section in their catalogs devoted to ordering. Concentrate your review for restrictive and potentially unacceptable terms and conditions in that section, but scan other sections as well.

To make sure you have examined restrictive contract terms and conditions generally found within the language of most indefinite-delivery contracts, use the checklist shown in Exhibit 3-1.

## Does My Requirement Meet the Ordering Criteria of This Contract?

Check “N/A,” “Yes,” or “No” in the boxes on the following checklist. A “No” answer indicates that you cannot place an order. If all your checkmarks are in the “N/A” and “Yes” column, you then must determine whether products and services meet the requirements of your purchase request before placing an order.

	N/A	Yes	No
1. The contract or Government source ordering information will state which organizations are authorized to place orders under its terms—Are you authorized to place an order?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2. The contract or Government source ordering information should specify a time frame during which authorized persons may place an order—Will you be placing an order during that time frame?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3. Some contracts are limited to one or more geographic areas. When an FSS provides a geographic coverage list, it is the receiving point and not the location of your ordering office, that determines whether you are within the covered area—Will your order fall within designated geographic zones?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4. If the contract specifies a dollar limit or quantity limit for each order, is your requirement within that limit?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5. If the contract specifies an amount or quantity as a maximum for cumulative orders, will the addition of your requirement keep the contract total below that cumulative ceiling amount or quantity?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Note that you may not have enough pricing information to answer this question, but may identify the potential for a “No” answer now. Depending on finalization of pricing data, a lack of sufficient funds may also prevent you from placing an order.

6. Carefully read the contract or ordering instructions. If there are additional restrictions, are you exempt from them?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
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*Exhibit 3-1*

## CHECKING FOR RESTRICTIVE TERMS

*Eric gave Joanne a copy of the checklist entitled, “Does My Requirement Meet the Ordering Criteria of this Contract?” She ran into trouble on the second item. The time for placing orders under the contract had expired. Everything else seemed okay. After talking to the GSA contracting office, Joanne learned that a new contract with the same general conditions had just been signed. GSA was sending her a copy of the new contract. She would have it in plenty of time to cover the maintenance and custodial services requirement at the laboratory.*

### Step 3

#### **Determine whether a contract product or service meets the need.**

You have already determined under Step 2 that there are no clauses or restrictions in the contract to prevent you from placing an order. Now you must determine that the product or service covered by the contract will meet your agency’s requirement.

For example, if your requisitioner needs an oak shelving unit to match existing office furniture, you need not purchase a metal one merely because it is the only unit on a mandatory Federal Supply Schedule that otherwise meets the size requirements of the end user. In this case, the oak shelving unit with the required size requirements is outside the scope of the contract.

Once you determine that the requirement is within the scope of the contract (use is authorized, terms are acceptable, and the product meets your needs), proceed with issuing the delivery order except when:

- Your agency is identified as an optional user, or
- The contract is a multiple-award schedule.

### **3.1..2 When Use Is Optional, Decide Whether to Order**

There are additional tasks you must perform as an optional user before placing any order. Optional users must verify through market research that the requirement cannot be better satisfied through an open market purchase. The degree of effort you put into market research verification depends on:

- Criticality of the item, and
- Dollar value of the order.

Deciding whether an item is critical is a judgment call. Obviously, you would research the characteristics of a particular brand of heart monitor for a military base hospital more thoroughly than you would the operating characteristics of a lawn mower.

Compare any quotations with the price established under the indefinite-delivery contract. Some indefinite-delivery contract prices may not be current or even published. Verify pricing information with the contractor for the indefinite-delivery contract, if appropriate. Use the indefinite-delivery contract only if it offers the lowest price.

The dollar value of the order is a consideration only when the indefinite-delivery contract establishes a minimum or maximum dollar value per order. If there are no limitations or your requirement falls within the stated limits, you can proceed.

**3.1.3 Determine Which Multiple Award FSS Contractor Offers the Lowest Delivered Price**

FAR 8.405-1

Indefinite quantity contracts generally establish one contractor to use when placing your orders unless you are ordering against a Multiple Award Schedule (MAS) contract. Contracts are awarded to vendors supplying the same generic types of items at various prices. Since multiple-award schedules can provide a large number of suppliers from which to choose, there are additional steps you need to take before placing an order. The steps you must take are:

Step 1—Obtain brochures and price lists.

Step 2—Identify products or services that meet your needs.

Step 3—Evaluate prices and other factors.

Step 4—Document your selection.

Step 1

**Obtain brochures and price lists for contractors on the schedule.** Multiple-award schedules refer you to the contractor's own price lists or catalogs. Ordering offices maintain current catalogs of those contractors with whom they do business on a regular basis and file them in a central location.

You must consider all suppliers where data is reasonably available at your office. Where no data is available or the office file is incomplete for a particular requirement, a minimum of three suppliers needs to be considered. If you do not have time to obtain the suppliers' publications by mail, you can generally get the necessary information by calling the contractor. When calling, be careful to adequately describe your needs.

When requesting contractors to submit their catalogs, be sure to ask for their:

- Brochure/catalog,
- Price list, and
- Government discount schedule.

You may need all three documents for making your selection. Price lists alone may not adequately define the product or establish the Government price.

## Step 2

**Identify products or services that meet your agency's needs.** Multiple-award schedules are designed to use industry distribution facilities or provide selectivity among comparable supplies and services when there are no prescribed Federal specifications or standards. While the evaluation emphasis for the type of items and services generally available under FSS schedules is price, there are other factors to consider that may have a significant impact on satisfying your customer's need. Some of these will directly affect price:

- **Delivery Time.** Be sure that your customer's delivery time is a real need and not just a date arbitrarily placed on the purchase request. Then, if the lowest priced contractor cannot deliver supplies or perform services when your customer really needs them, eliminate it from consideration.

Remember, though, that some of these contractors may be able to offer a better delivery time when you are about to place your order. The delivery time they offered at the time of award was probably based on the worst case scheduling situation they could envision. So call and inquire about expedited delivery before you eliminate a contractor from competition.

- **Specific or Unusual Circumstances.** Examples of situations included within this category are when the item's performance characteristics do not meet the needs of your customer—for example, when a copier does not produce the required number of copies per minute, or when the size of an item will not fit within the physical space that your customer has available.
- **Compatibility with Existing Systems or Equipment.** A box of typewriter ribbons, for example, will be useless unless it will work with your customer's typewriter.

## ORDERS AGAINST CONTRACTS/AGREEMENTS

- Need for Special Features. For example, if your customer will be using a typewriter you are ordering for typing Top Secret information, a special feature requirement might be that the typewriter include specific security features.

Consideration of these factors will clarify which of the offered products or services conform to your customer's needs. Since the vendors provide similar items, comparison of one product with another may not be feasible. Explain in the order file why you have eliminated any product from consideration.

### Step 3

**Evaluate prices and make a selection.** You have already eliminated products and services that do not meet your customer's need and have obtained prices and other pertinent information on those products that do. Use a matrix or a similar type analysis to effectively demonstrate the appropriateness of your selection, price and other factors considered. In this step, you will be considering price and price-related factors, such as:

### Equal Bids

When two or more contractors offer products or services at the same price, follow the same procedures for equal low bids. Investigate socio-economic preferences that might apply, but then draw lots if none are applicable as award factors.

### Optional (Non-Mandatory ) Users

Optional user should consider open market prices before ordering from a schedule contractor. Comparisons with products not available under schedule might result in locating a better product for a better price. As an optional user you are not required to order from the schedule contractor. You should document the results of your market research and should indicate which is in the best interest of the Government.

### Step 4

**Document your selection.** When making a selection under a MAS, you are required to justify any selection exceeding \$2500 (or less depending upon agency specific regulations) that is not the lowest price. Agency regulations detail how a selection is justified and who approves the justification. Documentation includes determinations on price reasonableness. Your file must show what was bought, why it was bought, how much competition was obtained. Documentation provides information for:

### Reasons for Documentation

- Ensuring that informed decisions are made at each step in the procurement process;

- Leaving a paper trail for reviews and investigations conducted by the agency Inspector General, the General Accounting Office, and others; and
- Providing essential facts in case of litigation or Congressional inquiry.

### 3-A.4 Prepare and Forward Order

#### Step 1

**Comply with any unique ordering instructions.** As with any other contract, your prime information source for unique ordering instructions is the contract (or schedule) itself.

#### Step 2

**Prepare your delivery order.** With your documentation complete, you are ready to fill out your order. Use the following block-by-block instructions for the Optional Form (OF) 347, Order for Supplies or Services. This is a Government-wide form provided in FAR Part 53, but your agency may use an agency-unique form. If this is the case, the blocks, although numbered differently, will ask for essentially the same information. OF Form 347 and specific instructions for completing it are shown in Exhibit 3-2.

#### Step 3

**Distribute your delivery order.** Make sure that whoever does the distribution has instructions for including any needed attachments to the order. The lack of attachments is one of the most common causes for contractor delays in properly completing orders.

The contractor should always receive the original copy of the order since it has the contracting officer's original signature on it and it is the most readable copy. Besides the copy retained by your office, other copies must be sent to the:

- Appropriate accounting and finance office.
- Requisitioner of the supplies or services contained on the order. If the order combines several requisitions, send each requisitioner a copy. Providing copies to individual users included in a single requisition is generally the responsibility of the requisitioner unless a particular user has inspection duties in regard to the order.
- Person or persons who will inspect and/or receive the items or services. Note that in the case of supply and equipment items, there may be more than one person involved. Send each a copy.

<b>Ordering Instructions for Indefinite Delivery Contracts</b>							
<b>ORDER FOR SUPPLIES OR SERVICES</b>					PAGE	OF	PAGES
<b>IMPORTANT:</b> Mark all packages and papers with contract and/or order numbers.					<b>1</b>	<b>2</b>	
1. DATE OF ORDER <b>October 15, 1990</b>	2. CONTRACT NO. ( If any) <b>OOSC XXX-XX</b>	3. ORDER NO. <b>N1234-721</b>	4. REQUISITION/REFERENCE NO. <b>777XA</b>				
5. ISSUING OFFICE ( Address correspondence to) <b>Jill Jackson, Buyer, Ofc symbol: XYZ</b> <b>Your Agency</b> <b>5678 Main St - Rm 123</b> <b>Your Town, LL XXXXX-XXXX</b>			6. SHIP TO: ( Consignee and address, ZIP code) <b>Sue Jones, Ofc symbol: ABC</b> <b>Your Agency</b> <b>5678 Main Street - Rm 456</b> <b>Your Town, LL XXXXX-XXXX</b> SHIP VIA: Routine transport				
7. TO: CONTRACTOR ( Name, address and ZIP Code)  <b>Attn: John Smith</b> <b>Best Products, Inc.</b> <b>75 Industrial Lane</b> <b>Boom Town, TX XXXXX-XXXX</b>			8. TYPE OF ORDER <input type="checkbox"/> A. PURCHASE -Reference your _____  Please furnish the following on the terms and conditions specified on both side of this order and on the attached sheets, if any, including delivery as indicated. This purchase is under authority of:  <input type="checkbox"/> B. DELIVERY - Except for billing instructions, this delivery order is subject to instructions contained on this side only of this form and is issued subject to the terms and conditions of the above-numbered contract.				
9. ACCOUNTING AND APPROPRIATION DATA <b>Accounting Code</b> <b>SIN XX17 &amp; 29 XXA-777-XX0 = \$440</b> <b>SIN XX40        XXXB-777-XX0 = \$50</b>			10. REQUISITIONING OFFICE <b>Ofc. symbol: ABC, Rm 456, your agency</b>				
12. F.O.B. POINT <b>Destination</b>			14. GOVERNMENT B/L NO.  <b>N/A</b>		15. DELIVER TO F.O.B. POINT ON OR BEFORE (Date)  <b>Jan. 7, 1991</b>		16. DISCOUNT TERMS  <b>2%/10</b>
13. PLACE OF INSPECTION AND ACCEPTANCE <b>Rm 456, Your agency</b>			11. BUSINESS CLASSIFICATION ( Check appropriate box(es))  <input type="checkbox"/> SMALL <input type="checkbox"/> SMALL <input type="checkbox"/> TAGED <input type="checkbox"/> OWNED  <input type="checkbox"/> OTHER THAN SMALL <input type="checkbox"/> DIS-ADVAN- <input type="checkbox"/> WOMEN				
<b>17. SCHEDULE ( see reverse for rejections)</b>							
ITEM NO. (A)	SUPPLIES OR SERVICES (B)	QUANTITY ORDERED (C)	UNIT (D)	UNIT PRICE (E)	AMOUNT (F)	QUANTITY ACCEPTED (G)	
SIN XX17	Super Duper Fluid for copier Each can contains 5 gallons of fluid	4	CN	\$10	\$50		
SIN XX29	Paper, Cover Stock, White 8-1/2 X 11	30	CT	\$13	\$390		
SEE BILLING INSTRUCTIONS ON REVERSE	18., SHIPPING POINT	19. GROSS SHIPPING WEIGHT		20. INVOICE NO.		17(H).TOT. (Cont. pages)	
	21. MAIL INVOICE TO: ( Include ZIP				\$50		
22. UNITED STATES OF AMERICA BY (Signature) <b>JANE JUSTICE</b>				23. NAME ( Typed) <b>JANE JUSTICE</b> Title: Contracting/Ordering Officer		17(I). GRAND TOTAL	
NSN 7540-01-152-8083		50347-101		OPTIONAL FORM 347 (10-83) Prescribed by GSA FAR (48 CFR) 53.213(e)			

*Exhibit 3-2 (continued on next page)*

## Ordering Instructions for Indefinite Delivery Contracts (continued)

Look at the sample OF 347 in this exhibit as you read the instructions for each block. A sample OF Form 348 is also provided.

- |   |   |
|---|---|
| BLOCK 1   | Insert the date the order is typed.   |
| BLOCK 2   | Provide the contract number of the indefinite delivery contract.  |
| BLOCK 3   | Obtain a sequential delivery order number. Your agency may provide this number through an automated system or you may obtain it from a handwritten log.   |
| BLOCK 4   | The person or automated system originating the purchase request should have provided a requisition number. Insert that number in this block.  |
| BLOCK 5   | Provide the name, office symbol, and address of your office. Do not indicate the office that issued the contract.   |
| BLOCK 6   | Provide the delivery address. If you have multiple deliveries, say “see block 17 (B),” where you may have room to list them. You also can continue block 17 (B) on the Optional Form (OF) 348, Order for Supplies or Services Schedule–Continuation. See the sample OF Form 348 on the next page. If you specify a shipping method other than the method specified in the contract, make sure that you have verified any excess costs for expedited shipment and included that amount both as a separate line item in block 17 (B) and as part of the total amount of your order in block 17 (H). |
| <div style="border: 1px solid black; padding: 2px; display: inline-block;">FAR 4.602(d)</div> |   |
| BLOCK 7   | Include the Contractor Establishment Code (CEC) in this block, if known. You will find this information in the specific schedule. The Federal Procurement Data Center uses these codes to track costs and contractual actions, by contractor, on a Government-wide basis, in order to provide valuable information for both industry and Government managers.   |
| BLOCK 8   | Since you are placing an order against an existing contract, you would check the “B” box in this form.  |

*Exhibit 3-2 (continued on next page)*

**Ordering Instructions for Indefinite Delivery Contracts (continued)**

<b>ORDER FOR SUPPLIES OR SERVICES SCHEDULE - CONTINUATION</b>	Page 2 of 2
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**IMPORTANT:** Mark all packages and papers with contract and/or order numbers.

DATE OF ORDER October 15, 1990	CONTRACT NO. OOSC XXX-SS	ORDER NO. N1234-721
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ITEM NO.	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
SIN XX40	Replacement Widget - Best Brands part no. 789 for Best Products copier, Model XYZ, Serial Number Z12345. Property Control #008911	2	e a	\$25	\$50
<b>TOTAL CARRIED FORWARD TO 1ST PAGE (ITEM 17)</b>					<b><del>\$50</del></b>

NSN 7540-01-152-8082	50348-101	Optional Form 348 (10-83) Prescribed by GSA FAR (48 CFR) 53.213(e)
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*Exhibit 3-2 (continued)*

## Ordering Instructions for Indefinite Delivery Contracts (continued)

**BLOCK 9**                      When there is more than one accounting and appropriation data code, you must specify which line items on the order applies to each code. If the contract itself is not funded, do you have enough money available to fully fund the order? If the contract itself is funded, are there sufficient funds remaining on the contract to cover the requirements of the order you will be placing?—The total of previous delivery orders will provide the answer to this question. Contact the contract administrator or contracting officer for the contract if you do not have the full delivery order file available.

**BLOCK 10**                     Fill in the office symbol and location of the office that originated your purchase request.

**BLOCK 11**                     Look for the business classification of the contractor in the contract document. Failure to supply this code may result in an understatement of percentage-of-total-award goals your office may be striving to meet in regard to specific business classifications.

### FAR Subpart 46.5

**BLOCK 12**                     Enter the word “Destination,” if the price shown on the indefinite delivery contract includes delivery to the address shown in block 6 and if the Government assumes title to the items delivered upon delivery. FSS, indefinite delivery contracts should all show “Destination” as the shipping point. If the Government assumes title when the common carrier accepts the shipment, provide the city and state where the common carrier accepts the shipment. F.O.B. literally means “free on board.”

**BLOCK 13**                     Inspection may occur at one place and acceptance at another location. When this is the case, specify these separate locations in this block or, if the space is insufficient, in block 17 (B) or in block (B) of Optional Form 348.

*Exhibit 3-2 (continued on next page)*

**Ordering Instructions for Indefinite Delivery Contracts (continued)****FAR 47.104**

**BLOCK 14** The acronym B/L means “bill of lading.” A Government bill of lading is a written document issued by a common carrier acknowledging the receipt of the goods named on the document and setting forth the terms of the contract covering transportation. Unless the Government has responsibility for shipment, this block should read “N/A.”

**BLOCK 15** Provide a delivery date that complies with the contract terms and conditions. If the contract allows variability in delivery, enter the date within that period that you and the contractor have agreed will apply to this order.

**FAR Subpart 32.9**

**BLOCK 16** Insert any prompt payment discounts that a contractor has offered. For example, an annotation of “1%/20” means that your accounting and finance office can deduct one percent of the total order amount if it pays the vendor within 20 days of the Government’s receipt of a correctly submitted invoice or within 20 days of the Government’s acceptance of the items, whichever occurs last.

**BLOCK 17 (A)** You must show each item/stock number or service as a separate line-item in this block if there is a deliverable item or a dollar amount to be calculated. If there is a sub-item under a line-item number whose price is reflected in the total price of the line item, do not show the sub-item as a separate line item. If the basic contract does not include delivery in the price of the item, include any estimated delivery charges as a separate line item amount on the order. You may only use a sequential line item numbering system, if the basic contract does not have its own numbering system. Your delivery order is not a stand-alone document. Line items must correspond to line item numbers in the basic contract. For Government supply sources for which you do not have the basic contract, cite the catalog number or item number referenced in ordering brochures. For example, FSS catalogs provide Special Item Numbers (SINs) that you must cite in this block.

*Exhibit 3-2 (continued)*

## Ordering Instructions for Indefinite Delivery Contracts (continued)

**BLOCK 17 (B)** Copy descriptive information from the indefinite delivery contract. Include any additional information that the contractor will need to make delivery or perform the services. Include agency invoicing procedures. Note that these procedures may be in addition to, but may not conflict with, any invoicing procedures stated in the basic contract. Use OF Form 348 as necessary. If the items you are ordering are repair or component parts or accessories for presently-owned Government equipment, note this information on all copies of the order and include the serial number, the brand, the model number, and your agency's property control number for each piece of listed equipment. This equipment information should be on your purchase request. Contact the requisitioner if it is not.

Be sure to identify terms used in block 17 (C). For example, identify "rolls" by providing the number of feet in a roll.

For a requirement that includes on-site work or delivery, specify the hours and days of the week, or specific dates, that the site is available to the contractor for service work or for delivery to the receiving activity. Discuss overly-restrictive site availability dates with the contractor before issuing the order.

Include in this block any special packaging or marking requirements.

**BLOCK 17 (C)** If the quantity is not fixed, for example, if the order is being issued for an uncertain number of hours of work, the quantity should be clearly identified as "ESTIMATED." Agency procedures vary in how to best express allowed variations in required quantities. For instance, it is standard to allow a variance in printing production runs and other special design production run items. Some advocate the use of the term "Estimated" in this column—with corresponding "Not-To-Exceed" amounts shown in blocks 17 (F) and (H), while others direct that the acceptable quantity range be clearly stated in descriptive language in block 17 (B). Observe caution when changing a standard procedure. It is essential that receiving, contracting, and paying offices all adhere to the same system and have the same understanding.

*Exhibit 3-2 (continued on next page)*

**Ordering Instructions for Indefinite Delivery Contracts (continued)**

- BLOCK 17 (D)** This column should reflect the unit of issue as it appears in the basic contract. For instance, if the contract specifies a unit of issue as a 5-gallon can and you need a total of 20 gallons, you must specify “cans,” not “gallons” in this block, with a corresponding quantity of “4” in block 17 (C), rather than “20.”
- BLOCK 17 (E)** This column shows the price for one unit. In the preceding example for block 17 (D) that illustrated four 5-gallon cans, if a 5-gallon can costs \$10, the unit cost reads \$10, not \$2 per gallon.
- BLOCK 17 (F)** This dollar amount must clearly reflect the total of the line item quantity multiplied by the unit price. If the quantity specified in Block 17 (C) is labeled “ESTIMATED,” the amount in this block should also be labeled “ESTIMATED.”
- BLOCK 17 (G)** This column is left blank when providing ordering information. It will be used later by receiving or inspection personnel within your agency to annotate the status of delivered items.
- BLOCK 17 (H)** This number must clearly reflect the sum of all amounts shown in block 17 (F). If any amount in block 17 (F) is labeled “ESTIMATED,” this block should also be labeled “ESTIMATED.” If you do not clearly label an estimated total, you run the risk of your accounting and finance office refusing payment for any variance from the amount in this block. Late payment for correctly invoiced items not only results in poor business relationships (some companies refuse to do any business with the Government because of a few bad experiences they have had), but may cost your agency money in interest due the contractor under the provisions of the Prompt Payment Act.
- BLOCK 17 (I)** This block should reflect the sum of the amount shown in block 17 (H) and the amount or amounts shown on one or more pages of OF 348 in the “Total Carried Forward” block at the bottom of the form. If no continuation sheets were necessary for the placement of your order, this block should read the same as block 17 (H).

*Exhibit 3-2 (continued)*

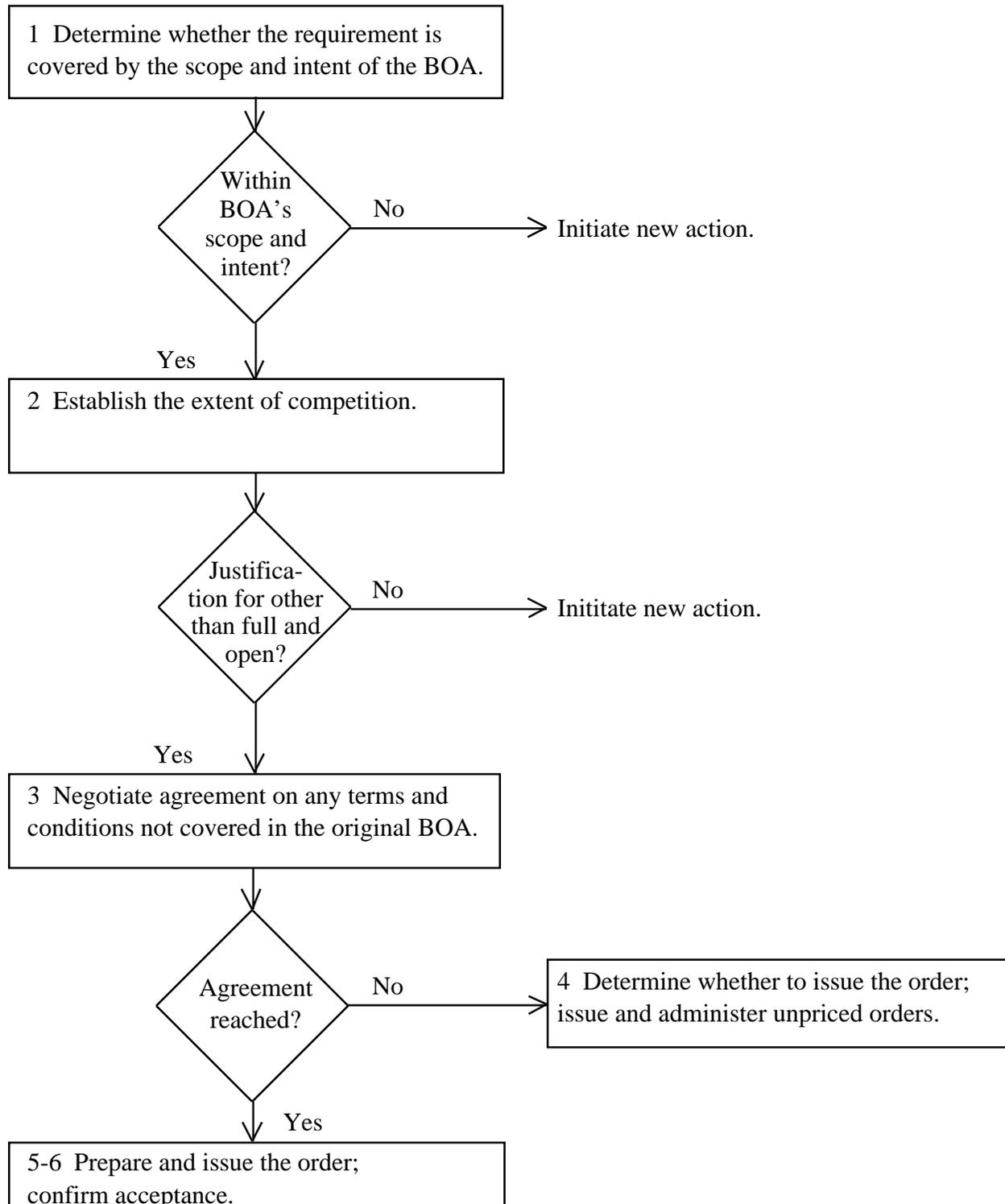
**Ordering Instructions for Indefinite Delivery Contracts (continued)**

- BLOCKS 18-21** Leave these blocks blank when filling out the order form. They may be optionally used by the contractor for invoicing purposes as detailed in the instructions on the back of the form.
- BLOCK 22** Only Government contracting officers are authorized to sign this block and only to the extent that they are authorized to do so, considering any restrictions placed on each contracting officer's Certificate of Appointment.
- BLOCK 23** The typed, stamped, or hand-printed name of the contracting officer who signed block 22 should appear in this block. Most agencies prefer to fill in this block after signature so they will not have to redo the block or delay forwarding the order because the person whose name was typed in, is not available.

*Exhibit 3-2 (continued)*

# STEPS IN ORDERING AGAINST CONTRACTS / AGREEMENTS

## 2. Basic Ordering Agreements



## 2.. Basic Ordering Agreements

A Basic Ordering Agreement (BOA) is a means of establishing, in advance of a requirement, many of the terms and conditions that will apply if and when an order is issued under it.

### 3.2.1 Determine If the Requirement Is Within the BOA's Scope

You can use Exhibit 3-1 as a job aid for determining if it would be appropriate to place an order under a BOA as well as an indefinite-delivery contract, but you must keep two important differences in mind when ordering against BOAs versus ordering against indefinite-delivery contracts:

- You must take particular care in examining whether your order is within the scope and intent of the BOA (item #3 on the checklist at Exhibit 3-1). BOAs usually have a much broader scope than indefinite-delivery contracts. Among the most common agency Inspector General and other auditing organizations' criticism of BOAs is either that their scope is written too broadly or that their scope is interpreted too broadly.
- The Government alone cannot decide to use an order under a BOA to fulfill a requirement. A BOA, by definition, is not a contract. It is an **agreement** and is only binding if **both** parties agree that they wish to conduct business under its terms. Each BOA will specify procedures for making an order binding on both parties.

FAR 16.703(c)(1)(iv)

Use a BOA as a tool to expedite getting your requirement under contract. You save administrative time in writing up and coming to agreement on the terms and conditions already specified in the BOA. Therefore, BOAs are most effective for expediting contracting for uncertain requirements for supplies or services when specific items and quantities are unknown when the agreement is executed. A typical use for a BOA is ordering spare parts for a new system with no history of typical items and quantities needed for routine system repair and maintenance.

### 3.2.2 Establish the Extent of Competition

The extent of competition will depend on the dollar value and urgency of the purchase.

Do not use BOAs to avoid normal levels of competition. If you fail to use normal competitive practices, you are providing an unfair advantage to contractors that have BOAs containing terms and conditions that apply to your proposed purchase. Therefore, you must either follow competitive procedures or document bona fide exceptions to the need to follow them, by following one of the four steps detailed below.

Step 1

FAR 13.106

**Observe competition requirements for purchases under \$10,000, and place the BOA order.** For a purchase of \$2,500 and below (10% of the small purchase limitation), there are no competition requirements. However, such purchases shall be distributed equitably among qualified suppliers. If practical, a quotation shall be solicited from other than the previous supplier before placing a repeat order. For purchases between \$2,501 and \$10,000 you need only obtain “reasonable competition,” as determined by your contracting officer, based on the circumstances of each case. The FAR standard for reasonable competition is three quotations. If you cannot obtain reasonable competition for BOA orders under \$10,000, you must follow the procedures in one of the other three steps that follow.

Step 2

FAR 6.303-2

**When urgency justifies restricting competition, document the circumstances and place the BOA order.** For small purchases (under \$25,000), an urgency justification should:

- Describe the urgency;
- Explain how placing a BOA order will meet the schedule while obtaining competition by adhering to open market procedures would not;
- Discuss the loss that would be sustained if the delivery schedule were modified to adhere to open market procedures.

FAR 6.304

An urgency justification for large purchases should contain the same rationale, but the documentation itself is expanded and more detailed. The justification itself, called a justification for other than full and open competition, must be approved at higher organizational levels that vary with the dollar value and, in some cases, the class of procurement.

Step 3

**When competitive sources are restricted, document the circumstances and place the BOA order.** Clearly explain why other sources cannot adequately meet the need. For instance, if a unique capability is required, the justification should include a description of the way in which the BOA contractor, and other restricted competitors, if applicable, uniquely qualify. The justification may cite:

- Facilities or specialized equipment;
- Patents, copyrights;
- Nonavailability of technical data and other information, including drawings and specifications.

FAR 6.302

Other than providing adequate rationale, the small-purchase justification has no specific content requirements. However, large purchase justifications for other than full and open competition must follow the same content and approval requirements as those for urgency justifications for other than full and open competition. Circumstances that may permit using other than full and open competition are listed in FAR 6.302.

Step 4

FAR 5.203

FAR 5.204

FAR 15.404

FAR 16.703(d)(1)

**Otherwise, pursue competition.** If you cannot justify restricting competition as detailed in the previous steps, you must obtain competition using open market procedures. Seek publicity to locate additional sources and use competitive procedures when you locate them.

You must publicize your intent to place an order against a BOA for any order over \$10,000 unless you were able to justify restricting competition. If you receive responses after publicizing the requirement:

- Place the order with the BOA contractor if you can document why the additional sources cannot meet your needs;
- Establish a BOA with any source that can effectively compete; OR
- Discontinue order placement procedures under a BOA and issue a solicitation if placing the BOA order would prejudice a known competitor.

### PRICING THE SPARES

*Joanne documented the urgent circumstances of the pump repair requirement in a justification for other than full and open competition and her Director approved it. She did not synopsise her intent to issue a BOA order for the pump repair because of the time it would take to get feedback from that publicity process. However, she did obtain some pricing information from regular dealers of the manufacturer of the pump as one means of documenting the reasonableness of the BOA prices. Since these prices were higher than the manufacturer's prices for the spare parts, she was able to justify placing an order for the spare parts needed to repair the pump.*

### 3.2.3 Negotiate an Agreement for Your Specific Requirement

BOAs contain only generalized terms and conditions. You will need to reach a specific agreement on the order you wish to place. Sometimes BOAs contain pricing. For services, pricing will probably specify rates for labor categories most often used in performing the general classification of service covered by the BOA. When placing an order, negotiate the number of hours it will take for a specific number of persons in those specified labor categories to perform the service. When the BOA contains no pricing, or when it contains only fixed rates as the means to reach a final pricing agreement, you reach agreement by:

- Obtaining the contractor's price proposal for your specific requirement;
- Analyzing market conditions and pricing data to develop and support the Government's prenegotiation position on price;
- Conducting negotiations and obtaining agreement on total price.

You may also need to negotiate terms and conditions that are not related to price. Examples of such terms are:

FAR 7.202

FAR 12.102

FAR 13.302(a)

- Economic order quantities;
- Time and place of delivery;
- Fast pay procedures if the order is a small purchase or has been approved for this specific order.

### 3.2.4 If You Fail to Reach a Timely Price Agreement, Consider Issuing an Unpriced Order

#### Step 1

**Assess the appropriateness of an unpriced order.** Unless there is absolutely no alternative, you must not issue an unpriced order if there is substantial risk of incurring an unreasonable price.

An example of a high risk indicator is when you have had past difficulties in reaching price agreements with this particular contractor. An example of a low risk indicator is when the BOA provides adequate procedures for timely pricing of unpriced orders.

Rather than issuing an unpriced order, use competitive pricing procedures for determining price reasonableness among BOA holders and other interested contractors.



## ORDERS AGAINST CONTRACTS/AGREEMENTS

### Step 3

**Issue unilateral settlements to resolve deadlocks.** If no agreement has been reached when performance under the order is complete, issue a unilateral settlement and inform the contractor that it has the right to file a claim under the disputes clause in the basic BOA.

### **3.2.5 Prepare and Issue the Order**

Fill out OF 347 to place a BOA order or use an agency-unique form like the one shown in Exhibit 3-3. Follow the same instructions as described in Step 2 of paragraph 3.A.4 when filling out the form to place an order against an indefinite-delivery contract.

In addition, you must:

FAR 16.703(d)(3)  
(ii) and (iii)

- Incorporate the terms of the BOA by reference in the order;
- Cite any authority you have for restricting competition on the order.

<b>Order for Supplies or Services</b>							
<b>ORDER FOR SUPPLIES OR SERVICES</b>					PAGE	OF	PAGES
IMPORTANT: Mark all packages and papers with contract and/or order numbers.					<b>1</b>		<b>1</b>
1. DATE OF ORDER <b>FEBRUARY 8, 1991</b>	2. CONTRACT NO. ( If any) <b>BOA # ZN574</b>	3. ORDER NO. <b>D0534</b>		4. REQUISITION/REFERENCE NO. <b>ENG #741</b>			
5. ISSUING OFFICE ( Address correspondence to) <b>Jill Jackson, Buyer, Ofc symbol: XYZ Your Agency 5678 Main St - Rm 123 Your Town, LL XXXXX-XXXX</b>			6. SHIP TO: ( Consignee and address, ZIP code) <b>Sue Jones, Ofc symbol: ABC Your Agency 5678 Main Street - Rm 456 Your Twon, LL XXXXX-XXXX SHIP VIA: Routine transport</b>				
7. TO: CONTRACTOR ( Name, address and ZIP Code)  <b>Attn: John Smith Smith Brothers Engineering, Inc. 729 Scientist Row Urban Heights, WX XXXXX-XXXX</b>			<b>CEC: X1274</b>		8. TYPE OF ORDER <input type="checkbox"/> A. PURCHASE -Reference your _____  Please furnish the following on the terms and conditions specified on both side of this order and on the attached sheets, if any, including delivery as indicated. This purchase is under authority of:  <input type="checkbox"/> B. BOA Except for billing instructions, this delivery order is subject to instructions contained on this side only of this form and is issued subject to the terms and conditions of the above-numbered contract.		
9. ACCOUNTING AND APPROPRIATION DATA <b>FX 016893-890-90049</b> Payment will be made by Paying Office, Office Symbol: ACR, Your Agency 5678 Main St., Rm 410 Your Twon, LL XXXXX-XXXX			10. REQUISITIONING OFFICE <b>Ofc. symbol: ABC, Rm 456, your agency</b>				
12. F.O.B. POINT <b>Destination</b>			14. GOVERNMENT B/L NO.  <b>N/A</b>		15. DELIVER TO F.O.B. POINT ON OR BEFORE (Date)  <b>Jan. 7, 1991</b>		
13. PLACE OF INSPECTION AND ACCEPTANCE <b>Rm 456, Your agency</b>			16. DISCOUNT TERMS  <b>2%/10</b>				
<b>17. SCHEDULE ( see reverse for rejections)</b>							
ITEM NO. (A)	SUPPLIES OR SERVICES (B)	QUANTITY ORDERED (C)	UNIT (D)	UNIT PRICE (E)	AMOUNT (F)	QUANTITY ACCEPTED (G)	
Task 04	The terms and conditions of BOA ZN574 are hereby incorporated and made a part of this order. Authority for other than full and open competition is 41 U.S.C. 253(c)(7).  Engineering services to conduct an environmental Study for the Consolidated Federal Office Building IAW the statement of work for Task 04, BOA #ZN574	One	JOB	26,000	26,000		
Task 19	Laboratory test work, as outlined in Task 19, BOA #ZN574	EST. 20			EST 2,400		
SEE BILLING INSTRUCTIONS ON REVERSE	18. SHIPPING POINT	19. GROSS SHIPPING WEIGHT		20. INVOICE NO.		None	
	21. MAIL INVOICE TO: ( Include ZIP		See block 9		<b>\$28,400 EST</b>	17(H).TOT. (Cont. pages)  <b>17(I). GRAND TOTAL</b>	
22. UNITED STATES OF AMERICA BY (Signature)  <b>JANE JUSTICE</b>			23. NAME ( Typed) <b>JANE JUSTICE</b> Title: Contracting/Ordering Officer				
NSN 7540-01-152-8083		50347-101		OPTIONAL FORM 347 (10-83) Prescribed by GSA FAR (48 CFR) 53.213(e)			

Exhibit 3-3

**3.2.6 Confirm  
Acceptance by the  
Contractor**

**Pursue the contractor's acceptance.** If the BOA contains procedures for the contractor's acceptance or rejection of each order, follow those procedures to the letter.

Step 1

If the BOA contains no such procedures, you can seek confirmation of acceptance through the mail by either a notice of acceptance or by obtaining a signature of agreement on the order itself. You could also seek a face-to-face meeting with the BOA contractor to confirm written acceptance. You may want to request oral confirmation of acceptance before issuing the order if you have any indication that the contractor may not want to accept it. However, you must obtain written confirmation of any oral acceptance.

Step 2

**Determine the validity of a contractor's rejection.** If rejection procedures are contained in the BOA, determine if the contractor followed them. If it did not, determine whether this lack of adherence results in acceptance. For instance, if the BOA agreement stated that the contractor could only reject orders if it did so within five days of receipt, and it did so on the twelfth day after receipt, you may have grounds for acceptance under that particular BOA if no other conditions affect that rejection.

Step 3

**Pursue remedies for nonperformance, if appropriate.** If the contractor refuses to fulfill its obligation to perform, seek administrative remedies available to you under the terms of the BOA.

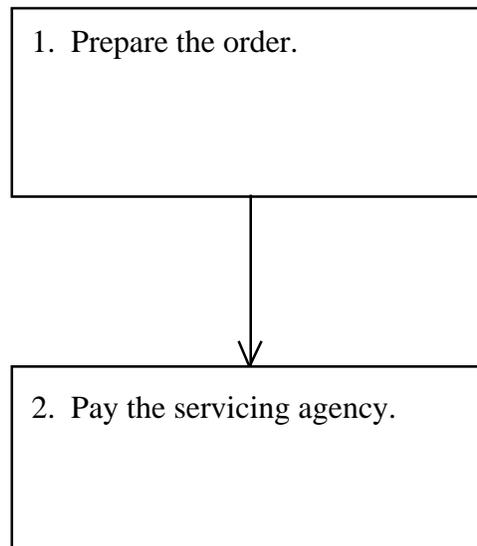
If the contractor claims that its refusal to perform is based on the existence of an excusable delay sanctioned by the terms of the BOA, determine whether the delay occurred and whether it in fact can be considered excusable. If it cannot, continue your pursuit of Government remedies, such as:

- Issuing a cure notice,
- Assessing any liquidated damages that may apply,
- Terminating for default,
- Assessing the BOA contractor any extra cost of reprocurring.

Refer to the chapter in this course on remedies.

# STEPS IN ORDERING AGAINST CONTRACTS / AGREEMENTS

## 3. Steps in Providing Orders to Other Agencies



### 3.3. Orders to Other Agencies

You may issue an order to another Government agency under the terms of an interagency agreement. The servicing agency may provide supplies or services ordered by the requesting agency in-house or through the terms and conditions of a contract or BOA it has established with a supplier.

An example of a service provided in-house might be when Agency A agrees to process Agency B's payroll or when Agency B agrees to perform building maintenance functions for Agency A. Agencies can also combine needs, such as bulk aggregate products, to take advantage of industry discounts on the larger quantity. This also saves administrative time in soliciting, awarding and administering two contracts.

#### 3.3.1 Prepare the Order

Step 1

FAR 17.502

**Fulfill prerequisite requirements.** Obtain a determination from your agency head or a designee that issuing an order under the interagency agreement would be in the Government's best interest.

Step 2

FAR 17.504(b)

**Write the order.** The agreement itself should specify what form or format to use. If it does not, discuss this administrative detail with the servicing agency. Any procedure you can agree on is acceptable as long as the order contains:

- A description of the supplies or services being ordered;
- Delivery requirements;
- A funds citation;
- Payment terms;
- Acquisition authority, if appropriate.

Some agencies use a standard purchase/delivery order form. Others use a letter format. An example of a letter format is shown at Exhibit 3-4.

#### 3.3.2 Pay the Servicing Agency

FAR 17.505

The servicing agency may request advance payment in full or in part. Often, this requirement will be contained in the agreement document itself.

If you must pay in advance, you are entitled to an adjustment on the basis of actual cost later on.

## Sample Letter Format for Interagency Order

TO: Contracting Chief, Agency A

FROM: Contracting Chief, Agency B

SUBJECT: Annual Order for Aggregate, Interagency Agreement #X103

Interagency agreement #X103 between our two agencies outlined the basis for combining annual requirements for supplies and services to realize a more economic order quantity for common needs.

The agreement further stipulated that the agency with the larger quantity requirement would act as the servicing agency.

Therefore, this office requests your service to contract for our annual requirement for industrial aggregate, for estimated quantities, per the description below.

DESCRIPTION:       an estimated 20,000 pounds of pea gravel  
                           an estimated 30,000 pounds of sand

DELIVERY REQUIREMENTS: The Headquarters Engineering Office (ENG/A) will call your contract administrator for individual shipments of not less than 1,000 pounds per shipment. The contractor is to make all deliveries to: Holding Area A, Agency Warehouse XYZ, 749 Main Street, Our Town, MN XXXXX-XXX.

FUNDS CITATION: X0111-90-XA

PAYMENT: Funds will be electronically transmitted from Agency B Paying Office to Agency A Paying Office before the Headquarters Engineering Office (ENG/A) calls your contract administrator for a shipment.

Our need can be satisfied by full and open competition. Therefore, no justifications are required.

SUBMITTED BY:

ACCEPTED BY:

\_\_\_\_\_  
 Jane Justice, Contracting Officer,  
 Agency B

\_\_\_\_\_  
 Sam Jones, Contracting Officer,  
 Agency A

*Exhibit 3-4*

ORDERS AGAINST CONTRACTS/AGREEMENTS

*NOTES*

## CHAPTER 4

# BASIC PROCEDURES FOR SUCCESSFUL PERFORMANCE MONITORING

### THE CHART ROOM

*Joanne was standing in the chart room studying the progress charts on the pallet contract with Angkor Wat Enterprises. Each specialist in the contracting office monitored approximately twenty contracts on a continuing basis. After only two months on the job, Joanne was responsible for monitoring nine contracts. The company had agreed after the postaward orientation meeting that they could supply the material for Government testing of flexibility six weeks after the meeting. The date had come and gone and Joanne had not gotten a call to pick up the material. She called the Angkor Wat project manager and he had told her to save time they had sent the material directly to the testing lab two days before the due date.*

*Joanne was frustrated by the administrative foul-up. The laboratory had gotten the material three days after Angkor Wat's due date, which was about the time that the lab would have gotten it from the Government, but without a Government order number on the shipment, it had taken a while to find.*

*"I should be getting those results back any day now," Joanne thought as she looked at the chart. "Maybe I'll give them a call this morning."*

*According to the schedule, Friday was the date for an on-site Government inspection of the production jigs and templates for the pallet production. Jake Richards had gotten a telephone message on Thursday, the day before the scheduled test, postponing it. The message had said that the material was not yet ready for preproduction testing. Jake had called her immediately. Joanne had placed a call on Friday to Angkor Wat's project manager and was waiting for a return call. It was Monday.*

*Every Monday morning the contract specialists were required to update their charts to show what deliveries had been made the previous week. This updating included progress reports, hardware deliveries, acceptance rates, briefings, meetings, testing failures or delay, and so forth. Joanne was posting the preproduction testing delay to Angkor Wat's chart. In some instances, the specialists might be required to spend a considerable time on the phone getting the latest performance status or verifying that deliveries had or had not been made. Problem areas required brief memos to Eric defining the situation, the cause, and the recommended solution, and providing revised dates. Eric had learned early on that effective and continual monitoring may not prevent problems, but it can help to spotlight potential problems, assist in preventing most contract failures and make his contract administration job easier. By two o'clock each Monday afternoon, Eric had a status report on the Director's desk concerning all ongoing contracts.*

*If Joanne hadn't heard from the Angkor Wat manager by 10:30, she had decided to call the Vice President who had attended the postaward orientation meeting. She was determined to get some information for Eric's afternoon status report.*

## COURSE LEARNING OBJECTIVES

At the end of this course, you will be able to:

**Overall:** Monitor performance under the contract of both the contractor and Government personnel and any actions required by the contracting officer.

**Individual:**

- 4.1 Respond to requests from contractors
- 4.2 Monitor actions of contracting officer representatives (CORs) and other support personnel.
- 4.3 Obtain data on contractor performance from the commencement of work through final inspection and acceptance.
- 4.4 Inform requiring activity and other interested parties of the contract's status.

# INTRODUCTION TO PERFORMANCE MONITORING

## Definition of Performance Monitoring

Performance monitoring involves those contract administration activities that contracting officers and their support personnel use to ensure that supplies and services acquired under Government contract conform to the contract's quality, quantity, and other specific requirements. These procedures include, but are not limited to, inspection and acceptance activities, that is, quality assurance techniques.

When a contract is signed, it is the intent of both parties to perform their respective obligations. However, not all contracts are performed according to specification or other terms and conditions and within the required time. Poor performance or late deliveries may cause costly delays in the program of which the contract is a part. The Government monitors contract performance closely to ensure that desired end items are delivered on time. Monitoring and inspection supports many objectives, including those to:

- Identify potential delinquencies;
- Isolate specific performance problems;
- Support contractor requests;
- Point out the need for government assistance;
- Reveal actual or anticipated default;
- Identify Government-caused delays.

## Government Policy on Performance Monitoring

FAR 46.102

Government-wide policy requires that agencies ensure:

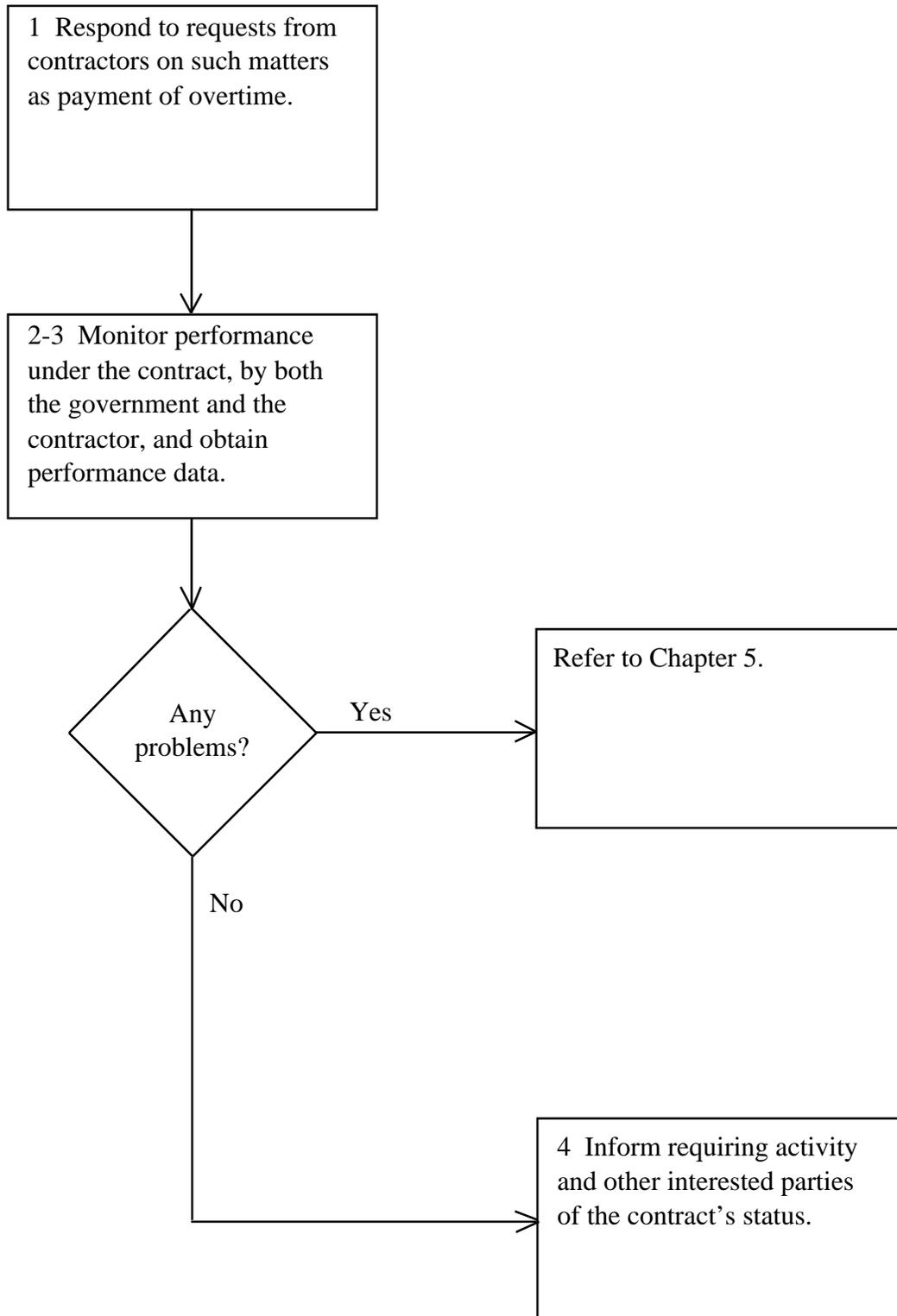
1. Contract supplies or services meet contract requirements.
2. Procedures for assuring that these contract requirements are met are performed before acceptance of items or services under contract.
3. No contract precludes the Government from performing inspection.

This policy further encourages the use of inspection and acceptance services by other agencies when it is more practical or beneficial to the Government.

## Steps in Performance

The steps in executing basic procedures for successful performance monitoring are charted on the next page. Following the flowchart, each step is discussed in turn.

## STEPS IN SUCCESSFUL PERFORMANCE MONITORING



## 4.1 Respond to Requests from Contractors

There are times when the Government will be called upon to review, approve, make decisions, or take other actions during the performance of the contract. Most Government actions are based on contract requirements. Examples are:

- Interpretation of technical specifications
- Obtaining approval for contractor entry on a Government site;
- Providing an escort in controlled areas;
- Arranging for utility outages when required by the contractor for maintenance or installation purposes;
- Authorizing the use of overtime under certain types of contracts;
- Authorizing used or surplus material as substitutes for new material.

Since the contractor is responsible for the direction of the work, the contractor is in the best position to determine when to submit requests to the Government. You, as the contract administrator, should be prepared to handle contractual requests by establishing a system to:

1. Track contractor requests, and
2. Provide timely response in accordance with the contract or regulation.

### Tracking Requests

Many requests a contractor submits require input from other Government officials. Use a tracking system, manual or automated, so that requests “out of sight” are not “out of mind.” The request may be crucial to contract performance. In fact, the contractor may not even be able to proceed until the Government responds.

For instance, the specifications might call for submission of a material sample for Government approval of color. While the program manager may be charged with overall responsibility for approving the color, other officials may have to concur. The contractor may be at a complete standstill until the approval is received. If you have not set up a tracking system, it may take days just to locate the sample. You can use a tracking sheet such as Exhibit 4-1 to monitor all such material approval requests, including those for used, surplus or reconditioned material.



## Timeliness

The primary rule is to respond to contractor requests in a timely and efficient manner. Timely response to contractor requests sets the tone for your relationship with the contractor and will pay dividends by minimizing the amount of contract administration required for contracts that are running smoothly.

An untimely response to a contractor request may have major consequences. The contractor may legitimately point at your inability to act upon their request as the reason for not meeting the delivery or performance schedule. Contracts should specify not only the request the contractor must make, but the amount of time the Government has to respond. If the contract does not specify a time, the Government should establish an adequate and reasonable response date with the contractor. A good tracking system will identify not only who is handling the response, but also the due date.

Contractors may submit requests to the Government based on unforeseen circumstances. Under some circumstances, the contractor may be entitled to delay delivery or performance. Under other circumstances, they would not. A timely response ensures the contractor is held accountable for delivery or performance terms.

#### **4.2 Monitor Actions of COR/COTRs and Other Support Personnel**

FAR 43.102
------------

You, the contract administrator, are responsible for the actions of all other Government personnel involved in the administration of the contract. Government officials overstep their authority at times by requiring the contractor to do something other than what is specified in the contract. Often these officials are merely reacting to an unforeseen or unplanned situation. The term used to describe these circumstances is “constructive change.”

## Constructive Changes

You will hear references to constructive changes from others within the contract administration process, but you will not see it defined or even mentioned in the FAR. Yet, it is an important legal theory often mentioned by boards and courts, particularly before the Contract Disputes Act (CDA) of 1978 was enacted.

A constructive change is an implied change. It occurs when the contracting officer or his or her duly authorized representative changes the contract without going through legal or regulatory formalities for

## BASIC PROCEDURES FOR SUCCESSFUL PERFORMANCE MONITORING

doing so. A constructive change can result from either a specific action or a failure to act. Examples are:

- Errors of interpretation
- Issuance of changes within the scope of the contract
- Failure to issue a change to correct a defective specification
- Acceleration of performance

The situations that characterize a constructive change are not addressed by the contract itself. Before the CDA, a change that was not addressed by the contract itself could not be processed administratively. The contractor's only avenue of relief was through the courts. Since this resulted in an unmanageable burden on the courts, the theory of constructive change was actually born of practical necessity to bring these changes within the administrative resolution process. Although the CDA diminished the significance of the constructive change theory, it is still used to define unauthorized changes effected by persons who would have been authorized to make those changes had they followed proper procedures. Using the constructive change theory, the boards considered these unauthorized changes "implied" changes under the Changes clause of the contract. Contracts must include one of the following clauses (or applicable alternate):

FAR 43.205

- Changes—Fixed-Price (for supplies and/or services)
- Changes—Cost-Reimbursement
- Changes—Time-and-Materials or Labor-Hour
- Changes (Construction contracts)
- Changes and Changed Conditions (for small purchases)

Any of these standard changes clauses give the Government the unilateral right to order the contractor to make a change to the contract. In exchange, the contractor is promised an "equitable adjustment" if the change causes an increase or decrease in the cost or time for total contract performance. Equitable adjustments include any adjustment in:

- Profit - Fixed Price contracts
- Estimated cost or fixed fee - Cost type contracts
- Delivery or completion schedule
- Other affected terms or conditions

FAR 43.102

Come to an agreement on price for a change before a contractor performs the change if this can be done without adversely affecting the Government's interest. Constructive changes destroy any possibility of prepricing, putting the Government in a poor negotiation position.

There are a number of methods you can use in monitoring the contract for constructive changes:

- Obtain correspondence copies of other support personnel;
- Instruct contractors to submit notices of constructive changes and other potential changes;
- Obtain feedback on meaningful oral communications with the contractor;
- Periodically contact CORs and other support personnel;
- Make unscheduled site visits and other methods;

### Cardinal Changes

The change, however, must be "within the scope of the contract." Otherwise the contractor is not obligated to make the change. Changes outside the scope of the contract represent "new work" and have been described as "cardinal changes." Contractors will generally not challenge any change order that provides for an equitable adjustment even if it is a cardinal change. Other interested parties are more likely to protest the change order especially if they believe they were denied an opportunity to compete for the "new work."

The changes clause for fixed price (supplies and services) only allows you to issue a change order to accommodate changes:

1. In the specification
2. In the method or manner of performance of the work
3. In the Government furnished facilities, equipment, materials, or site
4. That accelerate the work

The other changes clauses are similar in limiting changes.

### Obtain Correspondence

Your contract administration plan can include a requirement that support personnel provide the contracting office with copies of all written correspondence, whether it be in memo or letter form. By reviewing the written correspondence, you are in a better position to identify when other Government officials have inadvertently changed the terms of the contract.

### Contractor Notices

FAR 43.104

FAR 52.243-7

A clause in the contract may make submission of notices of potential changes a contract requirement. The clause is not mandatory. Generally, it is used for research and development, supply contracts for major systems, or subsystems over \$1 million. The basic requirements for a contractor's notice of change are shown in Exhibit 4-2.

## Notice of Change Content Requirements

### FAR 52.243-7

1. The date, nature, and circumstances of the conduct the contractor regards as a change;
2. The name, function, and activity of Government or contractor personnel who know about such conduct;
3. The identification of any documents and the substance of any oral communication involved;
4. The basis for any allegation of accelerated performance or delivery;
5. Any element of contract performance that the contractor may use as a basis for a change in time or money, including:
  - Contract line items affected,
  - Specific labor or material categories affected,
  - To the extent practicable, delay and disruption in the manner and sequence of performance and affect on continued performance,
  - Contractor estimates of adjustments to contract price, delivery schedule, or other contract terms.
6. The contractor's estimate of a reasonable Government response time that would minimize cost, delay or disruption of performance.

### *Exhibit 4-2*

If your contract does not contain this clause or a similar variation, keep this information in mind when you inquire about the circumstances of a potential change. Equitable adjustments are required when a change affects price or delivery.

### FAR 43.104

You perform several tasks when you receive such a notice. The tasks are outlined in Exhibit 4-3, Responsibilities in Responding to Notification of Changes.

### Responsibilities in Responding to Notification of Changes

1. Confirm that the circumstances constitute a true contract change.
2. Recommend to the contracting officer a method for directing further performance.
3. Plan for funding the change.
4. Take appropriate action by:
  - Canceling the change,

OR

  - Notifying the contractor that the Government does not believe that a true change has occurred.

*Exhibit 4-3*

The contractor has the right to appeal any unilateral decision made by the Government under the Disputes clause. Disputes are discussed in a later chapter.

#### Obtain Feedback on Discussions

Not all discussions with the contractor are documented in writing. A contractor may change how it is performing the contract based on discussions with other Government officials. If the Government official who orally directed the contract change had the authority to make the change in writing, a court or board will generally charge the Government with the legal consequences for it. However, even if the person who gave oral direction did not have the general authority to make the directed change, the contractor's ill-advised diligence in following it is likely to cause disruption to the Government's contract performance goals.

So require all Government officials involved in contract administration to report to you any meaningful communications they have held directly

## BASIC PROCEDURES FOR SUCCESSFUL PERFORMANCE MONITORING

with the contractor. Meaningful communications would include any information that might potentially affect:

- Performance
- Price
- Other contract requirements

FAR 42.1104(d)

This will help you control actions that are inconsistent with contract requirements.

Contact Other  
Government  
Personnel

Your contract administration plan may require your COR/COTR or other support personnel to provide periodic progress reports or daily logs of contract activity. Follow up immediately when you don't receive them. Make it a point to analyze them for constructive changes.

If your contract administration plan does not include the submission of reports from support personnel, contact them on a regular basis and ask them how things are going. Sometimes these people will not "bother" you with something they think is insignificant. However, you want to have an early warning of any contract performance difficulties. Often these "insignificant" events can cause major future headaches.

Use Other Methods

Sometimes an unannounced site visit is the most effective way to find out what's really going on. When both contractor personnel and your support personnel are there to listen to the other's answers to your questions, you are less likely to get a one-sided picture of events that have taken place or are currently happening.

Of course, you may have other more direct evidence of constructive changes, such as

- Requests for change orders from the contractor
- Invoice items or invoice amounts that are not consistent with contract requirements

The more quickly you identify changes and other problems, the easier they will be to resolve.

By monitoring the actions of other Government officials you are better able to:

- Identify and where possible forestall constructive changes before official notice from the contractor;
- Ensure that the officials are properly carrying out their roles and responsibilities within the limits of their authority;
- Ensure that the officials adhere to all time limits established in the contract.

### **4.3 Obtain Data on Contractor Performance**

In addition to monitoring the actions of Government officials for constructive changes, you should obtain sufficient data to verify satisfactory performance. You need to recognize any evidence of potential performance problems by either the contractor or the Government. Sources for obtaining information on potential contractor performance difficulties are summarized in Exhibit 4-4, Sources of Contract Performance Status.

Each source provides you with a better understanding of how the contract is progressing.

#### **Sources of Contract Performance Status**

FAR 42.1106

- Progress and other monitoring reports
- Requiring activity and end users
- Personal site visits/observations of work
- Inspection and acceptance officials
- Other data supporting acceptance or rejection
- Other persons (both Government and contractor officials)

*Exhibit 4-4*

## BASIC PROCEDURES FOR SUCCESSFUL PERFORMANCE MONITORING

### Progress and Other Monitoring Reports

Daily logs or progress reports required by a contract administration plan or the contract itself often early warning provide indicators of potential changes, delays or other problems in contractor performance. Reports may be provided by Government officials or the contractor.

Other than routine progress reports, CORs may initiate written reports identifying potential or actual delays in performance. Counsel CORs to provide such reports:

- In sufficient time for necessary action by the contracting office;
- With a specific recommendation for action.

You can only require the submission of written data from the contractor if it is required by the contract itself. However, some well-timed questions may produce valuable oral information. If your informational needs are not simple enough to be answered by a brief question-and-answer session, you probably have a contract submission requirement to fulfill that need. The contract may call for:

- Shop plans
- Shop travellers
- Blueprints
- Stick drawings
- Wiring diagrams
- Reprocurement data packages
- Identification of subcontractor sources
- Progress reports

For you, the contract administrator, progress reports will be your long-term contract administration monitoring tool.

FAR 42.1106

Because the informational needs of different contracts are not standard, there are no standard FAR clauses addressing content requirements for progress reports. However, progress reports do tend to have some common elements. These are listed in Exhibit 4-5, Common Elements of a Contractor's Progress Report.

### Common Elements of a Contractor's Progress Report

- Actual deliveries or performance milestones met
- Scheduled deliveries or projected performance milestones
- Factors causing delays
- Status of the work, in general, and by specific element
- Reasons for any difficulties or delay factors
- Actions taken or proposed to overcome difficulties or delay factors
- Assistance needed from the Government

#### *Exhibit 4-5*

Normally, the COR reviews and verifies the contractor's progress reports, but some contracts require direct submission to the contracting office. In this case, your contract administration plan should include a separate report from the COR. Make a comparison of similar reports and resolve any discrepancies.

The fact that a monthly progress report is required by the contract does not relieve the contractor of its obligation to report anticipated or actual delays to the COR or the contracting office as soon as such delays are recognized. Once an initial analysis is made and reported, the contractor does not need to repeat the analysis in regularly scheduled progress reports, but must track progress toward correction, if correction was indicated in the analysis.

In contracts for maintenance and overhaul, progress generally is reported and measured by the percentage of work completed.

#### Production Contract Reports

FAR 42.1107

FAR 52.242-2

Production progress reports are generally required unless the production is performed under a Federal Supply Schedule, a construction contract, or a facilities contract. Delays in furnishing production reports allow the contracting officer to withhold from payment an amount not exceeding \$10,000 or 5 percent of the total contract amount, whichever is less.

## BASIC PROCEDURES FOR SUCCESSFUL PERFORMANCE MONITORING

Some production contracts require a phased schedule for reporting progress. There is no standard format, but these schedules are often characterized by reporting on time required to pass through various stages of the production cycle, such as:

- Planning
- Purchasing
- Plant rearrangements
- Tooling
- Component manufacture
- Subassembly and final assembly
- Testing
- Shipping

### R&D Contract Reports

FAR 35.002

Since the primary purpose of research and development (R&D) contracts is to advance scientific and technical knowledge, they represent some unique monitoring problems. The Government must closely monitor technical progress. Therefore, progress reports are often required from the contractor and may include such things as:

- Number and names of key personnel working on the project during the reporting period
- Facilities currently set aside for the work
- Direction of the work
- Experiments being conducted
- Other work in process
- Negative results of R&D work
- Problems encountered
- Efforts taken to resolve problems are discussed in terms of:
  - costs
  - schedules
  - technical objectives

FAR 35.010
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### Graphic Progress Presentations

These progress reports are normally in addition to the scientific and technical reports that become a permanent record of the work accomplished under the contract.

Production contracts, as well as other types of contracts, may require the contractor to submit graphic displays that serve as a means of comparing actual with scheduled progress.

At one time, this was a time-consuming task, but now computer graphic software programs can create these comparison graphics with relative ease.

Bar charts and milestone charts represent the more simple graphic displays. An example of a milestone chart is shown as Exhibit 4-6. However, these have limitations. They do not show complex interrelationships among:

- Events
- Tasks
- Time
- Contractor progress

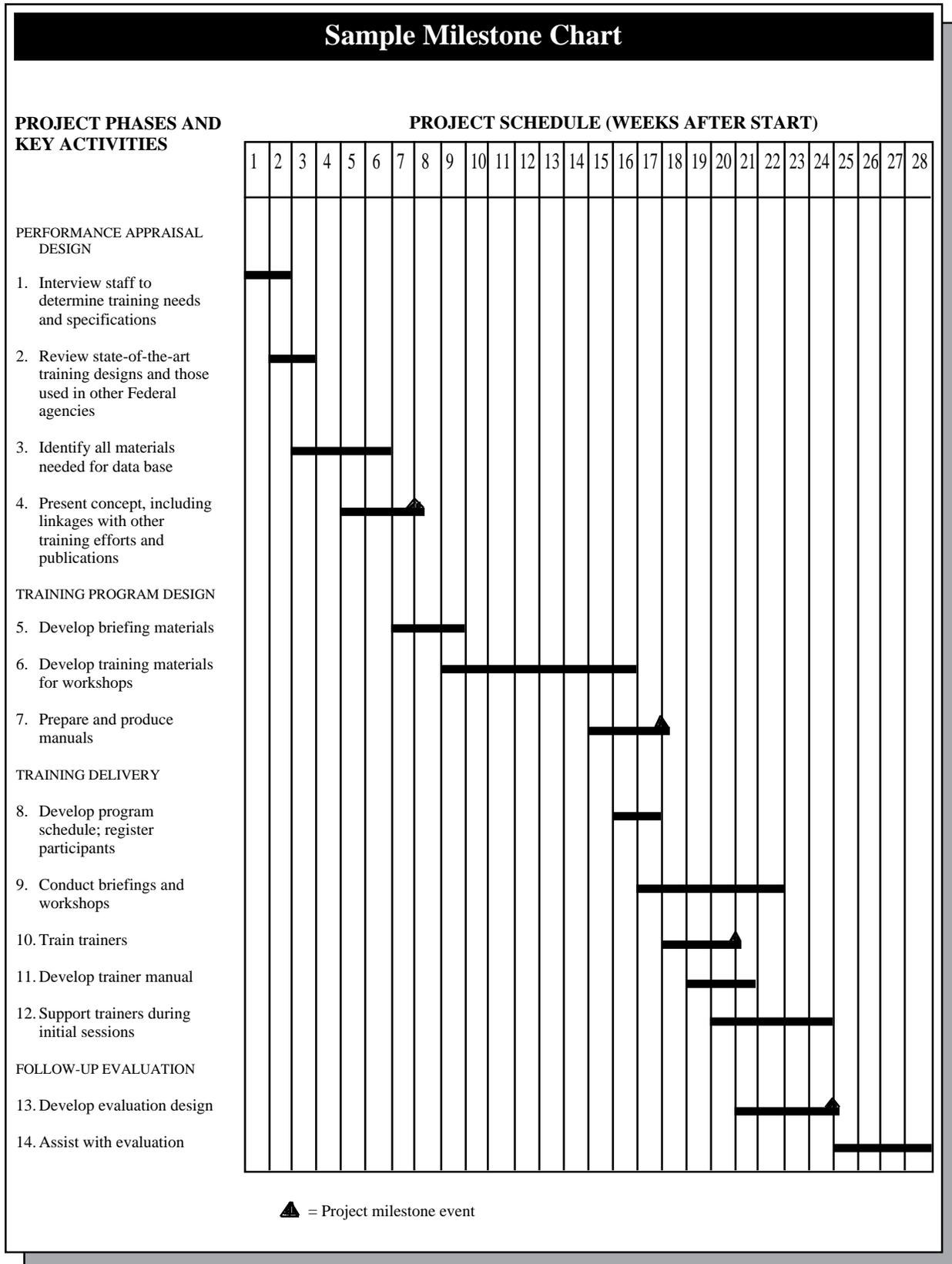
Moreover, bar and milestone charts are difficult to revise when changes take place.

When a contract involves a complex web of interdependent relationships between tasks, decisions and resources, the contractor may be required by the contract to prepare a more elaborate graphic display. These show what has to be done, and when. They help the contractor perceive the relationship among various tasks, the order in which events and decisions take place, and the need for specific resources (materials, equipment, and labor). This chart serves as a planning as well as a contract performance and management tool.

Examples of techniques used to make these more elaborate display systems include:

- Program Evaluation Review Technique (PERT)
- Critical Path Method (CPM)

PERT and CPM charts detail interrelationships. The contract may require the contractor to submit such a chart with its offer or after



*Exhibit 4-6*

contract award. Sometime the contractor submits them voluntarily because if it uses them for internal project management purposes. When these charts are available to the Government, they are important contract monitoring tools. More detail on these methods is provided in Appendix A.

Meeting with  
Requiring Activities

Hold periodic meetings with requiring activity and end users to obtain, as well as provide, pertinent information on contract status. These meetings help to foster the Government's team approach to contract administration. When the contractor performs on-site work, they provide early warning of any potential performance problems.

#### A NEWS UPDATE

*Eric had a periodic meeting scheduled with Roger Harrison, the plant manager for the three Government warehouses for which the pallets were being produced at Angkor Wat. Eric was to get an update on the pallet shortage problem. Hopefully, there would not be an excessive amount of additional damage to the pallets currently in operation. He didn't want to be in the position of negotiating for an accelerated delivery if the warehouse was having serious operation difficulties.*

*They would be talking about the two pallet contracts, the one from the original manufacturer and Angkor Wat.*

*The original manufacturer was a bit ahead of schedule. Eric hoped that this would compensate for a slight delay on the first shipment of pallets from Angkor Wat, although he still wasn't sure if the delay in preproduction tests would be substantial enough to affect the delivery schedule.*

*He hoped Joanne would have some good feedback from Angkor Wat by the time he talked to Roger Harrison. He was tempted to call the Angkor Wat president whom he had talked to during the preaward survey, but he didn't want Joanne to think that he did not have confidence in her professional ability.*

Personal Site Visits

Hold periodic meetings with contractor and Government technical personnel who have contract administration responsibility at the site. Your goal is not only to identify constructive change situations as outlined earlier in this chapter, but primarily to obtain monitoring data through your own observation. On-site meetings allow both Government and contractor personnel an opportunity to surface, as well as resolve, technical problems at the operating level.

FAR 42.402

However, there are certain rules of etiquette that you must follow before making a site visit when your contract administration office has delegated specific contract administration functions to another contract administration office (the CAO). This type of delegation often occurs when your office has a production contract in a plant where another agency has an on-site contract administration activity. When making on-site visits to such facilities, prior notification is required, as detailed in Exhibit 4-7, CAO Notification Requirements for Contractor Facility Visits. Refer to item #6 in this exhibit. If the CAO has already gathered data that will fill your data requirements, personnel within the CAO will generally discourage your visit and provide you with the existing data.

**CAO Notification Requirements for Contractor Facility Visits**

1. Names, official positions, and security clearance information for all visitors
2. Date and duration of your visit
3. Name and address of contractor facility and personnel you wish to contact within it
4. Contract number, any overall program involvement, and the purpose of your visit
5. Request for CAO representation, if you desire it. Note that the CAO may accompany you, whether you desire it or not
6. Identify data you may wish to obtain in conjunction with this visit.

*Exhibit 4-7*

In addition to these notification requirements, you are expected to inform the CAO of any agreements you reach with contractor personnel or other results of your visit that may affect CAO operations.

Data from Inspection Officials	The type of data you can expect to receive from Government officials responsible for inspection will depend on what inspection and acceptance methods are in the contract. When a contract is awarded by the Government, the contractor assumes the responsibility for timely delivery and satisfactory performance. Performance includes furnishing the Government with the quantity and quality of items the contractor agrees to deliver and the Government agrees to pay. Although the contractor is fundamentally responsible, the Government, through contract administration, protects its interests to insure a quality product. Inspection and acceptance requirements included in every contract are the contractual basis for this protection.
Purpose of Inspection	The purpose of inspection is to determine whether the product or service conforms exactly to what the Government has ordered. The extent of inspection varies with the dollar value of the contract and the type of product or service.
Inspection Defined	Inspection means examining and testing supplies or services (including when appropriate, raw materials, components, and intermediate assemblies) to determine whether they conform to contract requirements.
Types of Inspection	<p>Whenever possible, the contractor's self-inspection systems are used. There are basically three types of self-inspection systems:</p> <ol style="list-style-type: none"> <li>1. Government reliance on inspection by the contractor. FAR 52.246-1, Contractor Inspection Requirements, is the standard clause used to identify this quality level, but variations to the standard are authorized. The clause is used for small purchases unless the contracting officer decides that some form of Government inspection and testing is necessary. The clause does allow some <b>specialized</b> Government inspection and testing, but it relies on the contractor for overall inspection. An example of a specialized test for a small purchase could be an environmental test for an outdoor herbicide product.</li> <li>2. Standard inspection requirement. The standard inspection clause, FAR 52.246-2, Inspection of Supplies—Fixed-Price, requires that the contractor establish and maintain an inspection system not otherwise defined except that it must be acceptable to the Government. The standard inspection clause can be the only inspection clause in your contract, or it can be the foundation for other Government inspection specifications. The FAR specifies other clauses for use with different contract types and in specific</li> </ol>

FAR 46.101
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## BASIC PROCEDURES FOR SUCCESSFUL PERFORMANCE MONITORING

situations. With minor adjustments in wording for contract type and contractual situations, these are basically the same as the standard supply/production clause.

3. Higher-level quality control requirement. The clause, FAR 52.246-11, Higher-Level Contract Quality Requirement (Government Specification), is used when the technical requirements of a contract require closer control of work processes or attention to such factors as planning. This type of clause will require the contractor to comply with Government inspection procedures or quality assurance procedures.

### Inspection Methods and Data

The data you will see from Government inspections result from several different inspection methods. The most commonly-used methods and the kinds of data that result are:

- Sensory and dimensional checks. Sensory checks are examinations by an inspector using his or her eyes, ears, and other senses. The inspector exercises a good amount of personal judgement in this method. This kind of examination reveals surface defects, missing pieces, noisy operation, and parts out of alignment. The inspector makes dimensional checks using gauges and micrometers to determine whether the dimensions of the items conform to contract specifications. The data you obtain from your agency's inspection and acceptance personnel for routine commercial supply items or items that were previously inspected at the plant will be based on this type of inspection. Factors involved in this type of inspection are outlined in Exhibit 4-8, Elements of a Commercial Item Inspection.
- Physical or performance tests. This kind of inspection provides you with actual performance data. Requiring that a motor run or an operating system perform at a certain level for a specific period of time are examples of this kind of examination. Chemical tests to determine chemical composition and physical tests to determine hardness are also in this category of examination.
- Destructive tests. This kind of inspection often provides data on a "worst case" performance environment. Some contracts require that end products meet certain reliability standards or withstand a specific level of stress. Inspectors test these requirements simulating abuse until the item is destroyed. For instance, to test fireproofing, the inspector heats the product until it burns.

### Elements of a Commercial Item Inspection

1. Proper type/kind
2. Correct quantity
3. Damage check
4. Operability check
5. Preservation check for spoilage and other signs of age deterioration
6. Packaging and labeling requirements check
7. Appropriate packaging, if applicable
8. Proper identification

*Exhibit 4-8*

### GOOD NEWS AND BAD NEWS

*The test for flexibility on the Angkor Wat Enterprises pallet contract was a destructive test. It had called for a measured amount of pressure at various angles from a machine that looked like a smaller version of a compactor. Joanne had gotten a call from the testing lab Monday morning while she was in the chart room.*

*The message was that the material had passed the test, just meeting the flexibility tolerance of the existing pallet material. So it was just as good as the material from the original manufacturer.*

*“At least I’ll have some good news for the Director’s status report,” Joanne thought. She had just tried to reach the Angkor Wat Vice President and his secretary could not locate him. She had left a message that she had good news for them. She’d tell him about the test results first and then address the postponement of the preproduction test.*

## BASIC PROCEDURES FOR SUCCESSFUL PERFORMANCE MONITORING

### Interim Inspections

Even if the contract calls for reliance on the contractor's inspection system, the Government retains its right to inspect and will at least inspect for adequacy and perform sensory checks.

The Government, in fact, has the right to inspect all materials and workmanship at any time and any place where work on a contract for supplies or services is being performed in a manner that will not unduly delay the work. Interim Government inspections may focus on different aspects of performance, for example, determining whether:

- Performance on schedule can be expected;
- Cost will be within the estimate (for cost-type and fixed price with progress payments);
- Resources are being applied at originally predicted levels;
- Quality of the end products will be consistent with the specification;
- Progress payments are warranted;
- New components need to be incorporated in major systems; or
- A contractor's own inspection system is adequate.

### Improper Inspections

The inspection clauses give the Government certain rights in contract monitoring; however, improper application of inspection procedures can jeopardize those rights. So you must be alert to any indications of improper inspections. Most improper inspections fall into the following categories:

- **Unspecified tests that are improper.** The Government does not have to specify the method it will use to test a product or service for contract conformance. It can perform tests that are unspecified. Nevertheless, when unspecified tests impose a stricter standard of performance, they are improper. The contractor may be able to recover increased costs caused by unspecified Government tests if it could not have reasonably foreseen the unspecified inspection requirement during the solicitation phase.
- **Erroneous tests.** Inspection testing is improper if it is not a reasonable measure of contract compliance. However, if your inspector failed to accurately perform an interim test so that a

defective item passed through an interim inspection undetected, it will usually not prevent rejection later.

FAR 46.503

- **Repeated tests.** The Government generally has the right to inspect items or services it had inspected previously, but if reinspections are inconsistent with prior inspections, they are improper. Reinspections are also improper if they are unreasonable as to time and place so that undue or unnecessary delays result. Reinspections for acceptance purposes at destination when the supplies have previously been accepted at a place other than destination is inappropriate as well.

When the Government inspector conducts an inspection exactly according to the contract specifications, his rejection of supplies cannot be overturned by another test method, even though the other test shows that the supplies met the specifications of the contract. On the other hand, if a contractor produced an item that exactly conforms to a Government-furnished sample, a rejection based on improper operation is not valid because the contractor has literally complied with performance under the contract.

If the contractor can show that a Government inspector is incompetent, a rejection based on inspections made by the incompetent inspector may be invalidated in a formal appeals process. If the negligence of a Government agent causes damages to a contractor, the Government will most likely be held liable for those damages.

Data Supporting  
Acceptance  
or Rejection

The acceptance procedure is important because at the time and place of acceptance, title passes from the contractor to the Government. Acceptance is final except for:

- Latent defects
- Fraud
- Gross mistakes that amount to fraud

Inspection Standards

Acceptance is based on essentially three types of inspection standards:

- **Strict compliance standards.** The Government generally has the right to enforce strict compliance with contract specifications by either rejecting the work, or requiring a price reduction for nonconforming work, but discretionary standards, in the form of subjective standards or first articles, are sometimes necessary.

BASIC PROCEDURES FOR SUCCESSFUL PERFORMANCE MONITORING

- **Subjective standards.** “Comfortable fit” or “easy operation” are examples of such standards used in specifications. Brand name “or equal” specifications also fall into this category. Industry standards and common practice govern in these situations.
- **First article approvals.** Because the primary purpose for first article approval is to prove a contractor’s capability of producing end items that will meet the contract specifications, easily correctable defects are not cause for rejection of first articles. Instead, the first article approval clauses provide for “conditional” approval.

FAR 52.209-3(b)

FAR 52.209-4(b)

Point of Acceptance

The contract terms control where items will be accepted. The point of acceptance is:

- Contractor’s plant
- Destination of the product
- Anywhere else, if mutually agreeable

Normally, when a contract requires Government quality assurance actions at a plant, acceptance will be done at the plant. When quality assurance actions are performed at destination, acceptance will ordinarily be at destination.

Time of Acceptance

After delivery is made, a reasonable period of time is allowed for Government acceptance or rejection. Although the Government may not have formally accepted items, acceptance may be implied by either the Government’s conduct or by the Government’s delay. (Check type of contract for specifics.)

Notification of Acceptance/Rejection

Acceptance or rejection of supplies must be made as promptly as possible after delivery. A notice of rejection must be provided to the contractor when the product or service has been found unacceptable. Specific actions by the Government may be considered to imply acceptance when none was intended. For example, if the Government consumes part or all of defective items delivered, acceptance of the consumed portion is has generally occurred. In other words, Government alteration of items prior to rejection, or use of the items, constitutes acceptance.

The contractor is responsible for removing rejected supplies and paying the Government for any storage and similar charges. When a contractor refuses to remove rejected supplies, the Government has the authority to

ship them back to the contractor at the contractor's expense. The Government may be able to sell those supplies and use the proceeds against storage charges.

## Transfer of Ownership

FAR 46.505

Ownership (title) transfers to the Government upon FORMAL acceptance. The time of this ownership transfer is significant when damage or loss occurs. The Government becomes responsible for the damage or loss based on delivery requirements:

**F.O.B. ORIGIN** Contractor has delivered supplies conforming to the contract to the carrier.

**F.O.B. DESTINATION** Contract has delivered supplies conforming to the contract to the destination and the supplies have been accepted by the Government

## Evidence of Final Acceptance or Inspection

As evidence of final acceptance or inspection, you usually see one or more of the following documents:

- A receiving report
- An invoice copy with a signature of an authorized Government official
- A contractor bill of lading (CBL)
- A Government bill of lading (GBL)
- A Certificate of Conformance

## Receiving Reports

A receiving report signed by an official authorized to accept goods or services for the Government is the usual written evidence of final acceptance. The Material Inspection and Receiving Report, DD Form 250, is the document normally used to document formal acceptance of supplies and services by DOD. Non-DOD agencies normally have their own unique forms found in their agency FAR supplements.

## Approved Invoice Copies

An invoice copy signed by an authorized official can serve as an acceptance document only if the contract terms allow it.

## CBLs

Under a CBL, the transportation carrier is responsible to the contractor for any damage or loss, and the contractor, in turn, is responsible to the Government.

## GBLs

A GBL is used when the Government has title to the goods in shipment. Therefore, the transportation carrier is responsible to the Government

## BASIC PROCEDURES FOR SUCCESSFUL PERFORMANCE MONITORING

for damage or loss and the contractor has no liability for damage or loss of the goods shipped. A CBL means that the contractor paid the freight bill, but it doesn't mean that it cannot or even should not bill the Government for those charges. You have to look at the terms and conditions of the contract to see what is appropriate. The Government shall be responsible for freight payments when the contract states that shipment shall be by Government Bill of Lading.

### FAR Clauses

There are 19 standard FAR clauses that deal with postaward aspects of the f.o.b. point or the payment of freight. They are all in the FAR 52.247-series of clauses. You must read the one or ones in your contract thoroughly to make sure you understand what is appropriate. You may wonder why specifying the f.o.b. point, that is, origin or destination, is necessary at all. There is legal significance to the f.o.b. point because it signifies the point of acceptance, which in turn, almost always indicates when title (ownership) passes from the contractor to the Government.

### Certificate of Conformance

When the Government relies on the contractor's certification that the supplies or services will comply with the contract's terms and conditions, the basis for inspection is a Certificate of Conformance. You may only allow acceptance on the basis of a Certificate of Conformance if the clause at FAR 52.246-15, Certificate of Conformance, is in the contract. Moreover, you can require inspection even though the Government has the right to rely on the contractor's certification, because the clause reserves the Government's right of inspection.

### **4.4 Inform Requiring Activity and Other Interested Parties of the Contract's Status**

When the contract progresses to a successful completion according to plan, you need only provide status of that successful completion to all interested parties. This includes successfully "closing out" the administrative file, thereby deleting it from active status on all internal agency records. A later chapter discusses how to close out a contract.

## CHAPTER 5

# PROCEDURES FOR PROBLEM RESOLUTION IN CONTRACT ADMINISTRATION

### WHO'S TELLING THE TRUTH?

*Eric looked in the door of Joanne's office as he passed by on the way to his own, and stopped short, spilling some coffee on his hand in the process.*

*She had just slammed the phone down and was muttering to herself in tones that were not entirely hushed, "How did I ever get into this crazy business anyway!"*

*She had worked for him for almost three months now and he had never seen her so agitated. "Hey, you really sound like a Government contract pro now!" he told her. "Is there a problem I should know about?" he inquired.*

*She spun around in her chair when she heard his voice and smiled a bit sheepishly. "Well," she said, "There is a problem and if I could pin down what it is, I'd let you know about it. It's the preproduction tests for the jigs and templates at Angkor Wat. They're still not ready at the plant, but everyone has a different idea as to why, and it conflicts with what everyone else has to say. My frustration level is at about 98% right now. They can't all be right, but I really don't know at this point who's fibbing and who's telling me the truth."*

*Eric smiled. He'd been down this road before many times. "There's a good chance that none of them are lying to you, Joanne. Sometimes people just see things differently, or interpret words differently. You've played those party games where the person at one end of the line whispers some little story to the person next in line and by the time it reaches the guy or gal at the end of the line, it's hardly recognizable, haven't you?" he asked.*

*"Well, yes," she admitted, "but that was a game. This is for real. I can't just get up and leave this party."*

*They both laughed and Joanne seemed more relaxed. "Want to brief me on the details?" he asked her.*

*"Yes," she replied, "but let me do a bit more exploring first. I may get to the bottom of this yet." He admired her determination, but didn't want her banging her head against the wall either. "Okay," he said. "In two hours in my office. That will be 11:15."*

## COURSE LEARNING OBJECTIVES

At the end of this course, you will be able to:

**Overall:** Take all steps necessary for resolution of performance problems identified through monitoring your Government contracts and inform the contractor and other interested parties of decisions reached and actions taken.

**Individual:**

- 5.1 Verify and document evidence of potential performance problems, including breach problems.
- 5.2 Determine impact of the requirement
- 5.3 Issue a stop work order if needed
- 5.4 Prepare Government's position on delay
- 5.5 Resolve the problem short of invoking a formal contractual remedy.
- 5.6 Prepare Final Decision.
- 5.7 Inform requiring activity and other interested parties

# INTRODUCTION TO PROBLEM RESOLUTION IN CONTRACT ADMINISTRATION

**Definition of a  
Performance Problem**

A performance problem is any situation that has a potential for disrupting the efficient execution of contract terms and conditions, regardless of whether that situation was caused by the contractor, the Government, or if both share responsibility for the existence of the problem.

**Definition of a  
Stop Work Order**

A unilateral order of the contracting officer requiring the contractor to stop all or any part of the work called for under a Government prime contract or subcontract.

**Definition of an  
Excusable Delay**

Delay in performing, or failure to perform a contract, arising from causes beyond the control and without the fault or negligence of the contractor.

**Policy on Problem  
Solving Methods**

The key to innovative problem solving techniques is not to look for solutions in a textbook or in a regulation. Proactive problem solving procedures involve careful thought, a sense of practicality, and a positive approach. Consult regulatory guidance only to make sure that this direction does not prevent you from trying a proposed contract solution.

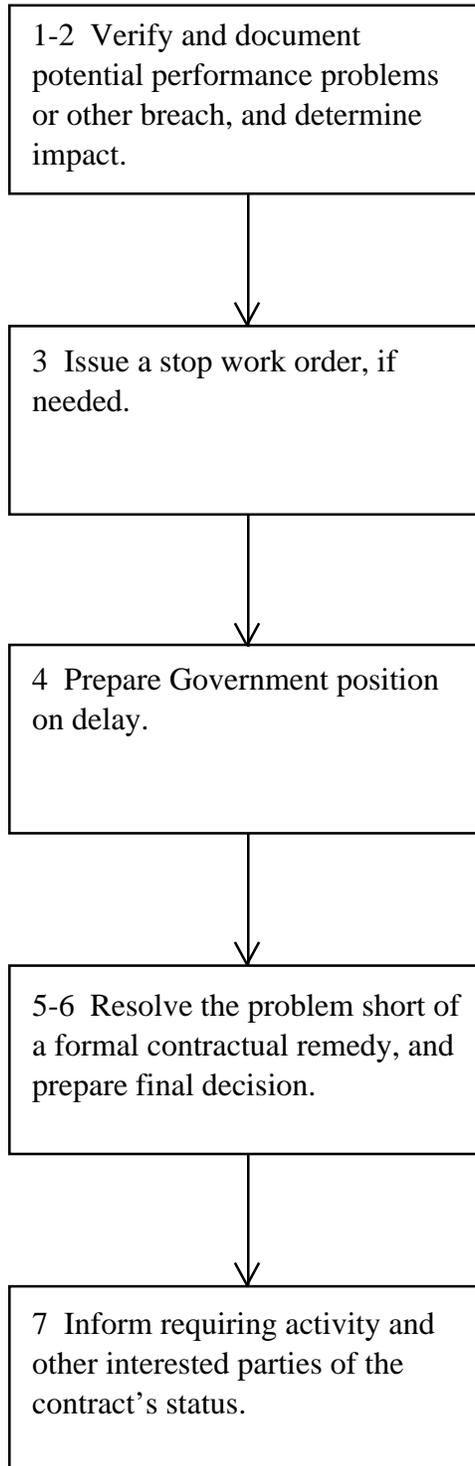
This chapter will provide you with some specific ideas for creative approaches to potential contract performance problems within subject areas such as:

- Looking for solutions that might satisfy both sides;
- Seeking solutions from the contractor;
- Seeking solutions from the other Government personnel.

**Steps in Performance**

The steps in seeking resolutions to problem situations in contract administration are charted on the next page. Following the flowchart, each step is discussed in turn.

## STEPS IN RESOLVING PROBLEMS IN CONTRACT ADMINISTRATION



## 5.1 Verify and Document Potential Performance Problems

Aggressive monitoring of the contract results in early identification of performance problems. Some performance problems that can occur are shown in Exhibit 5-1, Examples of Performance Problems.

<b>Examples of Performance Problems</b>	
<b>SCHEDULE:</b>	Failure to deliver or make progress toward timely delivery.
<b>COST:</b>	The contractor is exceeding cost estimates on a cost-reimbursement contract or is so over budget on a fixed-price contract as to endanger both schedule and performance (or even its very survival).
<b>QUALITY:</b>	The supplies or services in process or being delivered do not meet contract requirements or are not expected to do so.
<b>OTHER COMPLIANCE:</b>	The contractor is not complying with other terms and conditions of the contract (e.g., with clauses on labor rates, clean air and water, subcontracting goals, maintaining a drug-free workplace, etc.).

*Exhibit 5-1*

All of these problems have one common denominator—they all involve a potential broken promise, technically known as a “breach.” A breach of contract is nonexcusable nonperformance of a contract occurring when one party to a contract:

- Fails to perform, wholly or in part;
- Gives notice beforehand that it will not perform the contract when the time for performance arrives (anticipatory breach);
- Makes performance impossible for itself or for the other party.

Every breach of contract gives the injured party the right to collect damages.

Moreover, the party harmed by the breach may sometimes, in addition, be excused from performing its part of the contract.

In the Government contracting environment, the Government can be guilty of a breach when it:

- Issues a unilateral change to the contract that is outside the scope of the contract;
- Fails to disclose pertinent site information for on-site work.

The contractor can be guilty of a breach when it:

- Abandons contract performance;
- Commits a fraudulent act in connection with a contract.

You may need to conduct factfinding with the officials involved in the problem to identify both the symptoms and the cause. Methods used in factfinding include:

- Discussions with the contractor;
- Personal observations at the work site;
- Discussions with COR/COTRs;
- Discussions with audit personnel;
- Discussions with quality assurance personnel;
- Discussions with requiring activity and end user personnel.

## **5.2 Determine the Impact of the Problem**

When a problem surfaces, immediately ask: “What does the contract say?”

Always consider the problem as it relates to contract terms or conditions. Many “problems” disappear when you isolate terms and conditions that apply and compare their direction with the problem you are facing. For example, a technical specialist may report that the contractor is using inferior material. The basic policy concerning quality contained in required contract clauses makes contractors responsible for overall product or service quality, offering for acceptance only those items that conform to contract requirements. While the technical specialist may justifiably be disappointed in the quality of the product, a review of the actual contract requirement may indicate that the product

was conforming and, therefore, acceptable. Many so-called problems can be avoided simply by reading the contract.

You may discover after factfinding that the problem is in the contract itself. The Government may have made one interpretation of what is required and the contractor another.

You, the contract administrator, will first need to determine whether the contract language is ambiguous or whether one or more persons has made an unreasonable interpretation. Use the guidelines in Exhibit 5-2, Rules of Contract Interpretation.

### **Rules of Contract Interpretation**

1. Everyday words are given their dictionary definition.
2. Technical words are defined as is usual in the trade or technical area, unless the context or usage indicates a different meaning.
3. Words defined by the contract are interpreted as the contract defines them.
4. The same word, used in different parts of the contract, is presumed to mean the same thing.
5. Contract language should not be interpreted or defined so as to render the language meaningless or the rights and obligations of one or the other party unrealistic.
6. The contract should be read as a whole and, wherever possible, read consistently.
7. When there is a conflict between two contract sections and there is no specific direction to the contrary,
  - Handwritten language takes precedence over typed language,
  - Typed language takes precedence over printed language, and
  - Specific clauses take precedence over general clauses. The presumption is that the specific clause qualifies the general clause, and therefore, carries more weight.
8. Where the public interest is affected, an interpretation is preferred which favors the public.

*Exhibit 5-2*

## PROCEDURES FOR PROBLEM RESOLUTION IN CONTRACT ADMINISTRATION

If there is a problem involving someone who is making an unreasonable interpretation, your job is to calmly convince that person with cool logic that the position he or she is advocating is unrealistic.

Ambiguous language is usually interpreted against the drafter unless the other party's interpretation is unreasonable. Moreover, if the ambiguity is obvious, the other party (the "nondrafter") has the duty to request clarification before contract award. If the nondrafter does not and the ambiguous language is obvious, the courts would probably say that the nondrafter had the last opportunity to correct the deficiency and did not.

If the words themselves don't point to a solution, then see if there is any evidence as to what the Government and the contractor both intended when they entered into the contract. Look for inconsistencies with past interpretation of the same language by either the Government or the contractor. Courts and boards will generally hold a contracting party to interpretations that it held, or at least did not challenge, prior to the dispute. So, a Government interpretation of language in the specifications at the postaward orientation conference will prevail over a later contradictory Government opinion. Similarly, when the Government can show that the contractor originally calculated certain work as required by the contract and is now trying to claim that the work is extra, the work will be considered as part of the basic contract and not additional work.

Your documentation and factfinding efforts may be hampered by someone trying to cover up actions he or she now regrets. A problem-solving attitude always yields better results than the finger-pointing approach.

### **SEEK—AND YOU SHALL FIND THE ANSWER**

*Joanne arrived at Eric’s office at 11:15 on the button. He noted as she sat down across the desk from him that she had gotten her professional composure back. Her cool head was one of her strongest assets.*

*“I’ve got part of it solved,” she told him. “The specification for the test calls for some pretty detailed measurements. The whole testing procedure is outlined in a standard Federal specification that we don’t use too often. It was referenced in the contract and I just got a copy of it from Jake Richards.”*

*Joanne handed the specification to Eric and pointed to one of the paragraphs.*

*“See here where it says ‘Calibration equipment must be provided....’ and goes on talking about the testing equipment. Jake was insisting that Angkor Wat was supposed to provide the equipment, based on this language. Initially, they argued with him about whether it was their responsibility and continued to disagree about every aspect of it. The first time I talked to them about it, they forgot to even mention that they weren’t supposed to provide it. They were preoccupied in arguing the appropriateness of its characteristics. They remembered the second time around through.*

*“I’m not sure that I convinced Jake that it was really illogical to have a contract deliverable hidden in a referenced specification that the Government uses to perform its own test, but when I told him that a court or board of contract appeals would rule against the drafter of ambiguous language, he became disinterested in pursuing it. He’s now busy worrying that Angkor Wat is right about the appropriateness of some of the technical requirements for the testing equipment. Apparently they brought up some pretty good points.*

*“I haven’t figured out what the scheduling impact is going to be though,” she added, “but that’s another problem.”*

When a potential performance problem has been identified and it is not just a simple matter of clarifying the contract requirements, you must determine the significance of the problem. The overriding issue is the extent of damage the Government will incur. The factors you should consider are:

- Delivery
- Price
- Quantity
- Quality

The amount of time and effort you will need to resolve the problem will be based on how significant the problem is to the intended mission.

**5.3 Issue a Stop Work, If Needed**

One of the first issues you must deal with when a serious problem surfaces is whether the contractor should continue performance. Some of the questions you need to ask are:

- How serious is the problem?
- How long will it take to correct the problem?
- Which is more costly to the Government—paying additional money for stopping the work until the problem is fixed or paying money for the work to be corrected later?

As the contract administrator, you are responsible for making decisions that are in the Government's best interest, not only as that interest relates to one contract, but as it relates to the Government's overall well-being.

### WHAT THE DOCTOR MEANT TO SAY

*Eric's group of procurement professionals was small compared to that of many other agencies. Both the Director and Eric agreed that they could not afford the luxury of dividing his organization into contract negotiators and contract administrators. So, each professional followed their procurement action from inception to conclusion.*

*Joanne's first contract award was for a small research study. Of course, she did not sign the contract—as the contracting officer, Eric did. But under Eric's care and guidance she had put together the competitive solicitation; issued it; received the proposals; chaired the evaluation; made the recommendation for award; negotiated the final price, terms and conditions; and made the award. The file was completely and thoroughly documented. Joanne anticipated few, if any, problems during the life of the contract.*

*A month later, she received the contractor's first monthly progress report and forwarded it to the laboratory for review and approval. The phone call from Dr. Murphy, the director of the laboratory, took her by surprise. He had made a mistake in the contract's statement of work. It was a relatively minor mistake, but it could affect the outcome of the study. In overly simplistic terms, Dr. Murphy told Joanne that after a certain point in the study the contractor could either turn right or turn left. He had simply overlooked the fact that he did not want them to pursue the left turn.*

*"That's fine, Doctor," Joanne said, "but can't I simply tell the contractor not to take the left turn?"*

*"You could Joanne," replied Dr. Murphy, "but Dr. Smith (the contractor's project manager) will have to restructure his samples. At the rate he's moving, I believe he's started the sampling process already. He can't just discard the samples. They represent a fair amount of cost. Also, if you remember my comments about the contractor's pricing, it was rather tight."*

*Joanne also remembered that Dr. Smith had decreased the total time for the study by four weeks. Joanne had questioned both Dr. Murphy and Dr. Smith about this at the time. The answer was that Dr. Smith was not teaching this semester and wanted to devote full time to the project.*

*"What can we do?" asked Dr. Murphy.*

**Identify a Potential  
Need to Stop Work**

FAR 12.503

The necessity for a stop work order can result from actions initiated by either Government or contractor personnel.

1. **Government actions necessitating a stop work order.** These include actions taken by the contracting office on its own initiative, for example, to reduce Government liability when:
  - Correction of defective specifications is necessary;
  - Government-furnished supplies or services will be delivered late;
  - Termination for default is being considered (provided that the stop-work order is not used in lieu of termination).

The contracting office may also take action when other Government organizations surface the need for a stop work order. Examples are when:

- Quality assurance or inspection personnel notify the contracting office that the production line must be stopped for tool calibration.
  - Requiring activity notifies the contracting office that it needs time to initiate changes that would substantially change the end product or service.
2. **Contractor actions necessitating a stop work order.** For example:
    - The contractor submitted a value engineering proposal that will take the Government time to totally evaluate, but that appears to offer a production or engineering breakthrough that would be in the Government's interest to pursue.
    - The contractor notifies that contracting office of conditions at a Government work site that make the performance of work unsafe and are not immediately correctable.

## BUYING TIME

*Joanne briefed Eric on the problem of defective specifications on the small research contract.*

*“We’re going to use a stop work order so we won’t be wasting money while we figure out how to straighten this out,” he told her. “We need to reduce the Government’s potential liability.”*

*Eric had instructed Joanne to add the Stop Work Order clause at FAR 52.212-13 to the solicitation. So it was in Dr. Smith’s contract.*

*Eric discussed the problem with the Director and obtained his approval to tell Dr. Smith over the phone to stop work immediately. Eric explained that Dr. Smith was incurring costs daily that would not be necessary under the change that they would be getting from Dr. Murphy. Dr. Smith’s laboratory was about 65 miles from the contracting office so immediate delivery of a written stop work order was not practical. Later in the week they could hopefully come to a mutual agreement with Dr. Smith on how to best proceed.*

### **Establish a Time Frame for the Work Stoppage**

FAR 12.505(b)

There is an automatic 90-day period for work stoppages. The 90-day period can be changed as follows:

- The Government may cite a lesser period at the time of the work stoppage.
- The Government may cancel the stop work order before the expiration of the 90-day period.
- The Government and the contractor may extend the period by written agreement.

The Government should cite a lesser amount of time if a precise time can be determined. The contractor will be better able to plan and hold down any costs associated with the work stoppage if it has a more precise estimate of the time involved.

### **Determine the Impact of Stopping the Work**

Work stoppages should only occur after the Government has made a determination of the impact they will have. Factors that determine such impact are listed in Exhibit 5-3.

### **Factors That Determine Stop Work Order Impact**

1. Estimated cost for delaying the work.
2. Potential effect on labor (loss of skilled labor, loss of efficiency and so forth).
3. Potential damage to perishable goods.
4. Estimated effect on overhead (inventory, indirect labor, etc.).
5. Any adverse effects of the potential delay on contract completion.

*Exhibit 5-3*

#### **Decide and Document Whether or Not to Stop Work**

You are now ready to make a decision based on an estimation of the risks and benefits involved in letting the work continue versus those involved in discontinuing it. This risk/benefit analysis involves several areas of consideration:

1. The origin or purpose for stopping the work. This may override any other consideration. An example would be when the Occupational Safety and Health Administration orders a Government job site closed.
2. A cost assessment. Analyze the estimated cost for work stoppage versus the cost of Government liability if it let the work continue.
3. Other alternatives. There may not be other alternatives, but often there are. A termination for convenience may be a practical alternate, for instance.

In documenting the risk/benefit analysis for other alternatives, include documentation of why a supplemental agreement is not possible.

You may not issue a stop work order unless certain prerequisites exist, as shown in Exhibit 5-4.

## Prerequisites for Issuance of a Stop Work Order

Do not issue a stop work order unilaterally unless:

1. There is a clause in the contract that allows the Government to issue a unilateral order to stop work.
2. It is advisable to suspend work pending a decision by the Government.
3. A supplemental agreement covering the suspension is not feasible.
4. The issuance of the stop work order is approved at least one level above the contracting officer.

### *Exhibit 5-4*

Document the reasons for that determination as the most cost effective or practical solution to the problem.

#### **Issue the Order, If Appropriate**

Contracting officers can issue stop-work orders orally or in writing. ACOs can only recommend to the Contracting Officer the issuance of a stop work order is needed when a CAO is monitoring the work.

#### Oral Orders

Highly urgent reasons, such as life-threatening safety violations, may make oral orders necessary. Contracting officers should only issue oral orders when the situation precludes waiting for the issuance of written ones. The decision to issue an oral order should be based on minimizing Government cost liability. Immediately follow up oral orders with written ones.

Before issuing oral orders, the contracting officer should attempt to get the oral approval of the agency official charged with approving written stop work orders.

#### Written Orders

FAR 12.503(b)

FAR 12.503(c)

Include all of the content requirements listed in Exhibit 5-5, Minimum Content Requirements for a Stop Work Order, in the written order. Oral orders should cover as many of these minimum content requirements as is practical.

### **Minimum Content Requirements for a Stop Work Order**

1. The effective date and time.
2. Nature or reason for the stop work.
3. A description of the work to be suspended.
4. Instructions concerning the contractor's issuance of further orders for materials or services.
5. Guidance to the contractor concerning subcontractors.
6. Other suggestions to the contractor for minimizing costs.
7. When a written order follows an oral one, the written order should reference the oral order by identifying:
  - The date and time of the oral order;
  - Who conveyed the order for the Government;
  - The contractor employee who was given the oral order;
  - The method of transmission (for example—telephone, personal conference, and so forth);
  - The location where the oral order was presented in person, if applicable.

*Exhibit 5-5*

Orders should also contain, when feasible, a time frame for the duration of the stop work order. Often this is not practical. For instance, if a contract is stopped because of realignment of program priorities within an agency due to budget cuts, there may not be a resumption of work at all. In situations like this, keep the contractor informed of the other alternatives that the Government may be considering. This will allow the contractor to make better business decisions in regard to its other commercial and Government work.

### Contractor's Written Acknowledgement

Regardless of whether you present the stop work order to the contractor in person or send it through a third-party messenger, make sure you obtain the signature of a contractor employee acknowledging receipt of the stop work order. Without this acknowledgement, your documentation is incomplete as to when the stop work order actually became effective. You need to establish when the Government is released from the responsibility for payment of any costs incurred for contract work as a result of the stoppage.

#### USING TIME WISELY

*Eric's Director authorized issuing stop work orders for the agency and, as you will recall, Eric had gotten his approval to provide Dr. Smith with an oral order.*

*Dr. Smith had accepted the oral stop work order without question, but had requested that Eric provide him with a written notice the next day. Joanne had sent it Express Mail, with a receipt required for delivery.*

*Dr. Murphy had told Joanne that he could have the written change to the statement of work in her hands in two work days. She had set up a meeting with Dr. Smith for the day after.*

*Dr. Smith had told her, "I did start the sampling procedure, but I'm only a few days into it. I'll have the cost figures when we meet on Thursday. I hope we can settle this quickly. Our performance time was based on my working full time on this study and I won't be able to devote full time to it next semester. If I can't do anything for more than three weeks, you'll have to add about three days for every day of delay after three weeks," he had told her. "But I really don't want to deal with this contract and a full classroom schedule as well."*

*Eric assured him that the Government too was interested in settling this quickly. The written stop work order Joanne had issued under Eric's signature had estimated that the work would be authorized to resume "within three week's of issuance." Eric was hopeful that they could sign off on a supplemental agreement that incorporated the statement of work change in two weeks. He did not anticipate a pricing problem in finalizing the change.*

### Discuss the Order With the Contractor

FAR 12.503(d)

You must fully inform the contractor of all the circumstances and considerations that led up to the issuance of the stop work order and to identify other factors that you may have overlooked. In the interests of minimizing disruption and promoting better planning for both parties, your goal should be to keep the lines of communication open. At a minimum, include in your discussions those topics listed in Exhibit 5-6.

### Topics for Stop Work Order Discussions With Contractors

1. Fully discuss the reasons for issuing the stop work order.
2. Explain the factors considered when reaching any specified time frame and the degree to which it is certain or subject to revision.
3. Explore the appropriateness and the impact of possible time frames for the work stoppage.
4. Obtain an estimate of labor and other costs of the expected work stoppage.
5. Discuss any alternate actions to continuing the stop work order. Ask the contractor for suggestions.
6. Investigate the contractor's amenability to bilaterally extending the stop work order beyond a 90-day interval in the event that becomes necessary.
7. Discuss the **type** of costs that the Government can agree to cover and those for which it is unable to provide compensation.

#### *Exhibit 5-6*

Do not commit to covering any specific costs for delay and disruption unless the contractor provides full written justification or unless such justification is very obvious.

#### **Determine the Need to Terminate the Contract**

When the contractor has stopped work, a decision may eventually be made to never resume it. Then, you would terminate the contract. Any decision to terminate should be made within the period of the stop work order. Since reasonable costs resulting from the stop work order must be allowed in arriving at any settlement, termination should be made, and the contractor informed promptly.

### A STALEMATE

*All had not gone well during the negotiations on the small research contract with Dr. Smith's organization. Dr. Murphy had not considered the additional cost that Dr. Smith and his colleagues had incurred in preparatory work prior to sampling. The overall decrease in contract cost as a result of the change would be far less than Dr. Murphy had originally projected and Dr. Murphy had at first said that the preparatory costs were unreasonable. The first negotiation meeting had ended with no agreement.*

*Eric and Joanne, however, had been convinced of the reasonableness and allowability of the costs that Dr. Smith had presented. Joanne suspected that Dr. Smith was aghast at the cost of his mistake and that his objections were more emotional than rational.*

*They both met with him, but he had not budged in his convictions. He wanted to prepare a more detailed Government estimate to better illustrate his point.*

#### **Maintain Daily Contacts**

Daily communications may seem excessive, but it serves as a reminder that stop work situations are highly undesirable and should be discontinued as quickly as possible. At a minimum, contact the parties responsible for the stoppage. Consider including the offices most affected by the decision because requiring organizations can greatly influence the cancellation of the order. Remember that daily contacts are imperative when costs associated with the work stoppage are occurring daily.

#### **Cancel the Order**

The contractor will resume work on the expiration date (or any extension) of the stop work order unless you cancel the order or the contract is terminated. If you have determined the stop work order should be cancelled, contact the contractor orally first, advising the contractor when to resume work. You must follow up with written confirmation. Contractors are not required to resume work until written notice has been received.

If you take no official action when the stop work order expires, the contractor will again be free to resume work and the Government will be liable for all costs it incurs in contract performance.

**Adjust the Contract**      You will need to adjust the contract when the contractor resumes work, if the work stoppage results in an increase in the:

- Time or
- Cost

of any part of contract performance.

### GETTING OUT OF THE CORNER

*“We’re in a corner on this one,” Eric said to Joanne. “Dr. Smith will not be as easy to deal with if we make him complete performance next semester, and it wouldn’t make sense for the research company to switch project officers. A new one would have to become familiar with the project work to date.”*

*“And that would waste time and, as a result, money,” Joanne agreed.*

*They decided to go ahead and issue a change order based on Dr. Murphy’s change to the statement of work, using the changes clause in the contract as authority. The ceiling amount for the change was a decrease in contract price based on the costs for an equitable adjustment for the deleted work not yet accomplished. They used the estimate Dr. Smith had provided. The modification that Eric signed also changed the calendar date for completion by adding the number of days of the work stoppage, a total of 18 calendar days, to the former due date.*

*They used the stop work order clause to order the resumption of work and the extension of time. There would only be five more weeks of performance time before contract completion. Dr. Murphy had said that sampling and analysis work deleted due to the change would be less than a week’s work, and some of the sampling had already been done. The disruption would result in time lost. Eric had decided to call the time value of the deleted work versus the time effect of the disruption a “wash.” Dr. Smith had not indicated anything to the contrary, and Dr. Murphy was not overly concerned about time.*

*Eric’s goal was to get the contract up and running again. Further delay while they haggled over the price for the change would accomplish nothing. Dr. Murphy had said that cancellation or termination was out of the question. The agency badly needed the data for its long-term planning.*

The next section of this chapter deals with excusable delays and covers the actions you need to take to modify the contract based the effects of a stop work order or other changed conditions.

## 5.4 Delays

Over the years, the risks associated with delays have generally been allocated as follows:

- The contractor bears both schedule and cost responsibility for delays that it causes or that are within its control.
- For delays beyond the contractor's control and not caused by the Government, the contractor is entitled to extension of the delivery schedule proportionate to the excusable delay, but bears the risk of increased costs resulting from the delay.
- The Government is responsible for both the schedule and the cost effect of delays which it causes, which are under its control, or for which it has agreed to compensate the contractor.

This section will discuss the latter two types of delays. Delays caused by the contractor or within the contractor's control will be discussed in the next chapter of this course.

### ALL DELAYS ARE NOT THE SAME

*“Another day, another dollar,’ certainly can’t describe my job. Something new and unique seems to happen every day and I like it that way,” thought Joanne on her way to work. “Well, maybe an occasional slack day would be appreciated,” she mused.*

*This was not to be a slack day for Joanne, however. Fifteen minutes after she had poured herself a cup of coffee, looked at her “to-do” list, and scanned the mail, Eric called her into his office.*

*“Joanne, remember that piece of test equipment we had built for use on the Beckenridge contract? Well, it finally arrived. Our senior engineer, Bill Gress, just called. He says it won’t work. Mark Finnigan has already been on the phone with the manufacturer and they’re sending a technician to Beckenridge to find out what’s wrong. Apparently, some damage occurred during shipment. Luckily Bill was doing the final testing before we accepted it or we’d be stuck with the cost of repair or at least fighting with the freight handler. To make matters worse, this will probably delay the acceptance testing of the first 50 production units of Widget VI. We really won’t know the whole story until the technician arrives from Selma, Alabama.”*

*Less than an hour later Joanne received a call from Jake Richards who was at the Farthington Industries plant inspecting their first production delivery of Widget VIs. Joanne later told Eric that Jake’s tone of voice reminded her of a lion in one of those African nature documentaries. “Joanne,” Jake roared, “these idiots substituted materials in the first production lot. Seems the supplier would only deliver the prescribed material on a COD basis. They didn’t have enough money in any of their accounts to cover the cost, so they substituted a similar material. The problem is that the material has a low endurance threshold and affects the performance life of the Widget. Please talk to Eric about this and have him get back to me as soon as possible.”*

*Two examples of contracting delays. Joanne’s job will be to document the circumstances that caused the delay and recommend actions to Eric as the contracting officer. Eric must determine if the contractor and/or Government had any involvement in the delay. This will be key to corrective remedies available.*

#### **Obtain and Verify Evidence of a Delay**

Problems that involve delays are serious. One of the goals of Government contracting is to acquire what is needed, when it is needed. Therefore, every contract includes a completion time frame or delivery date. Their importance varies from contract to contract. There are basically two types of performance criteria—those for end products (including finished services) and those for a level of effort.

1. **End Products.** Some contracts call for a measurable amount of work, such as preparation of training course materials to be delivered in camera ready form, or the manufacturing of a product as required by applicable specifications. The “end product” type of performance requirement states a specific time for delivery or completion.
2. **Level of effort.** In other contracts, the purchase is for the contractor to apply a stated level of effort toward a specified objective or kind of work during a specified period. In these contracts, the expiration date of the contract marks the end of the contractor’s obligation. When that date has passed, the contractor is not obligated to provide additional service effort, even if the objective was not met during the life of the contract.

So, determining which type of performance criteria is contained in the contract is key in verifying evidence of a delay. The program planning background surrounding the date helps to determine how important the date is. Armed with this information, you can more intelligently and usefully apply the necessary effort to assure timely completion of work or resolve any delay problems.

A delay occurs when:

- The delivery period has passed and what should have been done was not done, or
- There is an anticipated delay in delivery or performance and the contractor has advised that it will not perform the contract when the time for performance arrives.

Failure to meet the scheduled delivery or completion date usually originates with a problem that occurred much earlier in the course of performing the contract work. Take action as soon as you identify a potential delay. Delay in meeting the delivery schedule could endanger an entire Government program or mission and may result in:

- Increased cost
- Reshuffling of program effort
- Disruption of personnel
- Decreased efficiency
- Inability to proceed with the mission or program
- Public embarrassment for the agency

## PROCEDURES FOR PROBLEM RESOLUTION IN CONTRACT ADMINISTRATION

Careful planning will not avoid all delays. Verify any evidence of a performance delay that results from your monitoring methods or from a contractor's notification. Check with all parties to:

- Identify the existence of an actual or anticipated delay;
- Determine if the delay will impact delivery or completion;
- Decide who is at fault;
- Determine the duration of the delay;
- Select the appropriate action to resolve the problem.

Contractors are quick to provide notice when the delay is not their fault because they are entitled to an extensions of time, additional money or both.

When the delay is their fault, you may not discover it until the date for completion has come. Careful monitoring of the contract helps identify any actual or anticipated delays, including those caused by the contractor.

### Identify the Type of Delay

The type of delay is based on who is at fault:

- The Government
- The contractor
- Both the Government and the contractor
- Neither party—no one is to blame

Delays invariably cause damage, either in the form of lost revenue or in the form of extra expenses to the Government or the contractor.

There are essentially three classifications for contract performance delays—excusable, nonexcusable and co-mingled..

#### Excusable delays

1. Excusable delays. Delays that are beyond the control and without the fault or negligence of the contractor or subcontractor. When you can establish that the Government is at fault or when no one is to blame, the contractor may be "**excused**" from meeting the completion date or paying the Government for costs incurred for the delay.

Examples of delays when neither the Government nor the contractor is responsible are:

- Acts of God
- Unusually severe weather
- Strikes and labor disputes
- Public enemy causes
- Causes beyond the control of the subcontractors and suppliers

Examples of actions that cause Government delays include instances when authorized Government officials:

- Direct the contractor to stop work
- Make a change to the contract
- Perform other acts within the Government's sovereign capacity

The Government may also cause delays by failing to perform an act that hinders contract performance. The Government's failure to act can generally be attributed to:

- Oversight
- Conditions beyond its control

Typical Government failures you may encounter include specific failures to:

- Make the site available when required
- Process approvals
- Obtain funding
- Issue changes in a timely manner
- Respond to contractor's requests
- Furnish Government property when required
- Inspect or accept when required

You use one of three standard FAR clauses to justify a delay as excusable. These are:

1. **Default clauses.** The standard FAR default clauses generally excuse the contractor from liability and cite circumstances that may be an excusable delay. Unless the contractor can demonstrate the delay was one that is excusable under the default clause in the contract, it is responsible for all costs.

2. **Changes clauses.** These clauses provide relief to the contractor when the contracting officer makes a written change to the contract. The change may also be covered by another contract clause, i.e., Stop Work Order, Government Property, and so forth.
3. **Disputes clauses.** These clauses provide the contracting parties with a mechanism for handling contract adjustments when:
  - The delay is excusable;
  - An unwritten change was made to the contract and the:
    - Contractor was forced to stop work by either the action or inaction of the Government, or
    - Contractor made a change based on the direction of an unauthorized Government representative;
  - The two parties cannot mutually agree on any adjustment to the contract.

Each of these clauses establishes the responsibilities and rights of the Government and contractor.

Nonexcusable Delays

FAR 22.101-2

2. Nonexcusable Delays. These are delays the Government has not authorized and for which the contractor is totally responsible. The contractor is not excused from meeting the delivery requirements at the price agreed upon when it cannot justify the delay as being beyond its control. The contractor is responsible for all costs incurred to make up for “lost time” resulting from a nonexcusable delay.

Co-mingled delays

3. Co-mingled delays. Unfortunately, not all delays can be justified as either an excusable or nonexcusable delay. Concurrent or co-mingled delays do happen. A concurrent delay occurs when two or more delays happen at the same time. Co-mingled delays are when both parties may be at fault for one or more delays.

When delay is co-mingled, but the results of delay factors can be segregated and measured separately, you can assess the contractor for the amount of delay that it causes. In other words, in

extending the time for the total delay, you can deduct that portion of the delay that was contractor-caused.

When the results are not separately measurable, try to determine who is primarily responsible. You may be able to tell which party's delay caused the greatest impact on delivery or performance, for instance. Then, you may be able to use this as a basis for determining whether any modification extending performance time is fair. However, do not assess the contractor any damages at all, either liquidated or actual, when there is co-mingled delay. Boards and courts will overturn such assessments.

#### Reasonableness of Delay

Frequently total delay adjustment is divided into reasonable and unreasonable portions with an adjustment granted for only that portion of the delay that is considered reasonable. For example, if work was suspended for 30 days while the Government made a decision and a period of five days is a good decision time standard, you would consider the 25-day delay over the standard decision time unreasonable. The contractor is entitled to a time adjustment of 25 days in addition to any costs that resulted from the 25-day delay.

#### FAR 22.101-2(b)

Contractors may be held liable for delays that are otherwise excusable if the delay was within its own control or within the control of a subcontractor. For example, a delay caused by a strike is normally considered an excusable delay. However, it cannot be excused if the contractor (or subcontractor) could have acted to end the strike by:

- Filing for injunctive relief with the National Labor Relations Board;
- Using other Government procedures;
- Using private boards or organizations to settle disputes.

Use Exhibit 5-7, *Is This Delay Excusable?* as a quick reference tool to help you identify the type of delay that has occurred.

### Is This Delay Excusable?

Note: If you can answer “yes” to any of these questions, the delay was probably excusable, but before you make a final decision you must make sure that the contractor had no control over the circumstances that caused the delay

	Yes	N/A	No
<p>1. If the delay was caused by a labor strike, did the contractor</p> <ul style="list-style-type: none"> <li>• File a charge with the National Labor Relations Board to permit the Board to seek injunctive relief in court, or</li> <li>• Use other available Government procedures or private boards or organizations in an attempt to settle disputes that caused the strike?</li> </ul>			
<p>2. Was the delay caused by Government interference or disruption? Examples of Government interference or disruption include:</p> <ul style="list-style-type: none"> <li>• Delay in making payments that were rightfully due</li> <li>• Late delivery of GFP</li> <li>• Failure to reply to contractor’s request for clarification</li> <li>• Failure to disclose all facts applicable to performance</li> <li>• Site conditions that are different than portrayed</li> <li>• Scarcity of supplies due to Defense Production Act priorities over commercial or nonrated orders</li> <li>• Delay in issuing a required notice to proceed</li> <li>• Delay in issuing changes</li> <li>• Delay in performance by other Government contractors</li> <li>• Delay caused by protesting the award of the contract by an interested party</li> <li>• Delay in making the site available</li> <li>• Delay in providing funding</li> <li>• Delay in inspection</li> <li>• Delay due to defective or ambiguous specifications</li> <li>• Delay in granting approvals</li> </ul>			

*Exhibit 5-7 (continued on next page)*

<b>Is This Delay Excusable? (continued)</b>			
	Yes	N/A	No
<p>3. If the delay was caused by a subcontractor or supplier, is the delay excusable to the subcontractor at each tier?</p> <p>You would answer “No” to this question if:</p> <ul style="list-style-type: none"> <li>• The delay was caused by a dispute between the sub and prime, or</li> <li>• The subcontracted products or services were available from other sources in time for the prime to complete performance.</li> </ul>			
<p>4. Was the delay caused by any other occurrences specifically mentioned in the Default clause as being generally excusable?</p> <p>These are:</p> <ul style="list-style-type: none"> <li>• Other acts of God or the public enemy</li> <li>• Other acts of the Government in either its sovereign or contractual capacity</li> <li>• Fires</li> <li>• Floods</li> <li>• Epidemics</li> <li>• Quarantine restrictions</li> <li>• Freight embargoes</li> <li>• Unusually severe weather</li> </ul>			
<p>5. Was the delay caused by other circumstances not previously mentioned which were:</p> <ul style="list-style-type: none"> <li>• Not caused by the contractor, and</li> <li>• Over which the contractor had no control?</li> </ul>			

*Exhibit 5-7 (continued)*

### THE PLOT THICKENS

*Joanne went through the mechanics of considering the questions that Eric had given her many months ago as a job aid. She was documenting the circumstances to base a determination on the type of delay that resulted from the material substitution at Farthington Industries. It was the same list of questions you just reviewed in Exhibit 5-7. There was just no other conclusion to reach: Not only was Farthington at fault for the delay, but was probably guilty of criminal behavior as well.*

*“Joanne, please mark your calendar,” Eric said when he stopped in her office on the way back to his own after briefing the Director. “Tomorrow morning at 9:15 you, Jake, and I have a meeting with some people from the Inspector General’s office. Farthington Industries is in deep trouble.”*

#### **Prepare a Finding of Facts on the Delay**

After you have addressed excusability issues, your next step is to document the Government’s position in a finding of facts. Present clear and concise evidence for your conclusions. Include:

- A list of the persons with factual knowledge of the delay;
- Relevant statements or evidence;
- A history of contract performance, indicating when work began under the contract;
- Progress made to date;
- Reasons for both excusable and/or nonexcusable parts of the delay;
- The contractor’s remaining obligations under the contract;
- The contractor’s expectations regarding contract completion.

Include this memorandum in the official contract file for future reconstruction of events.

**Develop the  
Government's  
Position**

Developing the Government's position on the delay is basically:

- Deciding if the delay was excusable, and
- Calculating the amount of any time and cost adjustments, if it is.

Unless it is obvious, you can require the contractor to:

- Substantiate the evidence of the delay;
- Substantiate the costs associated with the delay;
- Demonstrate that the delay was unreasonable;
- Demonstrate that the delay was void of any concurrent or co-mingled delays.

A delay is excusable when the contractor can prove:

- An event that caused a delay has occurred;
- The event was not its fault;
- The event was the type for which an excuse can be granted;
- The overall progress of the work was delayed;
- The event, in fact, caused the delay of the work;
- The event was unforeseeable;
- It could not have controlled the effects of an otherwise excusable delay;
- The requested additional time is appropriate to compensate for lost time.

## PROCEDURES FOR PROBLEM RESOLUTION IN CONTRACT ADMINISTRATION

If you have determined the delay excusable, you must consider what impact the delay will have on the requisitioning activity. Always consult the requisitioning activity before preparing the Government's position. The requisitioning activity can assist you in:

1. Estimating a reasonable additional performance time;
2. Identifying and analyzing any potential alternatives to a revised delivery schedule;
3. Establishing any recoverable damages due the contractor.

### Additional Performance Time

The delivery requirement, as stated in the contract, is probably based on a delivery that reflects one of the following:

- A Market Standard. The delivery or performance reflects standard market or industry practices. While the requisitioner needs the requirement, timeliness is not critical to its mission.
- Critical Need. The delivery or performance reflects an exact date or time on which the requisitioner is dependent for the satisfaction of its mission or program. A delay would seriously jeopardize it.
- Semi-Critical Need. The completion date cited in the contract is based on a bona fide need of the requisitioner, but would only cause inconvenience if the delivery date were missed. However, at some point, the delivery requirement would become critical.

Before meeting with the requisitioner, review the contract clauses that pertain to delay and any background information used to select those clauses. The acquisition plan, purchase request and any determinations and findings are good sources for background information. This information will enable you to temper any unrealistic reactions of the requisitioner. Also, by consulting with the requisitioner, you will be aware of their current needs. What was not critical in the past may be critical now.

The contractor's expectations for delay impact on final delivery or performance may be nonexistent or minimal. However, you also need to investigate if any portion of the contractor's continuing performance has a potential negative impact on the requisitioner.

After you establish the impact and current criticality of the requirement, you can make a better choice among possible resolutions.

Allowing a time extension commensurate with the delay is the appropriate action when the delay was excusable. For example, when flood conditions force a plant to close for five days, the completion date can be extended for five days, plus any additional time it actually took to clean up the plant for continued operations.

You may allow a time extension only when the requisitioner has determined the requirement is not critical.

When the requirement is critically needed, you must explore other alternatives. These alternatives would result in a change to the contract. Examples include:

- Use a different method of shipment;
- Delete a low priority task;
- Change the place for inspection;
- Allow a material substitution;
- Allow other specification changes;
- Accelerate performance.

The requisitioning activity needs to approve any alternative that would result in a change to their requirement. The requisitioning activity and technical advisors are great sources for:

- Identifying alternatives you have not already considered;
- Determining the feasibility for each alternative.

There may be technical reasons why a seemingly insignificant change to the requirement would be unacceptable.

## PROCEDURES FOR PROBLEM RESOLUTION IN CONTRACT ADMINISTRATION

Acceleration of contract performance includes adhering to the original delivery date when the contractor is entitled to a time extension for delay. So, acceleration can occur from your inaction on delay issues. If you accelerate the contract performance, the contractor may have to:

- Hire more employees,
- Add additional shifts,
- Pay overtime, or
- Purchase more expensive products from other sources

to meet contract delivery. The contractor's rights in these circumstances are derived from the Changes clause:

“(b) If any such change causes an increase or **decrease in the** cost of, or **the time required** for, performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.”

So, by not granting a timely extension, you, in effect, “change” the contract by shortening the time allowed for delivery under its terms. As with other changes it initiates, the Government is liable to the contractor for both time and cost effects of accelerating performance.

Therefore, it is important for you to resolve delay issues promptly after determining that the delay is excusable. If you do not recognize these delays by extending the contract completion date accordingly, your action may be treated as a “constructive change” by the contractor. When a contract modification is not issued, the contractor must prove:

- An excusable delay existed;
- The contracting officer (or authorized representative) had knowledge of the delay;
- Action by the Government indicates delivery was accelerated;
- It actually accelerated performance;
- It incurred extra costs as a direct result of the acceleration;
- It notified the Government of the existence of an excusable delay and a time extension was not granted.

Accelerated delivery can occur when an authorized Government official does any one of the following:

- Makes a request to accelerate delivery;
- Fails to grant a time extension when one should have been granted;
- Threatens to terminate for default;
- Puts pressure on the contractor to complete the schedule.

An important thing to remember is that there is no acceleration unless your action or inaction causes the contractor to perform the work at a faster rate. Therefore, it is crucial to determine if the contractor was on or ahead of schedule when acceleration began.

The contractor has the burden of proving the length of a proper time adjustment. So, it should be able to explain to you how it could have met the schedule had it not been accelerated. This serves as the benchmark for measuring any delay adjustment.

If, after analyzing the contractor's progress at the time of acceleration, you determine it was behind schedule, deduct the time it lagged behind schedule from the adjustment it would otherwise be due for the acceleration.

#### Incurring Costs

The Government may be required to pay for any additional costs to the contractor when it was a party to the delay or other change.

As a general rule, use standard principles of cost and price analysis to arrive at the Government position in regard to delay costs. However, recognize that your job in developing the Government's position for delay costs is often more difficult if actual cost data is not available and costs are difficult to prove. The contractor can use subjective measures to estimate its costs when presenting requests for additional money.

#### Total Cost Cautions

Be wary of an approach that presents actual cost compared with originally expected cost. There are two dangers in this type of approach:

- The total costs can include not only the costs properly attributable to the delay, but also those that may have been incurred through the contractor's mismanagement.
- The total originally expected costs can be based on unrealistically low, that is, "buy-in," bids.

## PROCEDURES FOR PROBLEM RESOLUTION IN CONTRACT ADMINISTRATION

### Proof of Entitlement

The contractor's burden of proof is two-fold:

1. It must present evidence that it had no control over the situation that caused the delay and increased its costs or that the Government was directly responsible for the delay. If it is unable to prove its entitlement to costs it claims, you may not process payment for them.
2. It must be able to show that the costs it is claiming as a result of the delay are reasonable. The contractor is not expected to know exact costs for delays that it was not anticipating and over which it had no control. But it must present a logical basis for the costs it is claiming so that you can conclude that they are a reasonable estimate of actual damages.

### Recoverable Costs

To the extent that the contractor can document them, verifiable expenses that are generally recoverable include:

- Idle time of facilities or equipment. Idleness of rental equipment is not normally an allowable expense since the equipment can be returned to the rental agency. However, if the contractor can show that it is less expensive to continue renting, you should allow these costs.
- Increase in material prices. The contractor should support these increases with supplier invoices or letters substantiating the price increases.
- Increase in wages. You can normally verify these costs by consulting local labor union officials, by interviewing contractor personnel, or by examining payroll records in an audit.
- Loss of efficiency. This is the most difficult expense to document, but it is also one of the most common delay and disruption costs. When the contractor has been forced to work out of sequence, that is, in a poorly-organized, inefficient manner instead of in the originally-scheduled sequence of work, learning curve efficiencies will be lost.
- Unusually severe weather conditions. To be allowable, these conditions could not have had an effect on performance were it not for the change in time of performance due to the delay. You can verify conditions of unusually adverse weather by U.S. Weather

Service reports for the affected period. Compare these reports with those of the original period of performance to verify the degree or extent of unusual weather conditions that could have contributed to delays. The contractor has the burden of proving through documentation it provides to you, not only that the weather was unusually severe, but also that it had an actual effect on its performance.

- Insurance and bond coverage. If the contractor extended these coverages for the period of the delay and would not have otherwise done so, it should provide you with a notice from the bonding or insurance companies for the amount of the increased premium that was the result of the extension.
- Protection or storage of materials. These must be actual additional costs. Examples are rehandling and transportation charges that would not have been necessary if the work had proceeded without interruption.
- Additional make-ready costs. If a production run was interrupted, there will be additional costs for restarting the production line.
- Demobilizing and mobilizing the work force. When the contractor laid off personnel during the delay, there will be administrative rehiring costs. If the delay was long and the contractor is unable to rehire part of the original work force, recruitment advertising and employment fees to recruitment agencies may be included within these costs.
- Interest. Interest on funds necessary to finance the extended performance time caused by the delay is recoverable.
- Unabsorbed overhead expenses. Unabsorbed overhead, when it applies, can include both direct labor personnel underutilized because of the delay and general office overhead expenses directly attributable to or chargeable against the contract. However, before you determine that these expenses are appropriate, make sure that the prerequisites shown in Exhibit 5-8, Prerequisites for Payment of Unabsorbed Overhead, are met.

### **Prerequisites for Payment of Unabsorbed Overhead**

1. The contractor must prove that it attempted to mitigate the damages for the delay, that is, sought other work to offset this overhead cost and spread it out to other jobs.
2. The contractor's overhead must be unabsorbed or increased over what it would have been during a normal period that did not include such delays.
3. The contractor must be agreeable to an audit of its books and records in order to verify the unabsorbed overhead amount. Note that you do not necessarily have to conduct an actual audit. You need only obtain the contractor's agreement to one.

#### *Exhibit 5-8*

#### **Discuss the Government's Position With the Contractor**

Discuss your findings with the contractor. These discussions should include:

- The Government's analysis of the evidence concerning the background and reasons for the delay.
- The Government's position reached as a result of this analysis.
- The contractor's position regarding the delay, including all the supporting facts and documentation for it.

#### **Prepare Final Decision**

When you conclude your discussions, prepare a written decision of your intended action. The notification should include:

- The Government's determination on the nature of the delay;
- Acceptable reasons for believing the delay is excusable and a determination concerning any non-excusable part of the delay;
- Recoverable damages (if any);
- A revised delivery schedule;
- The contractor's appeal rights.

**5.5 Revolving Contractor Performance Problems**

You should assist the contractor in identifying and solving performance problems that would not be considered excuseable. The earlier problems are identified the simpler the solution. You should attempt to reach informal resolution with all parties prior to invoking a formal remedy.

**5.6 Document the file**

Document any informal agreement on corrective steps to be taken to bring performance back into compliance through either:

- Memorandum of concern requesting a written plan from the contractor for correcting performance:
  - Statement of the problem
  - Suggested corrective steps
  - Response time
  - Place for contractor to sign acknowledgement of receipt
  
- Contract modification

**5.7 Invoke a formal remedy**

If the contractor is unwilling or unable to resolve the problem with its performance, you will need to invoke a formal contractual remedy. (See Chapter 7)

**5.8 Inform Requiring Activity and Other Interested Parties**

Advise the requisitioning activity of the final decision. They will need to be prepared to make adjustments on other program actions that may be affected by the schedule change. You may need the requisitioning activity's support if the contractor wishes to appeal the final decision.

**NOTES**

## CHAPTER 6

# CONTRACT MODIFICATIONS / OPTIONS

### 200 MORE PALLETS

*The Angor Wat Enterprises contract for pallets for the agency's warehouse operations had gained momentum. They had almost made up for lost time. Eric followed progress in the chart room and occasionally asked Joanne if there were any problems. Other than providing Roger Harrison, the plant manager, with periodic reports, he had not given it any personal attention for months. Then this morning Roger Harrison had called him about exercising an option for additional pallets on the contract. He wanted an additional 200.*

*Eric had given Joanne a list of things to check in regard to the option in the Angor Wat contract and told her to get back with him before she did anything. She hadn't exercised an option before.*

*She had asked to see him at two o'clock—a few minutes from now. He took another document from his "in" basket to read while he waited for her.*

*He smiled as he read the correspondence from Bollingbrook. The new managers really wanted to distance themselves from the previous owners. The letter explained that the company had changed its name and was requesting that the new name be reflected in the contract documents. The contract was still not closed out. GAO had not rendered a decision on liquidated damages remission. Eric figured they would hear within the next week or two.*

*He looked through the attachments to the letter. The only thing that seemed to be missing was a list of other open Government contracts it currently had. He was writing a note to Joanne to get such a list when she arrived at his door.*

*"The contract line item for the Angor Wat option is expressed as a percentage of the basic line item and it works out to 200, but Mr. Harrison wants the first 100 before the second 100," she told him. "The basic contract calls for deliveries of not less than 200 at a time," she added.*

*"Oh, great!" Eric exclaimed. "Well, let's see if he really needs them that way."*

*"I just asked him why," she said. "He told me that the third warehouse, where these option items would be going, is scheduled to be overloaded for several months around the time of delivery with three large overseas shipment requirements. He wants them to hold back 100 until he can get the first 100 on line for the second conveyor system."*

*"I know about the overseas requirement," Eric told her. "It is going to be a major workload. I guess we'll just have to take his word about not having enough room. We'll see what we can do. Maybe we can still work something out."*

*"But you said we couldn't vary the terms of the option, didn't you?" Joanne asked in astonishment.*

*"Oh, we won't vary the basic terms!" Eric said with a grin. "We'll just do a little old fashioned horse trading."*

## COURSE LEARNING OBJECTIVES

At the end of this course, you will be able to:

**Overall:** Develop skill in modifying contracts through administrative modifications, change orders, supplemental agreements, or exercising options.

- Individual:**
- 6.1.1 Determine whether to consider modifications proposed by contractors.
  - 6.1.2 Determine that a Government request for modification is sufficient.
  - 6.1.3 Determine whether to meet the requirement through a new procurement or a modification.
  - 6.1.4 Estimate the impact of the proposed change on price, delivery, and performance.
  - 6.1.5 Determine whether any consideration is appropriate for the modification.
  - 6.1.6 Document a decision on modifying the contract.
  - 6.1.7 Determine the type of contract modification.
  - 6.1.8 Implement contract modifications for supplemental agreements.
  - 6.1.9 Implement contract modifications for unilateral changes.
  - 6.1.10 Implement contract modifications for novation agreements.
  - 6.1.11 Implement contract modifications for name changes.
  - 6.1.12 Implement contract modifications for other administrative changes.
  - 6.2.1 Identify available options.
  - 6.2.2 Consult requiring activities to determine the need for additional supplies or services covered by the option.
  - 6.2.3 Determine whether a synopsis is required for the option.
  - 6.2.4 Determine whether to exercise the option.
  - 6.2.5 Provide written notice and exercise the option.
  - 6.2.6 Prepare a written determination for the contract file.

# INTRODUCTION TO CONTRACT MODIFICATIONS / OPTIONS

**Definition of a  
Contract Modification**

A contract modification means any written change in the terms of a contract.

**Definition of an  
Option**

An option is part of the original contract and is exercised through a contract modification. Before it is exercised, it is a unilateral right in a contract by which the Government may elect to purchase additional supplies or services called for by the contract, or may elect to extend the term of the contract.

**Policy on Contract  
Modifications**

Only contracting officers acting within the scope of their authority may legally execute contract modifications.

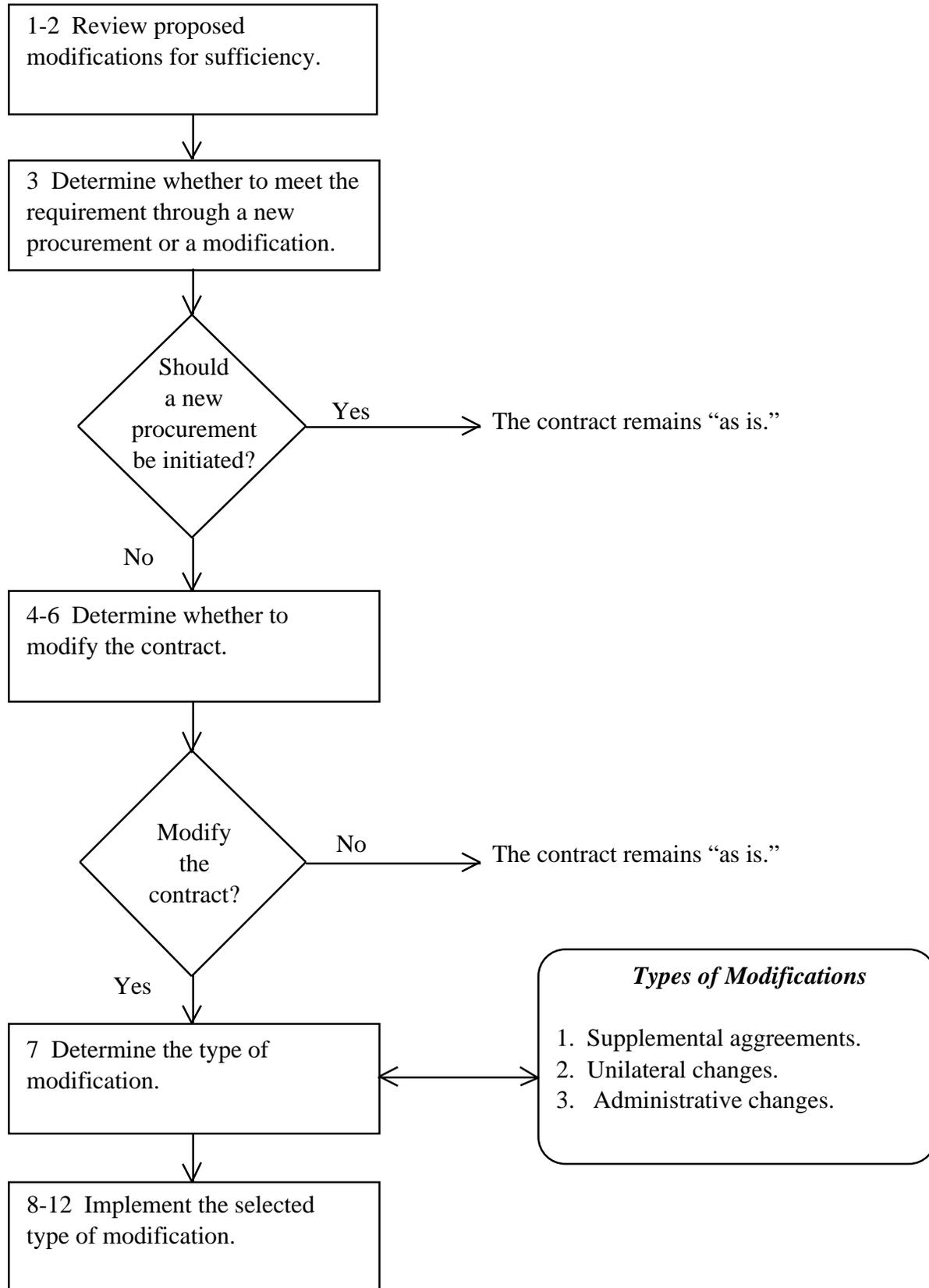
FAR 43.102
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It is the Government's policy that all contract modifications be priced, including modifications that contracting officers may issue unilaterally, UNLESS delaying the modification to include pricing will adversely affect the Government's interest.

**Steps in Performance**

The general steps in modifying contracts are charted on the next page. Following the flowchart, each step is discussed in turn. Then, in a subsequent section, the specific steps in exercising an option and documenting it in a contract modification is charted in the beginning of that section and then discussed in detail.

## STEPS IN CONTRACT MODIFICATION



## 6.1 Modifications

### Consider Contractor Requests for Modifications

The contractor may request a contract modification when the reason for the change was:

<b>Beyond Contractor's Control</b>	<b>Due to Action by the Contractor</b>	<b>Required by the Contract</b>
<ul style="list-style-type: none"> <li>• Excusable delay</li> <li>• Stop work order issued</li> <li>• Constructive change</li> <li>• Settlement for contract terminated for convenience</li> </ul>	<ul style="list-style-type: none"> <li>• Name changed</li> <li>• Value engineering proposal</li> <li>• Consideration offered for nonexcusable delay</li> <li>• Novation agreements</li> </ul>	<ul style="list-style-type: none"> <li>• Economic price adjustment</li> <li>• Price redeterminations</li> <li>• DOL wage rate increases when continuing services by exercising an option</li> </ul>

The contractor is required to provide all necessary documentation when submitting these requests. The documentation varies with the reason for the modification. The contractor must provide sufficient evidence to support any request for a change in delivery or performance. Contractors may attempt to make up losses they would have incurred had there been no change. Contractors may also see the opportunity to increase their profit margin. Carefully evaluate every request for a modification.

You must be satisfied the contractor has made its case for the change.

## CONTRACT MODIFICATIONS / OPTIONS

### Documentation

There is no specific guideline for documentation requirements except when the change affects the legal status of a company. A contractor submitting a request for either a novation agreement or name change must submit, at a minimum:

1. Three signed copies of the agreement.
2. A list of all affected contracts and purchase orders remaining unsettled between the transferor and Government showing:
  - Contract number and type;
  - Name and address of the contracting office;
  - Total dollar value as amended\*;
  - Remaining unpaid balance\*.

\*Only if this data is essential since the amounts are likely to change during the time it takes to process the request.

FAR 43.106

3. The opinion of legal counsel for the transferor and transferee stating that the change was properly effected under applicable law and the effective date of transfer.

### Obtain Guidance from the Requiring Activities

Novation agreements require additional documentation to support the request for a modification. Your agency's counsel must determine the adequacy of this additional documentation.

Many requests from the contractor for a contract modification involve the technical requirements of the contract. Cautiously examine changes which indicate the performance has changed, but not the function of the end item. In a firm-fixed-price contract, the contractor is generally free to use any method or manner of performance to provide the end item or service. As long as the end item meets the needs of the Government, the contractor is free to choose any method or manner of performance.

Determining if the Government will be harmed may require you to involve the requiring activity and any technical advisors involved in the project. Requiring activities are the best source for determining:

- Impact of any delivery delays on the mission;
- Value of proposed considerations other than price;
- Acceptability of a value engineering proposal;
- Acceptability of substitute materials.

Understand that requiring activities may not be amenable to any change to the original terms of the contract and may have justification for their negative reaction. Consider their point of view carefully. You are the middle person between the contractor and the user. You may want to ask the contractor to provide a briefing or further documentation to support their request for the change.

#### Make the Determination

After you have all the documentation from the contractor, decide if a modification to the contract is necessary. Do not approve the modification when:

- The requirement is already covered by the contract;
- Technical changes cannot be supported to the requiring activity's satisfaction;
- Changes to nontechnical business terms and conditions are unacceptable;
- Additional funds are not available, when appropriate.

Funding is always a consideration for approving a modification. Even when the contractor is entitled to an equitable price adjustment, the modification cannot be just summarily approved and issued. If the funds are not available, the contract may have to be otherwise adjusted so that the overall costs does not change. Decreasing the total quantity under the contract is one means of otherwise adjusting the contract.

**Consider Government Requests for Modifications**

At any time after award, the Government may have to make changes to the requirements of the contract. You will need to examine whether any Government proposed change is sufficient for processing. At a minimum, the request should:

1. Be clear and understandable as to what the change encompasses.
2. Not be covered currently by the contract.
3. Be agreeable with all appropriate Government officials.
4. Contain adequate documentation to support the need for the change.
5. Detail the contractor’s position on the proposed change’s impact on:
  - quality
  - quantity
  - completion date
  - price

**Determine If the Scope of the Contract Has Been Changed**

You must determine whether any change, initiated by either the Government or the contractor, is within the scope of the contract. Adding additional work under an existing contract permits the Government to avoid the costs associated with issuing a new procurement. There are definite limits, however, on adding such additional work. The contract may be changed under the Changes clause as follows:

<b>Supplies</b>	<b>Services</b>
<ul style="list-style-type: none"> <li>• Drawings, designs or specification when specifically manufactured for the Government</li> <li>• Method of shipment or packing</li> <li>• Place of delivery</li> </ul>	<ul style="list-style-type: none"> <li>• Description of services</li> <li>• Time of performance                             <ul style="list-style-type: none"> <li>– Hours of the day</li> <li>– Days of the week</li> </ul> </li> <li>• Place of performance</li> </ul>

Basically, changes can be made unless the nature of the requirement is altered. If the function of the end item is generally the same as originally solicited, the change falls within the scope of the contract.

Determine whether a change is within the contract's scope by making comparisons between the work covered by the change with the work required by the original contract.

Determining whether a proposed contract change is "within scope" is subjective, but these changes usually have several or all of the following characteristics listed in Exhibit 6-1, Factors Indicating "Within Scope" Changes.

### **Factors Indicating "Within Scope" Changes**

1. The function of the item or service has not changed.
2. The basic contract purpose has not changed.
3. The dollar magnitude of the change is proportionate to the price of the original contract.
4. Competitive factors of the original solicitation are the same.
5. Specification or statement of work changes are not extensive.

*Exhibit 6-1*

The questions you will need to answer are:

- Does the changed work represent what both parties reasonably contemplated at the time of award?
- Is the changed work essentially the same as was bargained for?
- Is the nature of the requirement altered by the change?
- Would this type of change normally be expected for this kind of requirement (sophisticated, complex requirements)?
- Was the specification defective, requiring extensive redesign?

CONTRACT MODIFICATIONS / OPTIONS

It may appear that any change resulting in either an increase of items or a longer period of performance would be considered outside the scope of the contract. The courts have suggested thinking in terms of major and minor variations. This helps determine whether quantity changes are within the scope of the contract. For example:

Minor	Major
<p>The Government’s design for a sophisticated machine required the use of 100 widgets. The contractor had to use 150 widgets to make the machine function properly.</p> <p>The increase of 50 units was within scope because the function of the end item did not change.</p>	<p>An existing contract covered the purchase of 100 widgets as a line item. The Government increased the total to 150.</p> <p>The increase of 50 units was not within the scope of the contract because the widgets were the end item.</p>

Generally, contractors are less concerned with changes that are beyond the scope of their own contract than they are with such changes on their competitor’s Government contract. When out-of-scope changes are made to a competitor’s contract, a contractor is likely to view it as a missed business opportunity. However, when a contractor is faced with an out-of-scope change to its own contract, it will not object on the basis that the change is not within the contract’s scope because additional compensation is clearly due.

The key is whether the modification is within the scope of the competitive basis of the basic contract. “Within scope” determinations are less judgmental when a specific contract term covers a proposed change. Obviously, competitors could anticipate the change in such circumstances.

The contractor’s competitors have the right to protest any change that would be considered outside the scope of the contract to the Comptroller General (CG). The Comptroller General describes changes that are

“within scope” as those that the competing offerors would have “reasonably anticipated” under the terms of the contract. The CG’s focus is the competitive process. At times the CG concludes that the change is new work and should have been issued as a new solicitation. In these circumstances, the CG may rule that the agency’s appropriate action is to terminate the modified portion of the contract.

In the case of the 50 extra widgets previously reviewed as an example for a minor change, competition was achieved. However, in the major change example, a competitive price was not obtained. Even if the price negotiated for the change was the same unit price as the basic contract, there is no way of knowing whether the increased quantity would have resulted in a lower unit price among competitors in the market place. Consequently, the CG would likely determine that the statutory requirement for competition was circumvented.

If you obtain full and open competition or get required approvals on a justification for not obtaining it, there is no prohibition against issuing a modification that is outside the scope of the original contract.

### **Estimate the Impact of the Change**

Before issuing a contract modification, you must determine what impact the change has on:

- Price
- Delivery
- Performance

The Government may anticipate some changes, addressing the need for them in the terms of the contract before award. For example, the Economic Price Adjustment clause addresses the volatility of prices for certain commodities by predetermining how to make an adjustment for fluctuating prices.

### **Technical Evaluation**

Obtain a technical evaluation of the proposed change when a contractor request would result in a change to basic contract requirements not anticipated before award of the basic contract. Ask the evaluators to address how the change impacts delivery and performance.

## CONTRACT MODIFICATIONS / OPTIONS

### Estimate Price Impact

Changes to basic contract requirements can be classified in three ways, according to the effect the change has on the resulting equitable adjustment. Usually a single change will embody elements of more than one type. These categories of change are:

- Additive Changes. Work added to the contract, resulting in more money to the contractor.
- Deductive Changes. Work a contractor has not yet performed deleted from the contract, resulting in a reduction of the contract price.
- Substitution Changes. Added work being substituted for deleted work, resulting in either no change in contract price or a change that is tempered by the monetary effect of the substitution involved. (Even when work of equal value is substituted, it is important to get the change in writing so that the requirement is accurately documented.)

Ask the technical evaluators if the contractor considered the effects of the change in its original pricing and technical proposal.

### Audit of Pricing Data

Examine pricing considerations in the same way you would examine them for a basic contract. If your independent Government estimate appears to be somewhat defective, use other means of comparisons, for example:

- A history for similar requirements, or
- Current market prices.

### Cost and Pricing Data

FAR 15.804-2(a)

When the amount that results from the value of the change(s) is \$100,000 or more, a contractor must submit cost and pricing data as a part of its proposal.

You may request an audit if necessary to establish the reasonableness of the proposed price.

FAR 15.804-3

You can provide an exemption from cost and pricing data for modification only when prices are:

- Based on adequate price competition;
- Based on established catalog or market prices of commercial items sold in substantial quantities to the general public; or
- Set by law or regulation.

Usually you are in a sole source position, because normally it is practical only to discuss changes to the basic requirement with a contractor who has a contract for the basic requirement. However, you could still justify a price based on adequate price competition by making favorable comparisons to other prices that were established based on adequate price competition.

FAR 15.804-4

When cost or pricing data is required, also obtain a Certificate of Current Cost or Pricing Data with the initial proposal.

Processing Delays

Evaluating a change can be extremely time-consuming. You may need to comply with legal or administrative requirements that apply to contracts for the increased dollar value of the contract as changed. Several examples follow.

EEO Clearance

FAR 22.805(a)(1)(ii)

When a change brings the contract total over \$1 million, you need to obtain an equal opportunity compliance approval. If the Department of Labor has no compliance approval on record for the contractor, there would be a delay while an approval was processed.

Wage Determinations

FAR 22.1007(b)

When a modification includes a significant amount of new work covered by the Service Contract Act and/or performed by new categories of service workers not included on wage determinations obtained for the basic contract, you are required to obtain a wage determination covering these new categories.

The regulations are not clear as to when new service work is significant, but certainly when the dollar value of work to be performed by persons within these new service categories exceed \$2,500, the threshold for applicability of the Act on a new procurement, an additional wage determination would be appropriate for a modification as well.

**Determine Whether  
Any Consideration Is  
Appropriate**

Because your job as contract administrator is to ensure fairness to both contracting parties, evaluate the relevance of consideration to both the contractor and the Government. Base your evaluation on what is equitable and reasonable for the particular circumstances surrounding this change. Sometimes consideration has been predetermined or limited, based on a formula or a restriction contained within the contract itself.

FAR 48.104

An example is the sharing arrangements relative to acquisition savings calculated for value engineering change proposals.

## CONTRACT MODIFICATIONS / OPTIONS

### **Provide Notice of Rejection**

You must notify all the parties involved when your decision is to reject the change.

You must advise the contractor in writing when rejecting the request. When the contractor initiates the request, you will not only owe the contractor a response, but generally would notify the requiring or program office of your decision as well.

If the requiring or program office initiated the modification, you would obviously owe the initiating office notification of any decision to reject the change. You may choose not to notify a requiring or program office on a contractor-initiated modification when its input was not required in the decision-making process.

FAR 48.103

The terms of the contract or regulatory guidelines may state when a specific type of response is due. For example, you must ensure the Contracting Officer responds to value engineering change proposals within 45 days from the Government's receipt of the proposal by either providing:

- Notice of the decision, OR
- The anticipated decision date with an explanation for the delay.

Otherwise, the contractor must be notified promptly to avoid costly delays or other performance problems.

### **Determine the Type of Contract Modification**

FAR 43.103

There are two main classifications of contract modifications:

- Bilateral (supplemental agreement), or
- Unilateral.

#### Bilateral Modifications

Bilateral or supplemental agreements are used to:

- Make negotiated equitable adjustments resulting from the issuance of unilateral changes;
- Definitize letter contracts;
- Approve changes required by the contract, such as economic price adjustments; or
- Reflect other agreements on contract terms and conditions between the contractor and the Government.

Most supplemental agreements involve negotiation of price and other terms, usually entailing tasks that are similar to award of the basic contract.

Select a bilateral agreement when:

- The change has an effect on the substantive rights of either party.
- There is sufficient time to negotiate a supplemental agreement.
- There is no basis in the contract's terms for issuing a unilateral modification.

## Unilateral Modifications

Unilateral modifications are of three basic types:

1. Administrative changes. These are changes that are minor in nature and do not materially affect contract performance. Examples of administrative changes include:
  - Correction of a fund citation
  - Addition of a zip code on a delivery address
  - Novation agreements
  - Name-change agreements
2. Change orders. This term refers to the actual issuance of a change authorized by a clause entitled "Changes" in the basic contract. The Changes clause is cited as the authority for the modification. An example is changing the delivery address from one state to another. Change orders can be used when there is not enough time to negotiate with the contractor. However, the contractor is required to submit its' proposal, if it desires, within 30 days for an equitable adjustment.
3. Changes authorized by other contract clauses. Although these are not termed change orders, they can be issued unilaterally. Examples are the issuance of a stop work order and termination notices.

Select a unilateral modification when:

- The change has no effect on the substantive rights of the contractor or the Government;
- The change can be made unilaterally under a specific contract term, such as Stop Work or Termination clauses;
- The contractor's agreement with the change is not otherwise required; and
- The time required to negotiate a bilateral agreement would cause a delay that would adversely affect the Government's interests.

You may not realize that there is a time problem until you begin negotiations for a bilateral agreement and experience a lack of progress in reaching an agreement.

Except for administrative changes, unilateral changes should be followed up with bilateral contract modifications when negotiations are concluded on the change. If exhaustive negotiations do not result in a mutual agreement, the contracting officer may issue a final decision as the basis for definitizing the unilateral change.

### **Implement Contract Modifications for Supplemental Agreements**

FAR 43.103

Step 1

**Obtain proposal from the contractor.** For contractor-initiated changes, most Government agencies prescribe formal procedures. The contractor's proposal should include cost, schedule, and performance data as well as an indication of the maximum equitable adjustment that could result from the change.

Step 2

**Evaluate contractor's proposal.** Make sure that the proposal covers all elements of the change, that is, increases, decreases and substitutes.

FAR 3.501

When you evaluate a contractor's proposal for a change, actual cost or value is just one factor to consider. A contractor should make the same overall percentage of profit or loss after a change that it would have

made without the change. Allowing a contractor to “get well” encourages the practice of “buying in.”

### Step 3

**Do factfinding if necessary.** Never enter any negotiation without being adequately prepared. Extensive factfinding is necessary when the change covers issues not required by the original contract or when you suspect that the contractor is in a loss position. Invite other Government officials involved in the change to provide pertinent facts to use during the negotiations. Contractors are more accommodating when the change is in their favor. Be prepared to counter any contractor arguments.

### Step 4

FAR 15.805

FAR 15.807

**Develop prenegotiation position on price.** Select and use whatever price analysis techniques will ensure a fair and reasonable price. The procedures followed on the original award may provide a sound foundation for developing the prenegotiation position for the change.

When there is no adequate basis for price analysis, use cost analysis techniques as the basis for the Government price position, addressing:

- The pertinent issues to be negotiated;
- The cost objectives; and
- A profit or fee objective.

Since, in negotiating a contract change, you must also consider the current position of the contractor, your task is often more complex.

One case that is often cited to illustrate the concept of maintaining the contractor in the same profit or loss position is Keco Industries, Inc. (176 Ct.Cl. 983, 1966). Keco had been awarded a contract for 200 refrigeration units. One hundred of the units were to be electricity-driven, and 100 gasoline-driven. Before any of the gasoline units were produced, the Government issued a change order directing that all 200 units be electricity-driven.

A Government audit revealed that the contractor was in a loss position on both types of units. However, the loss position on the electric units was \$332.58 per unit, whereas the loss on the gasoline unit was only \$148.80 per unit.

CONTRACT MODIFICATIONS / OPTIONS

The contractor's total loss position before the change was \$48,138. For the contractor to be left in the same position it had been in before the change was issued, the adjustment had to be figured as follows:

Price per gasoline unit	\$ 1,720.00
Less cost difference between the gasoline unit and the electric unit (\$1,868.80-\$1,603.58)	<u>265.22</u>
Price per unit for the 100 units covered by the change order	\$ 1,454.78

Contractor's loss position after the adjustment:

100 electric units unchanged by the order:	
\$1,603.58 (cost per unit)	
minus <u>1,271.00</u> (contract price per unit)	
\$ 332.58 (loss per unit) x 100 units =	\$33,258.00

100 units covered by the change order:	
\$1,603.58 (cost per unit)	
minus <u>1,454.78</u> (equitable adjustment price per unit)	
\$ 148.80 (loss per unit) x 100 units =	<u>\$14,880.00</u>

Total loss on contract after the adjustment	<b>\$48,138.00</b>
---	--------------------

A price adjustment reflecting only the price difference between the electric unit and the gas unit would put the contract into an even greater loss position than was originally intended. An adjustment giving the contractor its actual cost for manufacturing the units altered by the change order would enable the contractor to recoup some of the loss it would have suffered originally.

Step 5

**Develop negotiation strategies and tactics.** Review the methods and techniques used to successfully negotiate with the contractor previously. Inquire about the contractor's strategies and tactics with other contract administrators or contract negotiators who have negotiated with this particular contractor. Be prepared to counter contractor strategies and tactics you can anticipate.

## Step 6

**Conduct negotiations.** Practically speaking, the principle of equitable adjustment for contract changes means that the Government will do whatever is fair, right, or reasonable if the contractor can prove that it is entitled to the cost it claims. Have the flexibility to change your objectives as new information is provided by the contractor during the negotiation process. If required, take a break and meet with appropriate officials before making a final decision on new information.

## Step 7

FAR 43.301

**Prepare the agreement and obtain approvals.** Most agencies use the SF 30, Amendment of Solicitation/Modification of Contract, to modify their contracts, but your agency may require its own form. A sample of an SF 30 used as a supplemental agreement is shown at Exhibit 6-2.

When the SF 30 does not provide enough room to document the change, use the Optional Form (OF) 336, Continuation Sheet, or a blank sheet of paper as the second page of the modification.

Internal approval policies vary from agency to agency. Make sure you are familiar with your agency's requirements.

## Step 8

FAR 43.204(c)

**Obtain release of claims.** To indicate the finality of the settlement and to avoid subsequent controversy on supplemental agreements that result from unilateral modifications, a release of claims is recommended.

Refer to Exhibit 6-3, Contractor's Statement of Release, to review the FAR-prescribed terminology.

<b>Sample Supplemental Agreement</b>				
<b>AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT</b>			1. CONTRACT ID CODE	PAGE OF PAGES <b>1 1</b>
2. AMENDMENT/MODIFICATION NO. <b>004</b>	3. EFFECTIVE DATE <b>1/8/91</b>	4. REQUISITION/PURCHASE REQ. NO. <b>ENG 91-046</b>	5. PROJECT NO. ( <i>if applicable</i> )	
6. ISSUED BY CODE	7. ADMINISTERED BY ( <i>If other than Item i</i> ) CODE			
Jill Jackson, Administrator Your Agency 888 Main Street Your Town, LL XXXXX-XXXX <div style="text-align: right;">(Same)</div>				
8. NAME AND ADDRESS OF CONTRACTOR ( <i>No. , stret, county,</i> Attn: John Smith Smith Brothers Engineering, Inc.  729 Scientist Row Urban Heights, WX XXXXX-XXXXX  CODE FACILITY CODE			<input checked="" type="checkbox"/>	9A. AMENDMENT OF SOLICITATION NO.
				9B. DATED ( <i>SEE ITEM 11</i> )
			<input checked="" type="checkbox"/>	10A. MODIFICATION OF CONTRACT/ORDER NO. <b>OSR 91-04182</b>
				10B. DATED ( <i>SEE ITEM 13</i> ) <b>10/9/90</b>
<b>11. THIS ITEM ONLY APPLIES TO AMENDMENTS OR SOLICITATIONS</b>				
<input type="checkbox"/> The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of offers <input type="checkbox"/> is extended, <input type="checkbox"/> is not extended.				
Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended by one of the following methods:				
(a) By completing Items 8 and 15, and returning _____ copies of the amendment; (b) by acknowledging receipt of this amendment on each copy of the offer submitted; or (c) by separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGEMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.				
12. ACCOUNTING AND APPROPRIATION DATA ( <i>if required</i> ) <b>XX 91-SOFXXX-XX \$50,000</b>				
<b>13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACT/ORDERS, IT MODIFIES THE CONTRACT ORDER NO. AS DESCRIBED IN ITEM 14</b>				
<input checked="" type="checkbox"/>	A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: ( <i>Specify authority</i> ) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER IN ITEM 10A.			
	B. THE ABOVE NUMBERED CONTRACT ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES ( <i>such as changes in paying office, appropriation dae, etc.</i> ) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b)			
<input checked="" type="checkbox"/>	C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF: <b>General Provision XX, FAR 52.243-1, Changes</b>			
	D. OTHER ( <i>Specify type of modification and authority</i> )			
E. IMPORTANT: Contractor <input type="checkbox"/> is not, <input type="checkbox"/> is required to sign this document and return <b>3</b> copies to the issuing office				
14. DESCRIPTION OF AMENDMENT/MODIFICATION ( <i>Organized by UCF section headings, including solicitation/contract subject matter where feasible</i> )				
a. This definitizes Modification #3, Engineering Change #2 to the specifications, which added the redesign of peripheral equipment to the contract. b. The contract delivery date is changed FROM: June 28, 1991 TO: September 23, 1992 c. The contract price is changed from \$130,000 to \$180,000 d. In consideration of the preceding paragraphs a, b, and c, the Contractor hereby releases the Government from any and all liability under this contract for further equitable adjustments attributable to Engineering Change #2.				
Except as provided herein, all terms and conditions of the document referenced in items 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.				
15A. NAME AND TITLE OF SIGNER ( <i>Type or print</i> ) <b>John Smith, Executive Vice President</b>			16A. NAME AND TITLE OF CONTRACTING OFFICER ( <i>Type or print</i> ) <b>Jane Justice, Contracting Officer</b>	
15B. CONTRACTOR/OFFEROR  <u>John Smith</u> <i>(Signature of person authorized to sign)</i>	15C. DATE SIGNED <b>1/3/91</b>	16B. UNITED STATES OF AMERICA  <u>Jane Justice</u> <i>(Signature of Contracting Officer)</i>	16C. DATE SIGNED <b>1/8/91</b>	
NSN 7540-01-152-8070 PREVIOUS EDITION UNUSABLE		30-105	<b>STANDARD FORM 30</b> (REV. 10-83) Prescribed by GSA FAR (48 CFR) 53-243	

Exhibit 6-2

## Contractor's Statement of Release

(For supplemental agreements definitizing unilateral changes)

In consideration of the modification(s) agreed to herein as complete equitable adjustment for the Contractor's \_\_\_\_\_ (describe) \_\_\_\_\_ "proposals for adjustment," the Contractor hereby releases the Government from any and all liability under this contract for further equitable adjustments attributable to such facts or circumstances giving rise to the "proposal(s) for adjustment" (except for.....).

### *Exhibit 6-3*

A release of claims generally terminates a contractor's right to further claims unless it excepts a particular issue, reserving both parties' rights in future settlement. There are some recognized exceptions that may make a signed general release of claims invalid, such as when:

- A modification increases the price for a change to the contract and the change is later recognized as being part of the original contract;
- The Government breaches the contract or fails to perform in accordance with a supplemental agreement;
- A mutual mistake exists, but not a mistake about which only one of the parties knew or reasonably could have known;
- The Government uses economic duress, such as threats to terminate for default, in getting the contractor to sign the release;
- The circumstances involve fraud, unless both parties had knowledge of the fraud when the settlement agreement and/or claims release was signed; or
- The official who signed the release lacks the authority to sign it. (This has been held to apply to, among others, the signature of a duly authorized contracting officer when he or she did not follow appropriate procedures in settling a claim).

Step 9 **Document the file and distribute the agreement.** The supplemental agreement should be signed by both parties on three copies. Signed copies are to be distributed to each of the following:

- The official Government file
- The contractor
- The paying office

Other offices may be on your normal distribution list for duplicates of the signed copies in accordance with your agency regulations.

**Implement Contract Modifications for Unilateral Changes**

Implementing unilateral modification for administrative changes is different. Refer to the next section. Implementing other unilateral modifications followed by bilateral agreements require various steps.

Step 1 **Incorporate the change in the contracting office suspense system.** Generally issuing a supplemental agreement is the most common method to definitize a unilateral agreement. It is important that you establish goals for definitizing any unilateral change. Establish due dates for interim steps in the process, in addition to a date for the overall goal.

Step 2 **Identify the clause authorizing the change.** The changes clause is not the only clause authorizing a modification. When the Government issues a stop work order, the contractor is required for stop work until given the go-ahead. The clause allows the contractor to obtain an equitable adjustment for the delay. Make sure you cite the appropriate clause for the change.

Step 3 **Determine whether to issue a telegraphic order.** When unusual or urgent circumstances demand quick action, you may implement unilateral changes by telegraphic message, but only if you comply with all requirements as listed in Exhibit 6-4, Prerequisites For Unilateral Issuance by Telegraphic Message.

FAR 43.201

Step 4 **Prepare and issue the change order or other unilateral change.** Prepare your unilateral change on your agency's prescribed form for contract modifications, usually the SF 30, Amendment of Solicitation/ Modification of Contract. Exhibit 6-5 shows a sample of an SF 30 used as a change order.

### **Prerequisites for Unilateral Issuance by Telegraphic Message**

1. The contractual circumstances are urgent or compelling.
2. You furnish copies of the message promptly to the same addressees who received the basic contract.
3. You take immediate action to confirm the change by issuance of an SF 30, Amendment of Solicitation/Modification of Contract.
4. The message contains substantially the same information required by the SF 30, except that you would:
  - Not indicate the estimated change in price, and
  - Include in the body of the message the statement: “Signed by (Name), Contracting Officer”;
5. The contracting officer manually signs the original copy of the message.

*Exhibit 6-4*

<b>Sample Change Order</b>			
<b>AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT</b>		1. CONTRACT ID CODE	PAGE OF PAGES <b>1 1</b>
2. AMENDMENT/MODIFICATION NO. <b>003</b>	3. EFFECTIVE DATE <b>11/14/90</b>	4. REQUISITION/PURCHASE REQ. NO. <b>ENG 91-046</b>	5. PROJECT NO. ( <i>if applicable</i> )
6. ISSUED BY CODE	7. ADMINISTERED BY ( <i>If other than Item 6</i> ) CODE		
Jill Jackson, Administrator Your Agency 888 Main Street Your Town, LL XXXXX-XXXX		(Same)	
8. NAME AND ADDRESS OF CONTRACTOR ( <i>No. , stret, county,</i> Attn: John Smith Smith Brothers Engineering, Inc.  729 Scientist Row Urban Heights, WX XXXXX-XXXXX		✓	9A. AMENDMENT OF SOLICITATION NO.
			9B. DATED ( <i>SEE ITEM 11</i> )
		X	10A. MODIFICATION OF CONTRACT/ORDER NO. <b>OSR 91-04182</b>
			10B. DATED ( <i>SEE ITEM 13</i> ) <b>10/9/90</b>
CODE	FACILITY CODE		
<b>11. THIS ITEM ONLY APPLIES TO AMENDMENTS OR SOLICITATIONS</b>			
<input type="checkbox"/> The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of offers <input type="checkbox"/> is extended, <input type="checkbox"/> is not extended.			
Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended by one of the following methods:  (a) By completing Items 8 and 15, and returning _____ copies of the amendment; (b) by acknowledging receipt of this amendment on each copy of the offer submitted; or (c) by separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGEMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.			
12. ACCOUNTING AND APPROPRIATION DATA ( <i>if required</i> ) N/A			
<b>13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACT/ORDERS, IT MODIFIES THE CONTRACT ORDER NO. AS DESCRIBED IN ITEM 14</b>			
✓	A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: ( <i>Specify authority</i> ) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER IN ITEM 10A.		
X	<b>General Provision XX, FAR 52.243-1, Changes</b>		
	B. THE ABOVE NUMBERED CONTRACT ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES ( <i>such as changes in paying office, appropriation dae, etc.</i> ) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b)		
	C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:		
	D. OTHER ( <i>Specify type of modification and authority</i> )		
E. IMPORTANT: Contractor <input type="checkbox"/> is not, <input type="checkbox"/> is required to sign this document and return <b>3</b> copies to the issuing office			
14. DESCRIPTION OF AMENDMENT/MODIFICATION ( <i>Organized by UCF section headings, including solicitation/contract subject matter where feasible</i> )			
a. The attached Engineering Change #2 to the specification, adding the redesign of peripheral equipment to the contract, is hereby incorporated and made a part of this contract. b. The Government will consider the contractor's proposal for a price and time adjustment for the performance of this change order, but the contractor is directed to proceed diligently with the performance of this contract, including Engineering Change #2, immediately.			
Except as provided herein, all terms and conditions of the document referenced in items 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.			
15A. NAME AND TITLE OF SIGNER ( <i>Type or print</i> )		16A. NAME AND TITLE OF CONTRACTING OFFICER ( <i>Type or print</i> ) <b>Jane Justice, Contracting Officer</b>	
15B. CONTRACTOR/OFFEROR	15C. DATE SIGNED <b>1/3/91</b>	16B. UNITED STATES OF AMERICA <b>Jane Justice</b>	16C. DATE SIGNED <b>11/14/90</b>
<i>(Signature of person authorized to sign)</i>		<i>(Signature of Contracting Officer)</i>	
NSN 7540-01-152-8070 PREVIOUS EDITION UNUSABLE		30-105	<b>STANDARD FORM 30</b> (REV. 10-83) Prescribed by GSA FAR (48 CFR) 53-243

Exhibit 6-5

## Step 5

FAR 33.213

**Inform the contractor of its obligation to continue work under the contract as changed.** When a Government contracting officer issues a unilateral change, the contractor must proceed with the work as changed. This holds true even if an agreement as to adjustment in price and performance time has not been reached and even if there is open and intense disagreement on these adjustments. There are a few exceptions. A contractor need not proceed if:

- It needs and requests, but does not obtain, clear direction from the contracting officer on how to proceed with the change;
- The Government's action leaves the contractor in an untenable position. An example of this is when faulty Government testing procedures result in rejection of delivered item;
- A contract clause permits the contractor to stop work when funds are exhausted or when a certain percentage of the costs has been expended;
- The Government grossly and materially breaches its duties and obligations under the contract; or
- Performance is impossible. However, when performance is temporarily impossible, as in the case of temporary unavailability of Government-furnished materials, the contractor's duty to proceed will remain effective and the contractor must continue performance after the obstacle to performance has been removed.
- Change is beyond the scope of the contract

FAR 52.216-24

FAR 52.232-7

FAR 52.232-20

FAR 52.232-22

## Step 6

FAR 43.203

FAR 43.205(f)

**Inform the contractor of any need to segregate the costs of performing changed work.** A contractor's standard accounting methods seldom are designed to segregate the costs of performing changed work. You can demand this cost segregation only when the contract terms require a contractor to do so. When there is such a requirement, alert the contractor to the possible need for a revision to its normal accounting procedures to track the following direct cost categories:

1. Nonrecurring costs. Examples are engineering costs and costs of obsolete or reperfomed work.
2. Costs of specific work caused by the change. Examples are new subcontract work, new prototypes, or new retrofit kits.
3. Costs of recurring work. Examples are labor and material costs.

## CONTRACT MODIFICATIONS / OPTIONS

Step 7                    **Document the file and distribute the modification.** It is important to adequately document the file for unilateral changes. You need to identify what follow-up action is required for definitizing the change.

Step 8                    **Definitizing a Unilateral Change.** After the unilateral change has been issued, you need to issue a bilateral agreement or otherwise definitize the change. The following steps for definitizing unilateral changes are the same as in bilateral changes:

- Establish a prenegotiation position
- Negotiate a supplemental agreement on the amount of the equitable adjustment and other terms.
- Obtain a release of claims or resolve the claim.
- Document the file and distribute the supplemental agreement or other document used to definitize the change.

### **Implement Contract Modifications for Administrative Changes**

Most administrative changes correct nonsubstantive errors in the original contract document.

Step 1                    **Verify that the change does not affect the substantive rights of the parties.** Normally this is merely a matter of reading the change request and making a judgement.

Step 2                    **Prepare and issue the change.** Use SF 30, Amendment of Solicitation/Modification of Contract. Refer to Exhibit 6-6 for a sample unilateral modification to effect administrative changes.

Step 3                    **Document the file and distribute the modification.** Send signed copies of the modification to the contractor, the paying office and retain one signed copy for the contract file.

## Sample Modification for an Administrative Change

<b>AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT</b>		1. CONTRACT ID CODE	PAGE OF PAGES
			1 1
2. AMENDMENT/MODIFICATION NO. <b>001</b>	3. EFFECTIVE DATE <b>10/24/90</b>	4. REQUISITION/PURCHASE REQ. NO. <b>ENG 91-046</b>	5. PROJECT NO. ( <i>If applicable</i> )
6. ISSUED BY CODE	7. ADMINISTERED BY ( <i>If other than Item 4</i> ) CODE		

Jill Jackson, Administrator  
Your Agency  
888 Main Street  
Your Town, LL XXXXX-XXXX

(Same)

8. NAME AND ADDRESS OF CONTRACTOR ( <i>No., street, county</i> ) Attn: John Smith Smith Brothers Engineering, Inc.  729 Scientist Row Urban Heights, WX XXXXX-XXXXX  CODE _____ FACILITY CODE _____	<input checked="" type="checkbox"/>	9A. AMENDMENT OF SOLICITATION NO.
		9B. DATED ( <i>SEE ITEM 11</i> )
	<input checked="" type="checkbox"/>	10A. MODIFICATION OF CONTRACT/ORDER NO. <b>OSR 91-04182</b>
		10B. DATED ( <i>SEE ITEM 13</i> ) <b>10/9/90</b>

**11. THIS ITEM ONLY APPLIES TO AMENDMENTS OR SOLICITATIONS**

The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of offers  is extended,  is not extended.

Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended by one of the following methods:

(a) By completing Items 8 and 15, and returning \_\_\_\_\_ copies of the amendment; (b) by acknowledging receipt of this amendment on each copy of the offer submitted; or (c) by separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGEMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

12. ACCOUNTING AND APPROPRIATION DATA ( *if required*)  
N/A

**13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACT/ORDERS, IT MODIFIES THE CONTRACT ORDER NO. AS DESCRIBED IN ITEM 14**

<input checked="" type="checkbox"/>	A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: ( <i>Specify authority</i> ) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER IN ITEM 10A.
<input checked="" type="checkbox"/>	B. THE ABOVE NUMBERED CONTRACT ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES ( <i>such as changes in paying office, appropriation data, etc.</i> ) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b)
	C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:
	D. OTHER ( <i>Specify type of modification and authority</i> )

E. IMPORTANT: Contractor  is not,  is required to sign this document and return 3 copies to the issuing office

14. DESCRIPTION OF AMENDMENT/MODIFICATION ( *Organized by UCF section headings, including solicitation/contract subject matter where feasible* )

The paying office address is changed from #48 Main Street, Your Town, LL XXXXX-XXXX to 848 Main Street, Your Town, LL XXXXX-XXXX

Except as provided herein, all terms and conditions of the document referenced in items 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.

15A. NAME AND TITLE OF SIGNER ( <i>Type or print</i> )		16A. NAME AND TITLE OF CONTRACTING OFFICER ( <i>Type or print</i> )	
		Jane Justice, Contracting Officer	
15B. CONTRACTOR/OFFEROR	15C. DATE SIGNED	16B. UNITED STATES OF AMERICA	16C. DATE SIGNED
_____ <i>(Signature of person authorized to sign)</i>	1/3/91	Jane Justice <i>(Signature of Contracting Officer)</i>	10/24/90

NSN 7540-01-152-8070  
PREVIOUS EDITION UNUSABLE

30-105

**STANDARD FORM 30** (REV. 10-83)  
Prescribed by GSA  
FAR (48 CFR) 53-243

*Exhibit 6-6*

CONTRACT MODIFICATIONS / OPTIONS

Two of the most difficult administrative changes are for novation agreements and name changes. Novation is when a contract is transferred from one legal entity to another or substitution of a new contract from an old one by mutual agreement between the parties. Once you have obtained the documentation and verified you are the proper office to process the request, follow the steps as follows:

Novation Agreements	Name Changes
Obtain legal review of sufficiency	Verify that the contractor's rights and obligations remain unaffected
Execute the novation agreement and retain one copy for the contract file	Execute the Change of Name agreement and retain one copy for the file
Forward the executed agreement to both the transferor and transferee	Forward the executed agreement to both the transferor and the transferee
Prepare a SF30 incorporating a summary of the agreement and attaching a complete list of contracts affected	Prepare the SF30 incorporating a summary of the agreement and attaching a complete list of contracts affected
Distribute the SF30 <ul style="list-style-type: none"> <li>• One to the file</li> <li>• One to the transferor</li> <li>• One to the transferee</li> <li>• Other Government activities involved</li> </ul>	Distribute the SF30 <ul style="list-style-type: none"> <li>• One to the file</li> <li>• One to the transferor</li> <li>• One to the transferee</li> <li>• Other Government activities involved</li> </ul>

**Implement Contract Modifications for Novation Agreements**

A novation agreement is a legal instrument executed by:

- The contractor (transferor),
- The successor in interest (the transferee), and
- The Government.

A novation agreement provides for:

1. Transferor to guarantee performance of the contract by the transferee;
2. Transferee to assume all obligations under the contract; and
3. Government to recognize the transfer of the contract and related assets.

FAR 42.1203(f)(4)

Sometimes you will receive a copy of an administrative modification from another contracting office affecting your contract. If you do, merely distribute the modification as you would any other administrative modification.

The contractor must submit proper documentation to support a novation agreement as shown in Exhibit 6-7, Documentation Requirements for Novation Agreements.

FAR 42.1202(c)

Look at the list of all affected contracts and purchase orders first. The CO or ACO administering the largest unsettled dollar balance has the responsibility to execute the novation agreement for the Government.

Obtain any missing or deficient documentation if your contract has the largest unpaid balance of the listed contracts.

FAR 42.1203(b)

Provide all contracting offices affected by the proposed novation agreement with:

- A list of all affected contracts, and
- A request for feedback within 30 days.

Step 1

FAR 42.1203(d)

**Obtain legal review of sufficiency.** As with any legal documentation about which you are generally unfamiliar, obtain your lawyer's legal clearance on the basis for the modification and the supplemental agreement itself.

Step 2

FAR 42.1203(c)

**Execute the agreement.** The contracting officer signs the novation agreement only after the transferor and transferee have signed. Approve the document when it is consistent with the Government's interest to execute the agreement. However, it may not always be appropriate to process a novation agreement. Base a decision not to execute one on:

- Feedback from other contracting offices;
- A determination that the proposed transferee is not responsible.

## Documentation Requirements for Novation Agreements

1. Three copies of the proposed novation agreement.
2. An authenticated copy of the instrument effecting the transfer of assets, for example, a bill of sale, certificate of merger, contract, deed, agreement, or court decree.
3. A list of all affected contracts and purchase orders remaining unsettled between the transferor and Government, showing for each the:
  - Contract number and type
  - Name and address of the contracting office
  - Total dollar value as amended
  - Remaining unpaid balance.
4. A certified copy of each resolution of the corporate parties' boards of directors authorizing the transfer of assets.
5. A certified copy of the minutes of each corporate party's stockholder meeting necessary to approve the transfer of assets.
6. An authenticated copy of the transferee's certificate and articles of incorporation, if a corporation was formed for the purpose of receiving the assets involved in performing the Government contracts.
7. The opinion of legal counsel for the transferor and transferee stating that the transfer was properly effected under applicable law and the effective date of transfer.
8. Evidence of the transferee's capability to perform the contracts.
9. Balance sheets of the transferor and transferee as of the dates immediately before and after the transfer of assets, certified for accuracy by independent accountants.
10. Evidence that any security clearance requirements have been met.
11. The consent of sureties on all contracts if bonds are required or a statement from the transferor that none are required.

*Exhibit 6-7*

A lack of responsibility can be based on information that would include, but not be limited to the transferee's inclusion on the List of Parties Excluded from Procurement Programs.

FAR 42.1204(e)

Follow the format provided in the FAR for executing agreement when the contractor has not provided the agreement. Make any changes that might be necessary to the standard novation agreement.

Step 3

**Forward the novation agreement.** After the documents have been reviewed and approved by the Government, forward a copy to both the transferor and the transferee. .

Step 4

FAR 42.1203(f)

**Prepare a contract modification incorporating the agreement.** A contract modification (using SF30 unless otherwise directed by agency requirements) must:

- Reference the novation agreement.
- Incorporate a summary of the agreement in the modification.
- Attach a complete list of contracts affected.

Step 5

**Distribute the modification.** Send a copy of the modification to the following:

- The transferor
- The transferee
- Each contracting office listed by the contractor as having current contracts that would be affected by the agreement
- Each administration office, if different from the contracting office, listed by the contractor as having current contracts that would be affected by the agreement
- Everyone who got a copy of the contract you are currently administering.

**Implement Contract Modifications for Name Changes**

FAR 42.1201

A change-of-name agreement refers to a legal instrument executed by the contractor and the Government that recognizes the legal change of name of the contractor without disturbing the original contractual rights and obligations of the parties.

FAR 42.1203(f)(4)

Sometimes you will receive an administrative modification based on a change-of-name agreement signed for the Government by a contracting officer in another contracting office that affects your contract. If you do, make distribution as you would on any other administrative modification.

The contractor must submit proper documentation to support a name change as shown in Exhibit 6-8, Documentation Requirements for Change-of-Name Agreements.

**Documentation Requirements for Change-of-Name Agreements**

1. The document effecting the name change, authenticated by a proper official of the State having jurisdiction.
2. The opinion of the contractor's legal counsel stating that the change of name was properly effected under applicable law and showing the effective date.
3. A list of all affected contracts and purchase orders remaining unsettled between the contractor and the Government, showing for each the:
  - Contract number and type
  - Name and address of the contracting office
  - Total dollar value, as amended
  - Remaining unpaid balance.

*Exhibit 6-8*

As with novation agreements, look at the list of all affected contracts and purchase orders first. The CO or ACO administering the largest unsettled dollar balance has the responsibility to execute the novation agreement for the Government.

Obtain any missing or deficient documentation if your contract has the largest unpaid balance of the listed contracts.

### PASSING THE PAPERWORK

*When the list of current contracts came in from Bollingbrook, Eric asked Joanne to check the remaining balance on the list and tell him if there were any that had a larger remaining balance than their contract.*

*“GSA has the largest remaining balance on one of their contracts,” she informed him, adding, “DoD has two with bigger balances than ours.”*

*“I thought they had a few other Government contracts still current. With ours almost complete, I figured we could pass the paperwork on to some one else. Call GSA, Joanne, and tell them we have a present for them.”*

#### Step 1

#### **Verify that the contractor’s rights and obligations are unaffected.**

If the contractor’s basic rights are affected, a change-of-name agreement is inappropriate. A novation agreement or an assignment of payment may suit the circumstances. As with any legal documentation about which you are generally unfamiliar, obtain your lawyer’s legal clearance on this issue.

#### Step 2

**Execute the change-of-name agreement, if appropriate.** When it is consistent with the Government’s interest to sign the agreement, and the contractor has provided a signed agreement, you would include it with the review of legal sufficiency you obtained in the previous Step 1.

FAR 42.1205

Follow the format provided in the FAR for executing name changes when the contractor has not provided the agreement. Make any changes that might be necessary to the standard agreement.

Obtain the contractor’s signature on the agreement before the contracting officer’s.

Provide one copy to the contractor and retain one copy of the signed agreement in the contract file as backup for a subsequent contract modification.

## CONTRACT MODIFICATIONS / OPTIONS

Step 3

**Prepare a contract modification.** A contract modification (using SF30 unless otherwise directed by agency requirements) must:

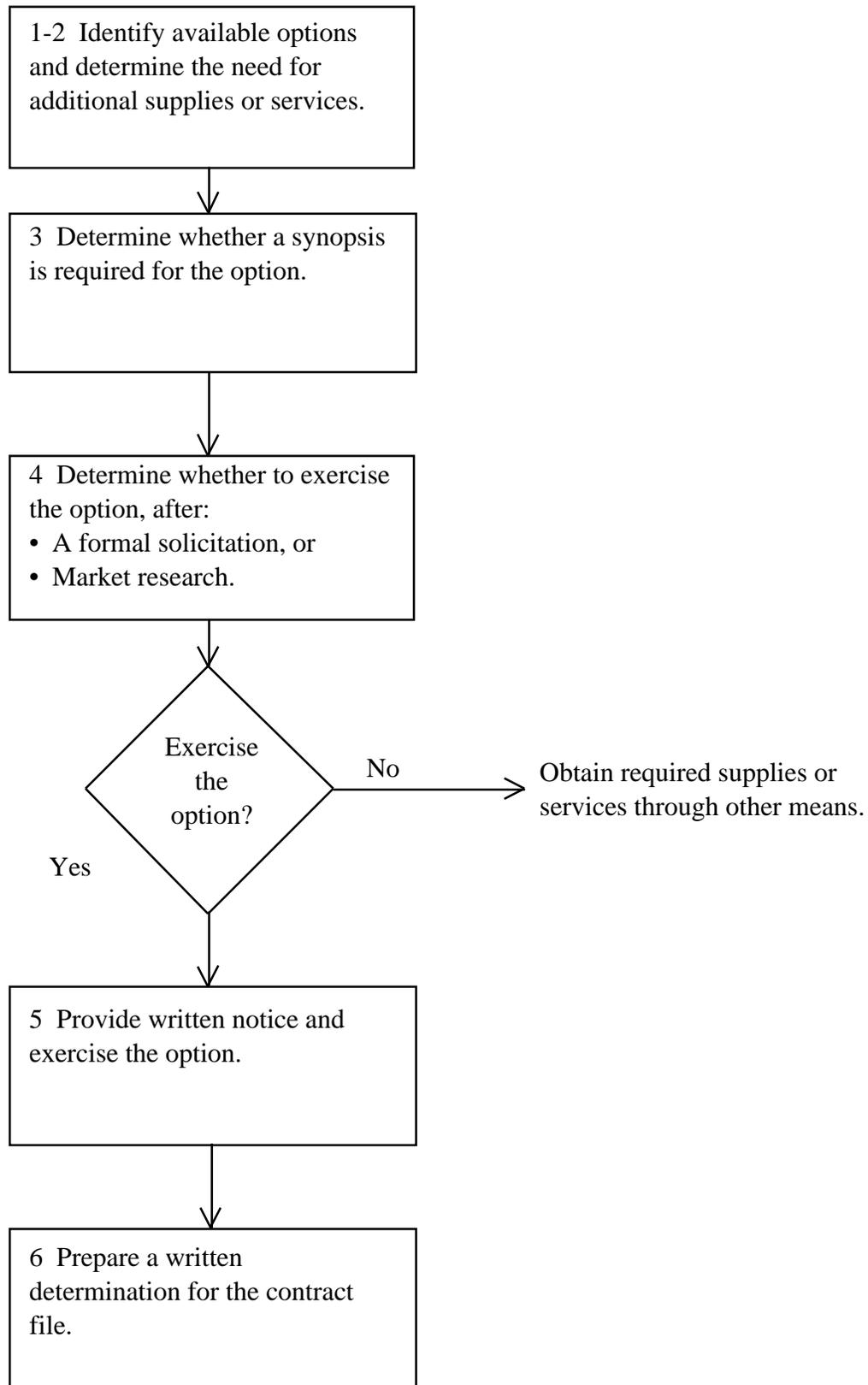
- Reference the name change agreement.
- Incorporate a summary of the agreement in the modification, and
- Attach a complete list of contracts affected.

Step 4

**Distribute the modification.** Send a copy of the modification to the following:

- The contractor
- Each contracting office listed by the contractor as having current contracts that would be affected by the agreement
- Each administration office, if different from the contracting office, listed by the contractor as having current contracts that would be affected by the agreement
- Everyone who got a copy of the contract you are currently administering.

## STEPS IN EXERCISING OPTIONS



## 6.2 Options

Options provide the Government with firm prices for additional quantities or periods of performance, but only for a specific period of time. That time period may extend beyond the basic contract period and must be identified in the contract.

### Identify Available Options

There are four standard FAR clauses that pertain to options. These are summarized in Exhibit 6-9, Standard Contract Clauses for Options. Read the clause provided in the contract carefully because the contracting officer has the discretion to alter the language to some degree to fit a particular situation.

FAR 52.102-1(b)(2)

If the clause is incorporated by reference, it is the standard clause language.

#### A REASON TO VARY

*The option clause in the Angor Wat contract was the first one listed in Exhibit 6-9, FAR 52.217-6.*

*It allows a variation in the rate of delivery of option quantities if both the Government and contractor agree to the variation.*

*Eric knew that Angor Wat was a bit pressed financially—a temporary cash flow shortfall. So he was prepared to offer a progress payment for material delivery to the Angor Wat plant, incorporating the progress payments clause in the contract modification for the option. He'd wait to see what Joanne's research on current market prices revealed before he talked to them.*

FAR 17.204(b)

Every option will state a time frame during which you may exercise an option. You may not exercise it at any other time. Your contract administration plan should include a suspense date for review of options that allows sufficient time prior to their expiration for verifying the need and researching current market prices.

Options are usually contained within the contract as a separate line item in the schedule.

### Determine the Need for Additional Supplies or Services

Consult requiring activities to verify that:

- The requirement covered by the option fulfills an existing Government need; and
- Funds are available for exercise of the option.

### Determine Whether a Synopsis Is Required for the Option

FAR 5.202

A notice in the Commerce Business Daily prior to exercising an option is required for options over \$25,000 UNLESS:

- The original contract synopsis provided sufficient detail on the option;

OR

- Another synopsis exception applies.

Additionally, you may use a “sources sought” announcement as a market research tool. See Step 2 in the following section.

### Determine Whether to Exercise the Option

Options must be exercised exactly as it is stated in the contract. You may not change quantities, unless the option itself, not the basic contract, authorizes partial deliveries, in which case, you may order less than the quantity stated. You may **never** order more than the quantities stated.

You may **not** mutually agree to vary the price or any other term or condition for the additional quantity or continued performance period EXCEPT for:

FAR 22.1001

- Any increase in wages contained in a new wage determination from the Department of Labor when services a contractor will provide under an option are subject to the Service Contract Act. Refer to Step 2 in the next section;

OR

FAR 17.207(b)

- Economic price adjustment, but **only if** the:

FAR 16.203

- Contract contains specific terms that allow economic price adjustment in contract prices; AND the
- Contractor specifically requests a price revision in strict compliance with those contract terms.

<b>Standard Contract Clauses for Options</b>		
<b>Clause</b>	<b>Use</b>	<b>Substance</b>
<p>FAR 52.217-6</p>	<p>Used if the option quantity is expressed as a percentage of the basic contract quantity or as an additional quantity of a specific line item.</p>	<p>Specifies that—</p> <ul style="list-style-type: none"> <li>• The contracting officer may increase the quantity at the unit price specified in the appropriate line item.</li> <li>• A written notice within a specified time is provided to the contractor to exercise any options.</li> <li>• Option deliveries will be at the same rate as the basic requirement unless the parties agree otherwise.</li> </ul>
<p>FAR 52.217-7</p>	<p>Used if the contract—</p> <ul style="list-style-type: none"> <li>• Is <b>not</b> a service contract, <b>and</b></li> <li>• Has an option identified as a separately priced line item with a corresponding basic line item with the same nomenclature.</li> </ul>	<p>Calls for a written notice within a specified period of time, and</p> <p>Specifies that option deliveries will be at the same rate as the basic requirement unless the parties agree otherwise.</p>

*Exhibit 6-9 (continued on next page)*

## Standard Contract Clauses for Options (continued)

Clause	Use	Substance
FAR 52.217-8	Used if the contract is recurring and continuing services to assure continued performance in the event of delays in the follow-on procurement process.	<p>Limits the total extension of line item services to 6 months.</p> <p>Provides for a written notice within a time frame specified in the contract schedule.</p> <p>Allows adjustment in line item prices <b>only</b> for Service Contract Act wage rates.</p>
FAR 52.217-9	<p>Used if—</p> <ul style="list-style-type: none"> <li>• Work covered under the option requires start-up or phase-in; <b>or</b></li> <li>• Contract extensions should be addressed; <b>and</b></li> <li>• The contract applies to either supplies or services.</li> </ul>	<p>Provides for a preliminary written notice of the Government's <b>intent</b> to exercise the option 60 days before contract expiration.</p> <p>Specifies a time frame for exercise of the option.</p> <p>Limits the total contract duration to a specific time frame.</p> <p>States that a contract extension extends the option as well.</p>

*Exhibit 6-9 (continued)*

When exercising an option, you save considerable time and administrative expense. However, if market conditions changed favorably for buyers of the supplies or services contained in the option, the savings realized by issuing a new procurement may be worth the time and trouble of a resolicitation.

Step 1

**Consider whether contract award is an indicator of current market conditions.** This consideration is only valid when:

- Options were considered in evaluating the basic contract award;  
AND
- The time between contract award and the option exercise is negligible.

Step 2

FAR 17.207(c)

**Decide whether market research provides sufficient evidence.** Some factors to consider for informal investigation of market prices are contained in Exhibit 6-10, Factors For Obtaining Comparative Data For Option Prices.

### Factors for Obtaining Comparative Data for Option Prices

1. The relationship of the option price to the price for the initial contract period.
2. The adequacy of competition at the time of initial award as compared with the competition at the time of the potential option exercise.
3. Changes in the general economy with a potential effect on the cost of performance.
4. The findings of an informal poll of other contracting activities surveying significant changes in offered prices for similar items or services;
5. Potential savings in administrative costs of exercising the option as compared with awarding a new contract, including service disruption costs;
6. Administrative or budget constraints that cause an inability to process a new solicitation.

*Exhibit 6-10*

### A MATERIAL DECREASE

*Joanne talked to the original manufacturer of the warehouse pallets. To her surprise, she found that raw material prices had decreased for the basic pallet material.*

*Upon inquiring further, they told her that they were able to offer a lower price on a similar Government requirement. Joanne checked with the contracting office for that agency they mentioned and found that the prices were 6.5% lower than her own agency's contract.*

FAR 15.404

When the contract award was noncompetitive, your research is primarily to identify whether any competitors have entered the market. Your primary tool in seeking new competition will probably be a “sources sought” synopsis, in which you describe the services and request interested and capable suppliers of those items or services to respond. This avoids the expense of a formal solicitation if there are still no other sources available.

Step 3

**Issue a formal solicitation if market research is insufficient.** Use a formal solicitation only if the first two steps do not provide sufficient data. The purpose of using an option is two-fold:

- To avoid the expense of a formal solicitation, AND
- To take advantage of a lower option price.

So use a formal solicitation as a last resort when there is no other way of confirming that the option price is at least equal to current market prices.

Step 4

**Make a decision based on the evidence at hand.** You may discover that the Government's right to exercise an option has expired because:

- Proper preliminary notice was not given (refer to the next section);  
OR
- Because funds were not available.

When you make this discovery, discontinue the option exercise UNLESS the contractor is willing to waive its right to the preliminary notice. The Government's right to exercise an option when the actual date for the expiration has passed cannot be restored. Items or services under the expired option must be procured through another contracting procedure.

### DOING IT THE RIGHT WAY

*Roger Harrison was delighted when Joanne told him about the price decrease and agreed that a new competitive procurement was the way to go.*

*He and Eric worked out milestones and agreed on a projected delivery date. It would not be as large as the original contracts so it would not take as long to award. Eric was hoping to get sealed bids from both the original manufacturer and Angor Wat.*

*“I’m sure we’ll have another option exercise for you pretty soon, Joanne,” Eric told her. “Unless, of course, you can continue to find these good prices.”*

*“Sometimes doing it the right way creates more work,” she observed. “It looked like it was going to be fairly easy to get those extra pallets on that option.”*

*“You’re right,” Eric agreed. “But our whole purpose here is to get the best deal for the Government without prejudicing the contractor’s rights. You know you more than earned your paycheck this week.”*

#### **Provide Written Notice and Exercise the Option**

Step 1

FAR 17.207

**Provide preliminary notices when required.** The standard FAR clause for services that would extend the term of the contract specifies preliminary notice “60 days before the contract expires.” Refer to Exhibit 6-9. You must provide notice within the time frame specified or the Government will lose its unilateral right to exercise the option. You could still exercise the option bilaterally, but the contractor would have to specifically waive its right to the preliminary notice and the option exercise could not otherwise vary option terms and conditions, except as specifically authorized elsewhere in the contract.

An option in a basic contract represents a considerable risk to the contractor. If costs increase after contract award beyond what the contractor anticipated when pricing the option, it must absorb the loss represented by the difference in the market price and the option price.

If costs go up, the contractor without proper notice may not consent to exercise the option.

The contractor will usually agree to waive a preliminary notice when market pricing is **the same as or lower than** its' option price.

## Step 2

**Obtain a new wage determination for services subject to the Service Contract Act, when required.** If the basic contract contained a Service Contract Act wage determination, then the option will probably also require one. The only time it will not is when one of the following is true:

- The basic contract contained both supplies and services, but the option applies only to supplies.
- No personnel within the service categories subject to the Service Contract Act will be used to perform services contained in the option.

An example of when the last exception would apply is when both professional services and services subject to the Service Contract Act are in the basic contract, but only professional employees will be used to provide services contained in the option.

When in doubt, question the contractor on the categories of labor he uses in performing specific option services.

FAR 22.1008-6
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When filling out the SF 98a, Notice of Intention to Make A Service Contract and Response to Notice, indicate “Mod-Exercise of Option” in Block 2 of the form, which asks for the estimated solicitation date.

## Step 3

**Exercise the option.** To exercise a contract option, use SF 30 or the form that your agency prescribes for modifications. This ensures that everyone who was provided a copy of the basic contract is aware of the additional requirement. It also provides the most uniform way of documenting it. Generally follow the procedures in paragraph 6.2.8 for implementing unilateral contract modification changes. In the rare instances when you will be issuing a bilateral modification for the contractor to acknowledge that it has waived a required preliminary notice, generally follow the procedures in paragraph 6.2.9 for implementing supplemental agreements.

Before presenting the SF 30 to the contracting officer for signature, double check to ensure that there is enough time to provide it to the contractor within the period specified in the terms of the contract. Provide a note to the contracting officer calling his or her attention to the expiration date.

**Prepare a Written Determination for the Contract File**

As contract administrator, you will prepare this determination for the contracting officer's signature. Refer to Exhibit 6-12, Content Requirements for a Determination to Exercise an Option.

FAR 17.207(f)

**Content Requirements for a Determination to Exercise an Option**

1. The option exercise complies with the terms of the option.
2. Funds are available.
3. The requirement covered by the option fulfills an existing Government need.
4. The exercise of the option is the most advantageous method of fulfilling that Government need, price and other factors considered.
5. A statement that the option exercise was synopsisized or a reference to the exception that authorized not synopsisizing.
6. The option exercise complies with the requirements of FAR Part 6 regarding full and open competition.

*Exhibit 6-12*

## CHAPTER 7

# REMEDIES

### A POTENTIAL DEFAULT

*Eric had taken Mark and Joanne out for lunch. The chit-chat turned to talk of business during coffee. “Mark, have you been able to convince our lawyers that we should assess liquidated damages against the Bollingbrook Corporation or are they still arguing with you?” asked Eric.*

*“Sam Jones is still arguing,” replied Mark. “He keeps insisting that Bollingbrook could claim the assessment was a penalty and that we’d lose if they protested. I can’t understand his logic. The liquidated damages assessment was so carefully constructed at the beginning of the requirement. I still maintain that his delinquency, as unavoidable as it may have been, has injured us.”*

*“Let’s discuss it with the Director on Tuesday,” Eric responded. “He may be able to give us some help with the problem.*

*“I like Sam,” Eric continued. “He’s a good lawyer, but sometimes it seems like he goes beyond his advisory role. On the other hand, maybe he’s stewing over some fine point that the rest of us just aren’t catching.”*

*“What’s going on with the Farthington contract?” Joanne asked.*

*Eric rolled his eyes. “I have never entered into a contract that I anticipated to go sour,” Eric said. “but, okay, I goofed on Farthington. Who would have known about the Finance Director skimming money from the company, or the strange cousin of Mrs. Farthington’s dead husband who was owed a half million dollars?”*

*“No one’s blaming you, Chief” Mark said soothingly. He was secretly a bit amused to see Eric in such a dither. He was usually so self-assured. “But, now that we’ve got it, what the heck are you going to do with it?”*

*Eric sighed. “I really feel sorry for Mrs. Farthington, but there was no other way to go. Sam signed off on a show cause letter last night. We sent it out this morning.”*

*They all pondered this silently for a minute. The agency had a few defaults within recent memory. They had all been an administrative nightmare.*

*“Well, think of what would have happened if Jake hadn’t discovered it,” Joanne offered.*

*“I don’t want to think about it!” Eric proclaimed. “The widgets would have been floating around in the supply system for months, maybe even a year or more, before we realized anything was wrong with them. We’d have to try to get them all back after the first few failures. We’d be trying to replace them all by proving latent defects if we hadn’t caught on to the substitution. Then we’d have gone for fraud. Either way—it would have been a lot bigger mess.”*

## COURSE LEARNING OBJECTIVES

At the end of this course, you will be able to:

**Overall:** Select and pursue a formal contract remedy for the performance problem.

- Individual:**
- 7.1 Identify remedies that might be appropriate.
  - 7.2 Determine whether to use a cure or a show cause notice.
  - 7.3 Invoke liquidated damages.
  - 7.4 Reject nonconforming supplies or services.
  - 7.5 Invoke written warranty.
  - 7.6 Invoke implied warranty.
  - 7.7 Prove the existence of latent defects, fraud or gross mistakes amounting to fraud.
  - 7.8 Select one or more remedies as the best for a particular contract problem.
  - 7.9 Determine whether to withhold or reduce payment or demand payment from the contractor.

# INTRODUCTION TO CONTRACT REMEDIES

## **Definition of a Government Contract Remedy**

Government contract remedies are forms of relief that the Government can pursue to compensate for a contractor's nonperformance or non-compliance with a contract term or condition. These forms of relief can be provided by contract clauses or from basic rights provided in Government contract law and, occasionally, in commercial contract law.

## **Government Policy on Choosing Contract Remedies**

There are certain policies that are standard in seeking contract remedies. These require that you:

- Document and verify the sufficiency of evidence for the remedy sought;
- Notify the contractor of your intentions of seeking relief; and
- Seek and obtain contractor feedback on the proposed Government action.

The preference is always to reach a bilateral agreement on solutions to contract problems, rather than taking unilateral Government action. Sometimes, however, unilateral action is needed.

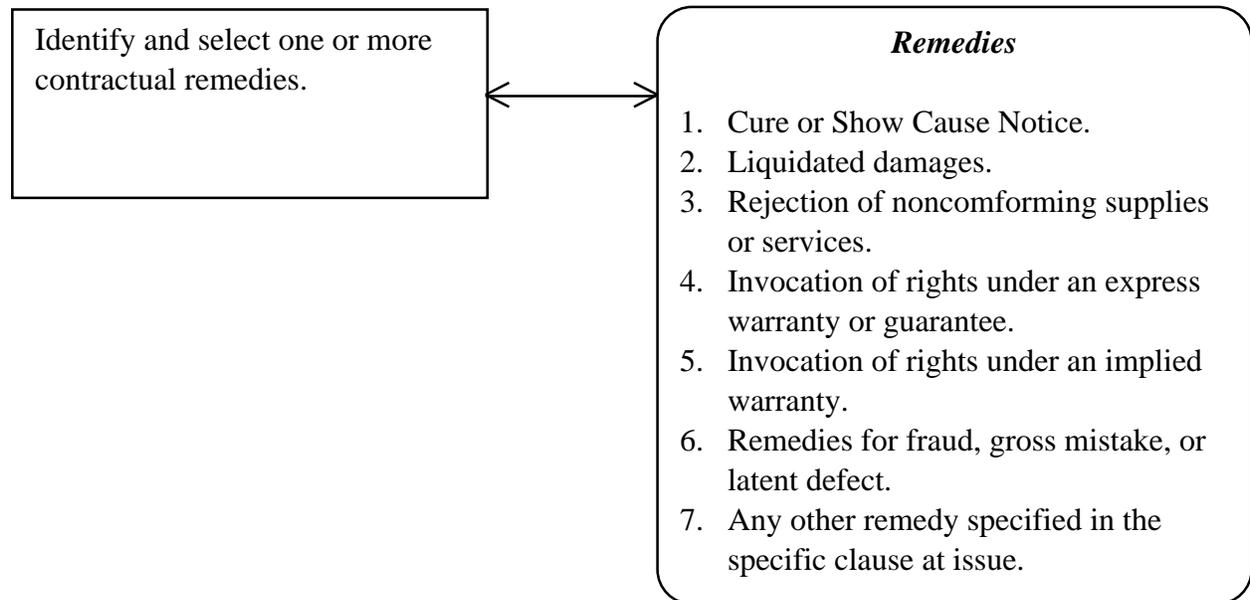
This chapter outlines remedies not discussed separately in other chapters:

- Actions preliminary to termination for default;
- Liquidated damages;
- Rejecting work and demanding reperformance;
- Accepting work with minor nonconformities for a reduced contract price or other consideration;
- Pursuing rights under a warranty; or
- Seeking postacceptance rights due to:
  - Latent defects,
  - Fraud, or
  - Gross mistakes of the contractor.

## **Steps in Performance**

The general steps in seeking corrective actions to defective performance are charted on the next page. Following the flowchart, each step is discussed in turn. Then, in subsequent sections, the steps in seeking some specific remedies are charted at the beginning of the section and then discussed in detail.

## PRELIMINARY STEPS FOR CHOOSING REMEDIES



## 7.1 Identify Types of Remedies

Monitoring identifies performance failures or other breach of contract situations, such as:

- Anticipated or actual late delivery,
- Failure to adequately control costs, and
- Unsatisfactory performance.

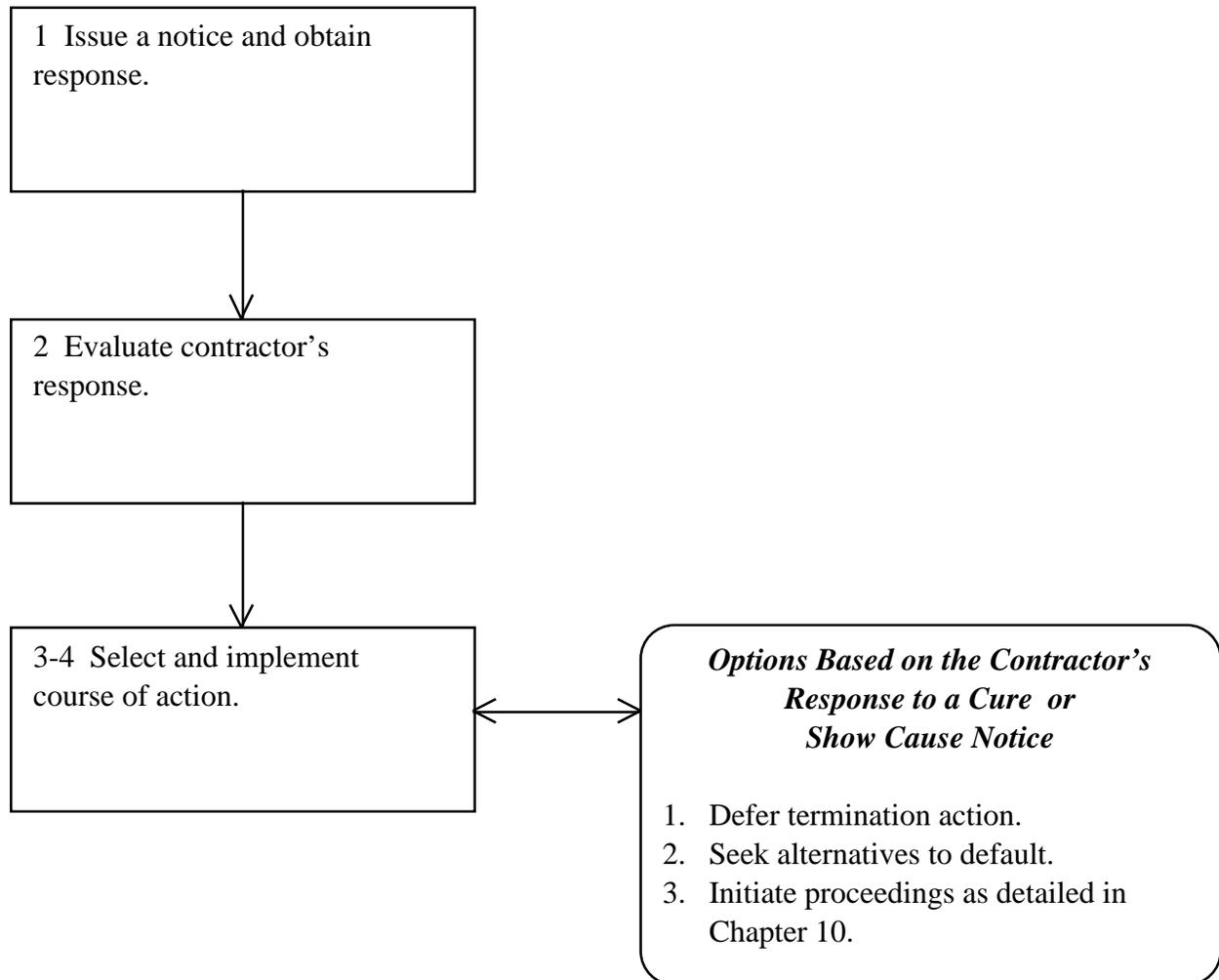
The Government has several methods at its disposal to remedy a given situation without resorting to terminating the contract. Remedies include:

- Issuing cure or show cause notices;
- Imposing liquidated damages;
- Rejecting nonconforming supplies or services;
- Invoking written warranties;
- Invoking implied warranties;
- Proving the existence of latent defects, fraud, or gross mistakes amounting to fraud.

Each one of these remedies will be discussed in this chapter. Reducing progress payments is another remedy available to the Government when the contractor fails to make progress. This remedy will be covered in the Advanced Contract Administration course.

Selecting the most appropriate remedy for the situation is covered in Section 7.8 of this chapter.

## STEPS IN ISSUING A DELINQUENCY NOTICE



## 7.2 Issue a Cure or Show-Cause Notice, If Appropriate

Contractors should, if practicable, be notified of the possibility of being terminated for failing to perform its contractual obligations. Notification will take one of two forms:

- Cure notice
- Show cause letter

### Issue Notice to Contractor

A cure notice is used when:

1. The contractor fails to make progress and performance is endangered;
2. The performance problem does not involve terms for contract delivery;
3. At least 10 days remain for contract performance and correction of the problem can reasonably be expected to take place within the time remaining; or
4. The intent is to terminate the contract prior to the delivery date.

FAR 49.607(a)

At a minimum, a cure notice must:

- Specifically state the failure you believe is endangering performance,
- Allow the contractor at least ten days to “cure” the failure, and
- Be in writing and sufficient to support a default termination.

The FAR format for a cure notice is shown in Exhibit 7-1, FAR Format for a Cure Notice.

### FAR Format for a Cure Notice

You are notified that the Government considers your \_\_\_\_\_ [specify the contractor’s failure or failures] a condition that is endangering performance of the contract. Therefore, unless this condition is cured within ten days after receipt of this notice [or insert any longer time that the Contracting Officer may consider reasonably necessary], the Government may terminate for default under the terms and conditions of the \_\_\_\_\_ [insert clause title] clause of this contract.

*Exhibit 7-1*

## REMEDIES

After a cure notice has been issued, the contract cannot be terminated until the 10 days period has been completed unless there is evidence of wrongful conduct or repudiation by the contractor.

### FAR 49.607(B)

A show cause notice is used when there is insufficient time remaining in the delivery schedule for the contractor to cure or correct the delinquency. Usually a show cause notice is issued when there is less than 10 days remaining; however, it can be used at any time when you can determine there is an "insufficient amount of time left."

The notice must afford the contractor an opportunity to provide evidence the delinquency was beyond its control.

At a minimum, a show cause notice should:

- Inform the contractor of its liabilities in the event of default;
- Request the contractor to show cause why the contract should not be terminated for default;
- Inform the contractor that failure to explain the cause of the deficiency may be taken as admission that no valid explanation exists; and
- Invite the contractor to discuss the matter at a conference, when appropriate.

The FAR format for a show cause notice is shown in Exhibit 7-2.

Send both notices using a "proof of delivery" method.

### FAR 49.402-3(e)(4)

Copies of either notice must also be sent to:

### FAR 49.402-3(e)(3)

- When the contractor is a small business, the contracting office's small business specialist and the Small Business Administration Regional Office nearest the contractor.
- When a payment and performance bond were required for contract performance, the contractor's surety.

## FAR Format for a Show Cause Notice

Because 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 the Government’s letter of (date)”], the Government is considering terminating the contract under the provisions for default of this contract. Pending a final decision in this matter, it will be necessary to determine whether your failure to perform arose from 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 the name and complete address of the contracting officer] within 10 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 the government 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 the Government of delinquent goods or services will be solely for the purpose of mitigating damages, and it is not the intention of the Government to condone any delinquency or to waive any rights the Government has under the contract.

### *Exhibit 7-2*

**Evaluate Contractor’s Response**      A contractor’s response to delinquency notices can take several forms.

**Cure Notice Response**      A contractor is not required to respond to a cure notice since the contractor is told to correct the problem before the contract becomes delinquent. However, unless the problem is actually cured, the Government, upon expiration of the delivery period, has the option of issuing either a:

- Show cause notice, or
- Termination notice.

**Show Cause Notice Response**      If you choose to issue a show cause notice (either with or without a prior cure notice), the contractor has 10 days to respond. Typical responses are summarized in Exhibit 7-3, Typical Contractor Responses to Delinquency Notices.

### Typical Contractor Responses to Delinquency Notices

- An offer to “cure” performance.
- An offer to provide substantial performance in exchange for relief from some terms or conditions in the contract.
- Presentation of a case for excusable delay.
- Agreement with the facts of the notice, but no offered solution.
- No response.

*Exhibit 7-3*

Actions after  
Evaluation

Depending on the response you receive, you may:

- Defer termination action.
- Modify the contract.
- Begin default proceedings.

**Defer Termination  
Action**

Forbearance is the more formal term used to describe deferring termination action. This strategy is appropriate when a contractor has provided a workable solution to the performance deficiency you formally brought to its attention.

Waiver of Default  
Right

It is possible for you to unintentionally waive the Government’s right to default, but only under certain conditions. This can happen when:

- The Government fails to terminate within a reasonable time after the conditions for the default occurs.
- The contractor relies on the Government’s failure to terminate and incurs additional expenses in its continuation of efforts to complete performance.
- The Government has indicated a willingness for the contractor to continue performance.

You obviously think there is a good chance for correction of deficiencies or prefer late delivery to default if you take any of these actions. When the Government indicates its concurrence with continued performance, such an indication must be clearly demonstrated to the contractor in order for that indication to constitute a waiver of the right to terminate. Note that if the Government contracting office does not make such a clear indication, the contractor may choose to discontinue performance.

Protection of Default  
Right

To protect the Government's right to further action:

1. Provide a notice to the contractor that includes all of the elements contained in Exhibit 7-4, Necessary Elements of a Forbearance Notice, obtaining a receipt for the notice; and
2. Continue with default proceedings immediately after the contractor's commitment for correcting performance is over.

### Necessary Elements of a Forbearance Notice

To ensure preservation of the right to future remedial action for deficient performance, a letter of forbearance must:

1. Acknowledge the contractor's stated method for and commitment to "cure" performance.
2. Put the contractor on notice that the Government is deferring its right to future corrective actions only if the contractor fulfills its commitment to remedy deficient performance.
3. Declare the Government's intention of pursuing corrective contractual remedies, including default, if the contractor fails to fulfill its commitment.

#### *Exhibit 7-4*

By outlining the conditions of forbearance, you eliminate the contractor's defense of relying on the Government's inaction to its detriment.

An example of a forbearance notice is shown in Exhibit 7-4, Sample Forbearance Notice.

## Sample Forbearance Notice

Dear Mr. Project Manager:

SUBJECT: Contract No. LX74920-89-C-0891, Deficient Performance

This notice is a direct response to your reply of January 18, 1991 to the cure notice I issued on January 11, 1991 to the ABC Company.

In your January 18 reply you outlined your company's plan for making a delivery of the first run of 160 widgets that was due, according to the delivery schedule of this contract, by December 31, 1990, stating, in part that:

1. The delinquency of the first run of widgets was due to:
  - (a) employee absenteeism and overall lack of production during end of year holiday season, and
  - (b) the late delivery on January 4, 1991, by a material supplier of chemical compound X3-NY that is necessary to complete the final stage of production.
2. Your company "projected" delivery of the first run of widgets by February 1, 1991, by adding a third production labor shift for the five- day work week beginning January 21, 1991.
3. Your company "projected" that the second production run of widgets would be delivered on time on April 1, 1991.

In response to these statements, I find the following facts are very pertinent:

1. Since the holiday season was a well-established fact on June 28, 1990, the day you signed the proposal on which the Government contract award was based, any delay that may have been caused by it is not excusable under paragraph (b) of the Default clause in this contract.
2. Since you offer no explanation for the delinquent delivery of your material supplier I am unable to determine if its late delivery was excusable under paragraph (b) of the Default clause. Since you provided no evidence to the contrary, I would presume that it was inexcusable.

*Exhibit 7-5 (continued on next page)*

**Sample Forbearance Notice (continued)**

Your use of the term “projected” does not convey to me a firm commitment on the part of the ABC Company to meet the February 1 delivery date for the first run delivery or the contractually scheduled delivery dates for the second and third deliveries. It was only upon my questioning your intent in this regard during a telephone conversation on January 15, 1991 that you affirmed your company’s commitment to these delivery dates.

Based on this evidence, and in spite of the apparent inexcusability of the delayed shipment, the Government is prepared to temporarily defer default action; however, this forbearance is conditioned upon the following events:

1. Delivery of the first run of widgets on February 1, 1990.
2. Delivery of the second and third production runs for the widgets as scheduled in the contract.

If delivery is not made as indicated above, the Government reserves its right to take all remedies available to it under the contract, including the right to terminate this contract for default, and under the general rights provided by Government contract law, based on all of the evidence it has accumulated to date in regard to the initial late delivery and any subsequent late deliveries.

If I may be of assistance in further explaining the Government’s position in regard to deficient performance under this contract, please contact me immediately.

Sincerely,

Jane Justice  
Contracting Officer

*Exhibit 7-5 (continued)*

## REMEDIES

If the Government does inadvertently waive its right to default, the contracting officer can regain the right by:

- Unilaterally establishing a new reasonable date for delivery. The date must be reasonable considering the contractor's capabilities at the time that the new date is set.

OR

- Bilaterally establishing a new date for delivery.

Seek consideration from the contractor when establishing a new date. However, the date can be extended without consideration to clearly establish the contractor's obligation and protect the Government's rights to damages.

### **Seek Alternatives to Termination for Default**

FAR 49.402-4

There are other alternatives to termination. You can:

- Establish a revised delivery schedule.
- Permit the contractor to use a third party to continue performance.
- Terminate the contract at no cost when a requirement is no longer needed.

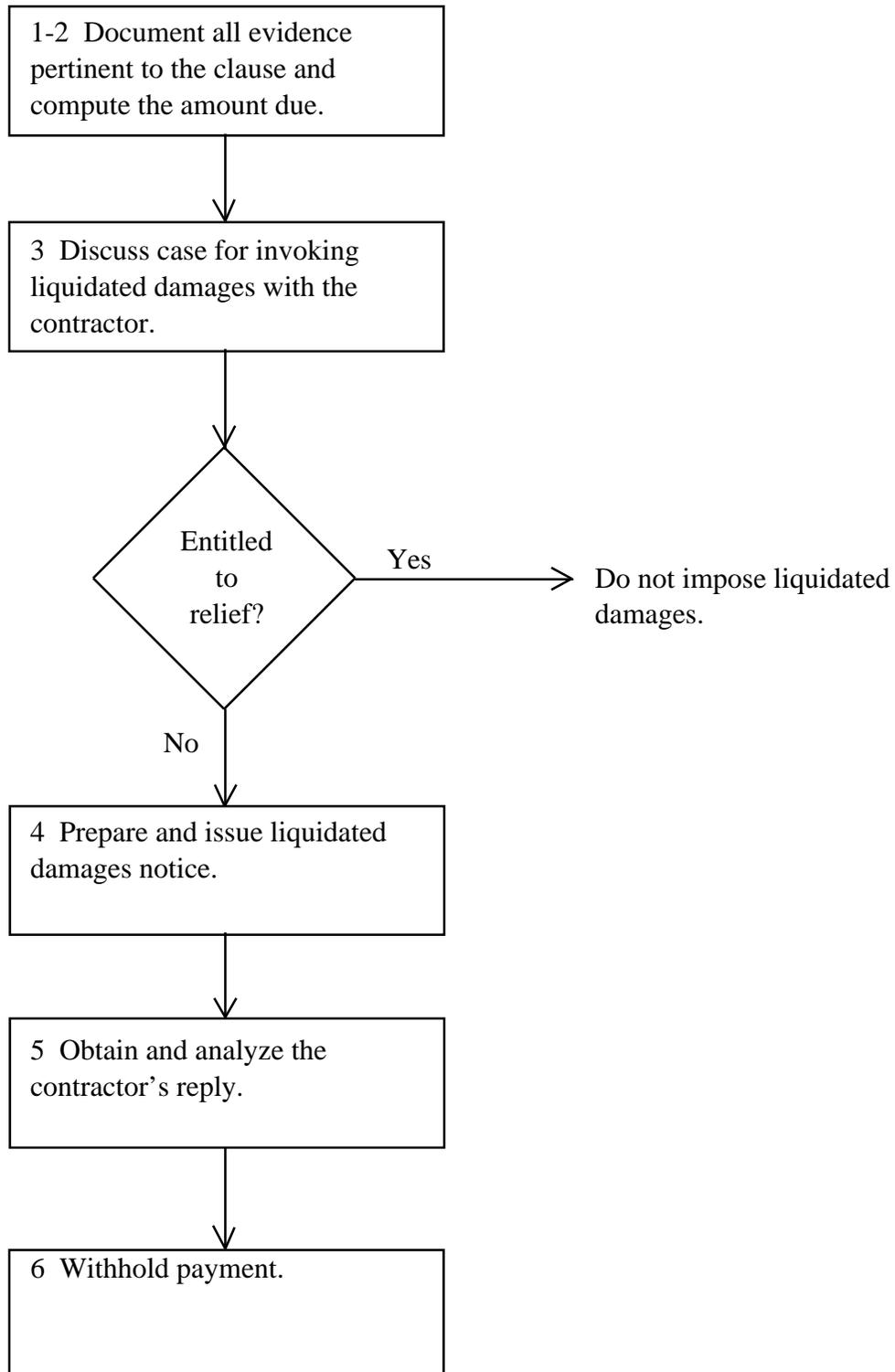
Establish the Government's position on any consideration, a new delivery schedule and/or other terms and conditions.

Negotiate sufficient consideration for relief from terms and conditions.

Execute a supplemental agreement.

Document the file to support your actions.

## STEPS IN IMPLEMENTING LIQUIDATED DAMAGES



## REMEDIES

### 7.3 Liquidated Damages

Liquidated damages are a predetermined rate of damages, payable to the Government by the contractor, for the contractor's delay in performance.

Liquidated damages are predetermined when the need for timely delivery or performance is so crucial that the Government would probably suffer damages if the delivery or performance is late; and the extent of the Government's actual damages would be difficult or impossible to prove.

Assessment of liquidated damages must be reasonable and considered in light of contract requirements, on a case-by-case basis. Any amount fixed without reference to probable actual damages might be interpreted as a penalty, thereby making them unenforceable.

Liquidated damages can only be assessed when a clause has been included in the contract. Standard liquidated damage clauses are:

FAR 52.212-4

- Liquidated Damages—Supplies, Services, or Research and Development

FAR 52.212-5

- Liquidated Damages—Construction

FAR 52.219-16

- Liquidated Damages—Small Business Subcontracting Plan

FAR 52.222-4

- Contract Work Hours and Safety Standard Act—Overtime Compensation

Only liquidated damages for supplies, services and research and development will be covered in this course.

### Document All Evidence

Document any evidence of the contractor's failure to deliver the supplies or perform the services within the time specified in the contract.

Focus this documentation on:

1. The stage of completion;
2. The probable amount of damages sustained by the Government;
3. The reason and excusability for a delay;
4. The contractor's ability to complete the contract.

**Compute the Amount Due**

When assessment of liquidated damages is appropriate, the contracting officer withholds payment based on an accurate computation of the amount due.

The actual computation will depend not only on the specific amount or specific formula in the contract, but also on actual events that occurred during the contract administration phase of the contract.

Identify all factors that control how you must compute these amounts to reflect an accurate maximum amount authorized under a specific liquidated damages clause.

Subtract amounts of time that may have constituted an excusable delay from the period for liquidated damages assessment. When you subtract out time for excusable delay, subtract out calendar days unless the performance is specifically described as “work” days. Holidays and weekends are not considered “work” days.

FAR 12.203(c)

The rate of assessment for liquidated damages may be in two or more increments, providing a declining rate of assessment as the delinquency continues.

**Evaluate Calculated Damage Amount**

FAR 32.111(c)(2)

Examine the contract for any restrictions. Generally, the contract will restrict the total amount withheld to the greatest amount that can be withheld under the authority of a single clause. Compute amounts that would be authorized under each clause.

FAR 12.202(b)

To ensure that the total liquidated damages amount is reasonable and not a penalty, you may have special contract terms limiting the overall dollar amount or period of time, or both, for liquidated damages assessment. The courts and administrative boards will not uphold liquidated damages that are so excessive that they can be construed as a penalty.

## REMEDIES

### **Discuss the Assessment with the Contractor**

After you determine the Government is entitled to assess liquidated damages, discuss the situation with the contractor. Explain your position and provide a chance for the contractor to present evidence to refute that position. Prior to the actual assessment of liquidated damages, advise the contractor of:

- The Government's intention to assess liquidated damages unless the contractor provides evidence to the Government by a specified date that such an assessment would be improper;
- The basis or bases for the Government's assessment of these damages; and
- The amount of the planned liquidated damages assessment, detailing the reasons for any reduction in a specified amount stated in the contract.

### **Prepare and Issue Liquidated Damages Notice**

A liquidated damages notice should indicate:

- The reason for assessing the damages provided in the clause.
- The dollar amount of damages.
- Any steps the contractor may be able to take to avoid further assessment of liquidated damages.

By issuing this notice, you are giving the contractor one last opportunity to provide evidence for not assessing these damages.

### **Obtain and Analyze the Contractor's Reply**

A contractor's response may:

- Document a case for an excusable delay,
- Claim impossibility of performance, or
- Claim the work substantially complete.

Liquidated damages are generally not appropriate after the work can be considered "substantially complete." Substantial completion occurs on the day the product is ready for use in the manner intended by the Government at the place required by the contract (for example, f.o.b. destination). The practical basis for this theory is that minor defects that do not affect use are not a reason to continue the liquidated damage

period. However, this theory has limited application to supply and service contracts—applying mainly to equipment installation—and is based on decisions of the boards of contract appeals and the courts.

### **Withhold Payment**

Based on the evidence you gather, you will either:

- Forego assessing liquidated damages;
- Assess a reduced amount; or
- Assess maximum allowable liquidated damages.

When you decide that it would be fair to forego liquidated damages assessment, provide the contractor with a written explanation of the reason. Underscore that this case of nonassessment is not indicative of probable action in other similar circumstances.

Reduced amounts may be assessed when the total amount of liquidated damages is excessive in relation to:

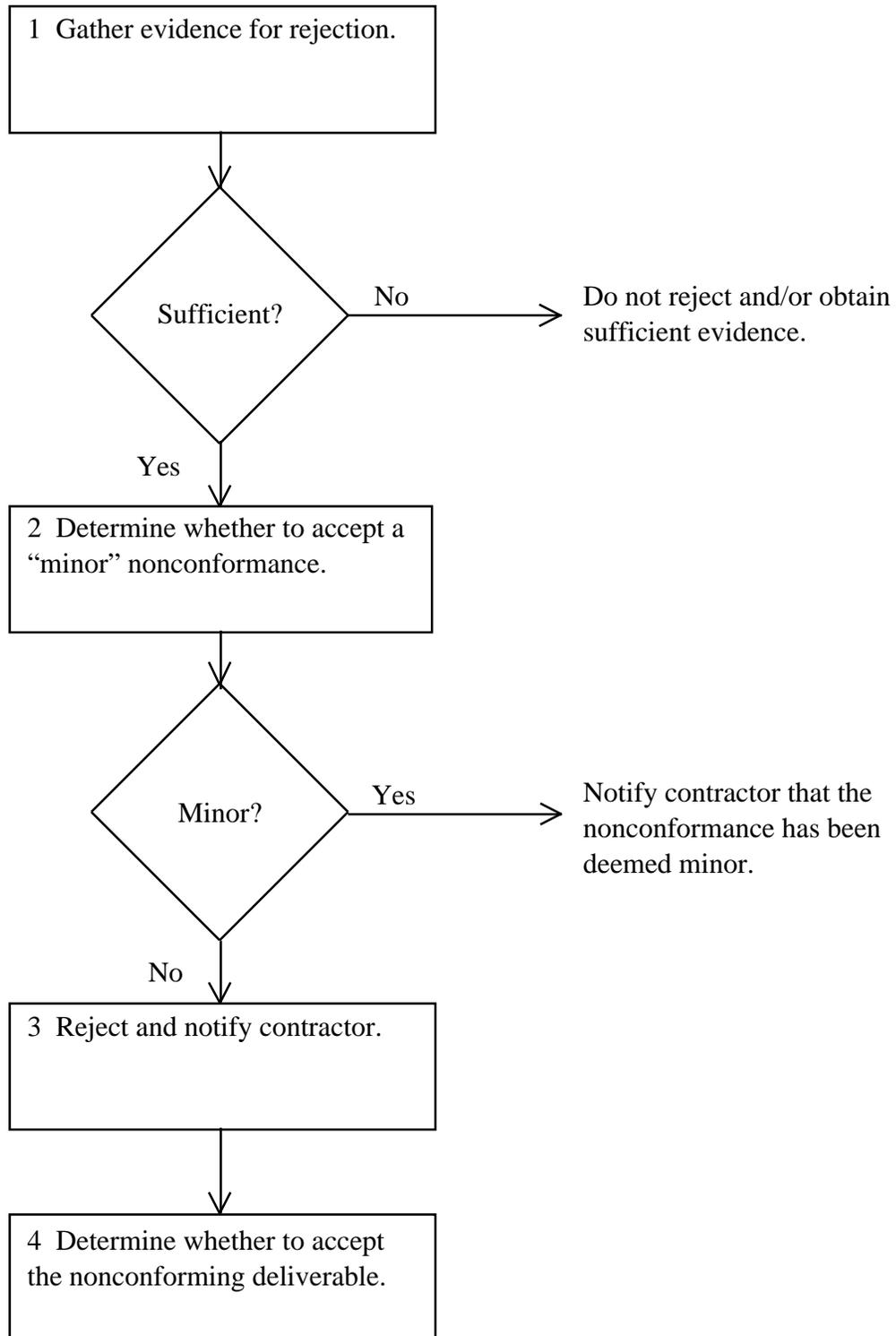
- The total dollar amount of the contract or
- The probable amount of damages sustained by the Government.

Before you actually deduct this amount from any invoice, you must advise the contractor that the contracting officer has made a decision to deduct a specific amount.

When the contractor has been authorized partial payments based on Government acceptance of some of the supplies or services under contract, apply the amount due from your computations and consideration to the invoice the contractor submits for payment of late partial shipments.

Do not deduct the amount of liquidated damages due the Government on invoices for progress payments. Wait until the supplies or services on the invoice have been accepted by the Government before actually deducting the amount due. This is true even when acceptance results from a repurchase against the contractor's account. If payment is not due until final acceptance, deduct the amount on the final invoice.

## STEPS IN REJECTION OF NONCONFORMING SUPPLIES OR SERVICES



## 7.4 Rejection of Nonconforming Supplies or Services

FAR 46.407

### Gather Evidence for Rejection

The regulations specifically tell contracting officers to reject supplies or services not conforming in all respects to contract requirements, except as otherwise authorized.

When the supplies or services do not conform, investigate the circumstances to:

- Establish that acceptance has not already occurred;
- Provide a basis for the rejection;
- Determine the seriousness of the problem;
- Determine if the contractor is at fault.

### Previous Acceptance

Supplies or services that do not conform to the terms of the contract should be rejected before acceptance. After a product or service has been accepted, you cannot later reject it. Acceptance is final except for:

- Latent defects
- Fraud
- Gross mistakes amounting to fraud

Because acceptance is final, determine if you still have the right to reject nonconforming supplies or services. Investigate whether:

- The work has already been explicitly accepted;
- There is any evidence of implied acceptance by events such as:
  - Silence
  - Late rejection
  - Retention and use of delivered items
- The Government accepted nonconforming work under a prior contract for the same requirement.

## REMEDIES

### Basis of Rejection

The rejection must clearly demonstrate the reason the supply or service did not conform to the specification. Supporting documentation must identify which part of the contract did not perform and why. Inspection and acceptance clauses in the contract provide the basis for rejecting supplies and services.

### Criticality of Nonconformance

One of the areas for concentrating your investigation is the seriousness of the deficiency. Consider the potential problems that could result from the deficiency. You may not accept any supply or services when the nonconformance is substantial.

### Excusability

Another consideration is who is responsible for the nonconformity. You will need to verify that one of the other Government officials involved in the procurement did not direct the contractor to make any changes.

For instance, a procurement for a firetruck may require the inclusion of 300 feet of hose. If the COR tells the contractor to provide only 250 feet of hose and in its place provide five fire extinguishers, a constructive change has occurred (assuming the COR had the authority to make such a substitution). The “missing 50 feet of hose” may cause a different inspector to recommend rejecting the truck.

### **Accept Minor Nonconformance**

You can accept a product or service when the basis for nonconformance is minor. Generally, a minor nonconformance does not adversely affect:

FAR 46.407(d)

- Safety
- Health
- Reliability
- Durability
- Performance
- Interchangeability of parts or assemblies
- Weight (if a contract requirement)
- Appearance (if a contract requirement)
- Any other basic objective of the contract

FAR 46.407(f)

Minor nonconformities may even be accepted as is without receiving compensation from the contractor when the savings realized by the contractor by not conforming does not exceed the cost to the Government for processing a formal modification.

When the value of the deviation exceeds the cost of administrative processing, you must issue a formal contract modification specifying appropriate consideration for accepting the nonconforming deliverable. A downward price adjustment is the most typical form of compensation.

You may not be in a position to determine the seriousness of the nonconformance. You may need to convene a joint contractor-contract administration review group to decide when a nonconformity is minor. Such a group would not have the authority to sanction a serious nonconformity.

Accepting a minor nonconformance on one contract or order does not provide relief for correcting similar defects on pending or future work. Let the contractor know that you expect it to correct other similar defects before acceptance.

### Reject and Notify the Contractor

FAR 46.407(g)

When the nonconformity seriously affects the requirement, you should ordinarily reject the item. It is acceptable to discuss the rejection with the contractor before issuing any written notification. The contractor may have additional information concerning the deliverable. You may learn that the contractor was directed to make a change. Before you can reject the product or service, determine if any of the contract requirements have been changed.

### Written Notices

The contractor must be notified by the person responsible for acceptance of the rejection. The notification must be in writing if:

- The rejection took place at a location other than the contractor's plant;
- The contractor persists in providing minor nonconforming items or services; OR
- Late supplies are being rejected and no excusable delay factors were involved in the delinquency.

Written notification should:

1. Provide the reason for rejection.
2. State a time period for the contractor's reply.
3. Be furnished promptly.

A written notice requires a written receipt from the contractor in acknowledgement of delivery.

### Prompt Notices

The requirement for the Government to give "prompt" notice is measured within the context of the supplies or services that were rejected.

## REMEDIES

The Government may not delay in issuing a rejection notice to the point that the contractor was prevented from reworking or repairing the defective item, the contractor would have good grounds for asserting that the notice was not prompt. Similarly, a notice is not prompt if the delay caused a contractor additional work or expense.

A rejection notice does not extend the delivery period. The contractor is still required to provide supplies and services which conform to the contract within the delivery schedule.

### **Make the Final Decision on Acceptance**

A contractor may respond to the notification by submitting:

- A proposal to correct the work;
- A proposal to provide a downward price adjustment for acceptance;
- An offer to analyze and negotiate a revised delivery schedule for a conforming product with consideration;
- No reply; or
- A refusal to repair the work or offer any consideration.

The following table outlines the decisions that could result from your analysis.

## NONCONFORMING DELIVERABLES

<b>MINOR NONCONFORMANCE</b>		
<i>If</i>	<i>Then</i>	<i>Consideration</i>
Consideration would be less than the cost of modifying the contract	Accept as is (once)	None
Consideration would be greater than the cost of modifying the contract	Accept as is (once)	Consideration comparable to the value of the loss sustained by the Government
<b>SUBSTANTIVE NONCONFORMANCE</b>		
<i>If</i>	<i>Then</i>	<i>Consideration</i>
The contractor agrees to correct the deliverable (or reperform the service) within the delivery schedule	Withhold acceptance until receipt of the corrected deliverable	<ul style="list-style-type: none"> <li>• Cost to reinspect or retest</li> </ul>
The contractor agrees to correct the deliverable (or reperform the service) but needs an extension of the delivery date	Withhold acceptance until receipt of the corrected deliverable	<ul style="list-style-type: none"> <li>• Cost to reinspect or retest</li> <li>• Appropriate consideration for the delay</li> </ul>
Repair can be accomplished through warranty provisions	Accept as is	None
Acceptance: <ul style="list-style-type: none"> <li>• Would not affect safety or performance, and</li> <li>• Is justified on the basis of economy or urgency</li> </ul>	Accept as is	Consideration comparable to the value of the loss sustained by the Government
The contractor refuses to make repair or provide appropriate consideration.	Either: <ul style="list-style-type: none"> <li>• Correct the product or service through other means (contract or in-house), or</li> <li>• Terminate for default and reprocure.</li> </ul>	Contractor to pay all costs for the correction or reprocurement.

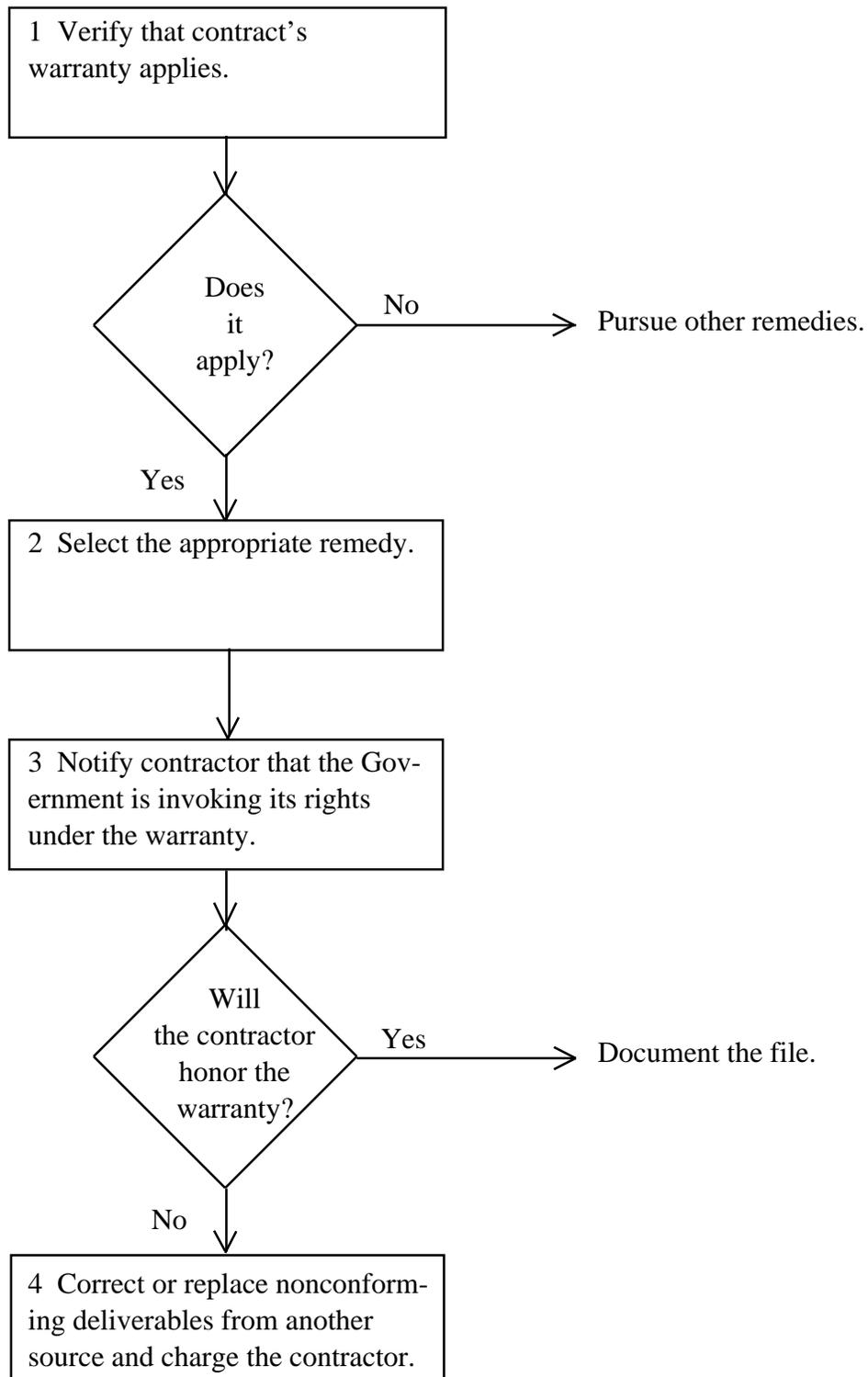
## REMEDIES

Accept a contractor's proposal for correction of the nonconforming supply or service based on:

- Advice of the technical activity concerning safety and performance;
- Information regarding the nature of the nonconformance;
- A request from the contractor for acceptance of the supplies or services, if feasible;
- A recommendation, by the requiring activity, and when appropriate, a program office, for acceptance or rejection with supporting rationale;
- An appropriate contract adjustment.

If you are ordering Government correction of defects at the contractor's expense, be sure to give the contractor a chance to correct the work. The contractor is liable for the cost of Government or third party correction costs only if it was given the opportunity to make the correction itself and failed to do so with a reasonable time.

## STEPS IN IMPLEMENTING EXPRESS WARRANTIES



REMEDIES

**7.5 Express Warranties**

FAR 46.701

An express warranty is:

“[A]written promise or affirmation given by a contractor to the Government regarding the nature, usefulness, or conditions of the supplies or performance of services furnished under the contract.”

In typical procurements for supplies and services, the Government specifies its requirements and validates that they have been met through the inspection and acceptance process. Written warranties limit the Government risk when relying upon the contractor’s own inspection methods to ensure the quality of the requirement.

Post acceptance rights

Acceptance by the Government imposes a major limitation on its rights. Standard inspection and acceptance clauses make acceptance by the Government final and conclusive (unless otherwise stated in the contract). The contractor is not liable for patent defects after acceptance by the Government unless a warranty clause was made a part of the contract. A patent defect is a defect that was either known by the Government or could have been made known through reasonable inspections or tests prior to acceptance.

Warranties are a necessity whenever there is concern inspection and testing may not be diligently carried out by the Government before acceptance. Warranties preserve the Government's rights after acceptance.

Express warranties are the contractor’s way of assuring the Government the product or service:

1. Is free from defects in workmanship; and
2. Will conform to the requirements of the contract.

Express warranties can be written in the form of a specification provision or a written contractor guarantee.

Specification Provisions

Specification provisions that focus on the quality of the requirement can be a warranty provision. Not all An example of a provision routinely found in a specification is:

The contractor's design shall ensure safe, efficient and economical operation under normal operating conditions.

This provision is an attempt to protect the Government from defects discovered after acceptance. Unlike warranty clauses or provisions, this specification provision would not survive acceptance. The Government would have to test this provision prior to acceptance to determine if the product conformed to the specification.

Expressed warranties (including specification provisions) must

1. state the duration of the warranty, and
2. specify a period during which notice of any defect must be given to the contractor.

If the specification provision example were to read:

The product shall be capable of reproducing copies for 30 calendar days without experiencing failure of any nonconsumable part. (5,000 copies per day represent the estimated normal daily usage.)

thethis provision would be considered an expressed warranty. The Government's rights would be protected after acceptance for the 30 day period. In this case, the 30 days represent both the duration of the expressed warranty and the period of time for notification.

#### Written Guarantees

A contractor can make written guarantees to the Government through:

- Accepting a warranty clause in the contract, or
- Incorporating its commercial warranty in the contract

Since acceptance is final unless otherwise stated in the contract, oral guarantees made by the contractor are not considered warranties.

Warranties included in the contract define the rights and obligations of the contractor and the Government concerning defective items and services after acceptance. Warranty clauses extend the Government's right to correction of defects or replacement of the deliverable until after acceptance.

Clauses requiring written warranties from the contractor are:

REMEDIES

<i>FAR Clause</i>	<i>Title</i>	<i>Purpose</i>
52.246-17	Warranty of Supplies of a Noncomplex Nature	<ul style="list-style-type: none"> <li>• Fixed-Price Supply                             <ul style="list-style-type: none"> <li>– Alt 1 (Commercial Items)</li> <li>– Alt 2 (Transportation Costs to correct)</li> <li>– Alt 3 (Contractor only source)</li> <li>– Alt 4 (Disassembly required for inspection or replacement)</li> </ul> </li> </ul>
52.246-18	Warranty of Supplies of a Complex Nature	<ul style="list-style-type: none"> <li>• Fixed-Price Supply or R&amp;D                             <ul style="list-style-type: none"> <li>– Alt 1 (Commercial Items)</li> <li>– Alt 2 (Transportation Costs to correct)</li> <li>– Alt 3 (Fixed-Price Incentive Contract)</li> <li>– Alt 4 (Disassembly required for inspection or replacement)</li> </ul> </li> </ul>
52.246-19	Warranty of Systems and Equipment under Performance Specifications or Design Criteria	<ul style="list-style-type: none"> <li>• Fixed-Price Supply, Service or R&amp;D when performance specifications or design are of major importance                             <ul style="list-style-type: none"> <li>– Alt 1 (Transportation Costs to correct)</li> <li>– Alt 2 (Fixed-Price Incentive Contract)</li> <li>– Alt 3 (Disassembly required for inspection or replacement)</li> </ul> </li> </ul>
52.246-20	Warranty of Services	<ul style="list-style-type: none"> <li>• Fixed-Price Service when 52-246-19 is not used</li> </ul>
52.246-21	Warranty of Construction	<ul style="list-style-type: none"> <li>• Fixed-Price Construction                             <ul style="list-style-type: none"> <li>– Alt 1 (Brand Name and Model equipment specified in contract)</li> </ul> </li> </ul>

## Types of Warranties

FAR 46.703

Government warranty clauses provide for various types of warranties in supply and service contracts, which generally fall into four basic categories:

1. Failure-free or hardware warranty. The contractor accepts the responsibility to correct any failure or defect that occurs during a specific or measured amount of use or operation. Refer to FAR 52.246-17, Warranty of Supplies of a NonComplex Nature, for an example of this type of warranty.
2. Correction of deficiencies warranty. The contractor agrees to correct any deficiency in design, material, or workmanship that becomes apparent during the test or early operation and that results in the specific item's performing below the standard required in the contract. This type of warranty in a major systems contract usually also applies to spare parts and other supplies included in the contract. Refer to FAR 52.246-19, Warranty of Systems and Equipment under Performance Specifications or Design Criteria, for an example of this type of warranty.
3. Supply warranty. The contractor is obligated to replace or reperform work on contract items if defects in material or workmanship existed at the time of acceptance. This is very similar to a consumer warranty for commercial products. Refer to FAR 52.246-18, Warranty of Supplies of a Complex Nature, for an example of this type of warranty.
4. Service warranty. The contractor agrees to reperform defective services if defects in workmanship existed at the time of acceptance. This is similar to a repair warranty in a retail establishment. Refer to FAR 52.246-20, Warranty of Services, for an example of this type of warranty.

## REMEDIES

### Enforcement

Since end users are the first to identify defects under a warranty, it is essential that they be provided information, such as:

- A summary of warranties that applies to a specific product or service;
- Specific components to which the warranty applies, if all components are not included;
- Who has Government responsibility to report warranty incidents and who has authority to implement warranty clauses;
- Duration of the warranty;
- Contact person in the Government procurement office;
- Contractor's contact person, if direct contact is allowed;
- Documentation and other warranty requirements; and
- Packaging and transportation requirements.

If the contractor's standard warranty applies, obtain a copy for your files and provide a copy to the end user.

### Application

Verify that a warranty clause applies to the specific failure. The basic considerations for determining applicability are outlined as follows:

1. Confirm that the Government has officially accepted the items or services.
2. Examine the written terms and conditions of the warranty. Your examination should reveal:
  - Duration of the warranty;
  - Coverage for specific defects.
3. Determine if any Government obligations under the warranty were met or ensure that they will be met.
4. Confirm that the facts support invoking the warranty.

**Select the Appropriate Remedy**

You need to accurately determine the contractor's responsibilities and the Government's rights under the terms and conditions of the warranty. Warranties may provide alternate remedies such as:

- Repair the defect
- Replace the item
- Reperform the service
- Make an equitable adjustment.
- Pay for repairs, replacements, or reperformance the Government has obtained from other sources

Unless a specific clause states otherwise, the Government has the right to choose the remedy that is in its best interest.

FAR 46.706(b)(2)
------------------

The contractor's obligation to repair, replace, or agree to a price adjustment includes the labor and material costs necessary to:

- Reinspect items the Government reasonably expected to be defective;
- Repair or replace the defective items; and
- Inspect, package, pack and mark the repaired or replaced items.

**Notify the Contractor**

Contact the contractor about a warranty problem. Resolve the issue by:

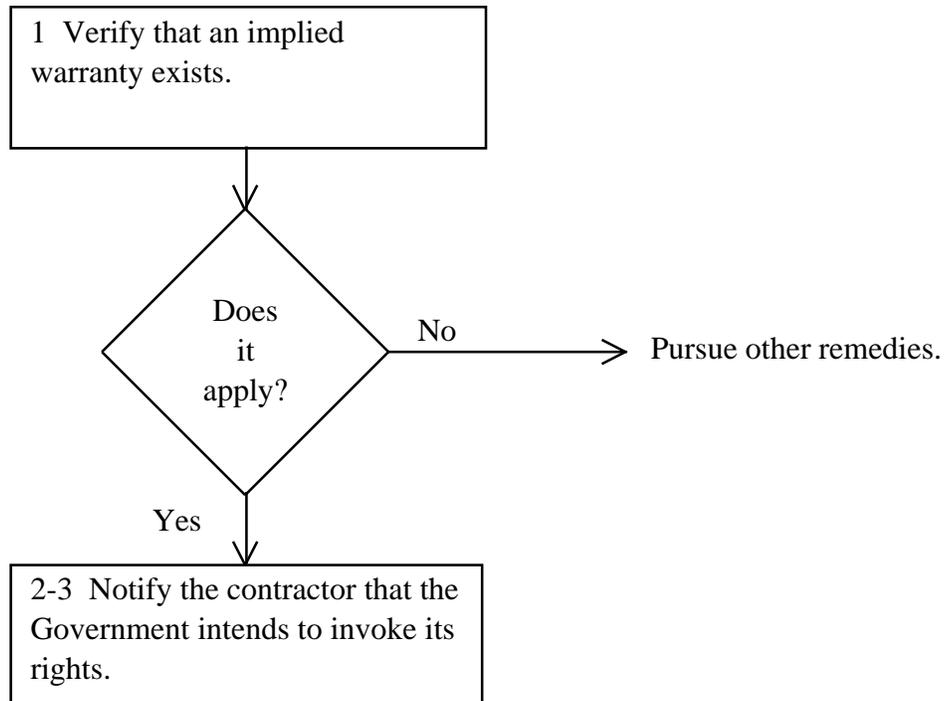
1. Obtaining the contractor's position and its reasons for taking that position;
2. Reaching agreement on how and when the warranty will be applied;
3. Documenting the results.

There will be less room for argument if you notify the contractor before the warranty period expires. Warranties may be administered by other organizations besides the contracting office. A supply organization or the end user with this responsibility may issue the notification to the contractor. Make other Government organizations aware of the need for quick internal Government coordination to ensure that the Government's rights are not lost.

**Correct or Replace Nonconforming Items or Services**

You may arrange for repair or replacement by the Government, or another source, at the expense of the contractor, but take this action only as a last resort when their actions have failed.

## STEPS IN IMPLEMENTING IMPLIED WARRANTIES



**7.6 Implied Warranty**

An implied warranty is an unwritten warranty that exists through the operation of commercial law. The legal concept is one of fairness—a product or service should live up to the claims of the manufacturer or service provider. If it does not, the buyer is generally entitled to a legal remedy through the concept of an implied warranty.

**Verify that an Implied Warranty Exists**

There are two basic implied warranties that the Government, under very limited conditions, can use when a defect is not identified until after acceptance:

1. Merchantability and usage of trade (UCC 2-314). The goods comply with the general description and average quality of other similar goods produced within the industry, and also comply with the description of the label affixed to them. The goods are fit for the ordinary purposes for which such goods are generally used.
2. Fitness for a specific purpose (UCC 2-315). The goods must fit the particular purpose when the Government is relying on the contractor to furnish goods that will be suitable for that purpose.

The Government may not invoke an implied warranty after acceptance if:

**Finality of Acceptance**

1. The inspection and acceptance clause included in the contract provides for finality of acceptance. For example, FAR clause 52.246-2, Inspection of Supplies - Fixed Price, covers acceptance as follows:

"(k) Inspections and tests by the Government do not relieve the contractor of responsibility for defects or other failures to meet contractual requirements discovered before acceptance. Acceptance shall be conclusive, except for latent defects, fraud gross mistakes amounting to fraud, or otherwise provided in the contract.

The contractor is relieved of any obligation of implied warranties once acceptance is made.

**Express Warranty**

2. A warranty clause was included in the contract and specifically excludes implied warranties. For example, FAR clause 52.246-17, Warranty of Supplies of a Noncomplex Nature excludes implied warranties as follows:

## REMEDIES

"(4) All implied warranties of merchantability and 'fitness for a particular purpose' are excluded from any obligation contained in this contract."

3. Defects are latent (A defect that was not known or would not be made known through reasonable inspection and testing at the time of acceptance.)

### Basis of Enforcement

The more heavily the Government relies upon the contractor's inspection system to ensure compliance with the specification, the more important implied warranties become. For instance, the Government does not include an inspection and acceptance clause in their small purchase orders. Instead, the Government relies on the contractor to inspect and test the requirement.

### Contact the Contractor

Notify the contractor when the defect is covered by an implied warranty. Procedures are basically the same as those for contacting the contractor in regard to written warranties:

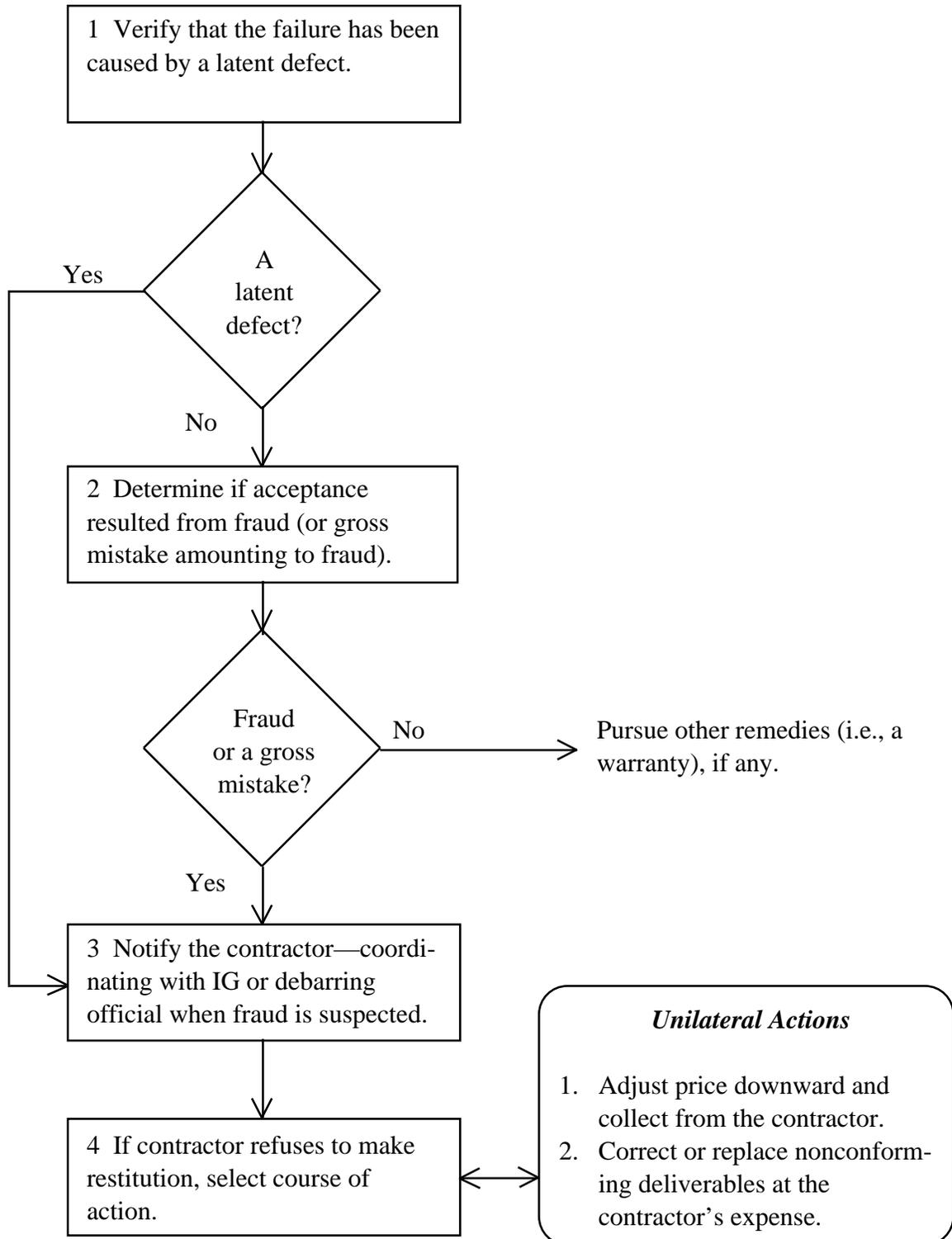
1. Obtain the contractor's position and its reasons for taking that position.
2. Reach agreement on how and when the warranty will be applied.
3. Document the results of this contact and include it in the contract file.

### Invoke the Appropriate Remedy

You have the same rights under implied warranties as under written ones. You may choose to:

- Obtain a corrected product from the contractor;
- Have the contractor reperform the service;
- Make an equitable adjustment;
- Have the product corrected or the service reperformed by other means at the expense of the contractor.

## FRAUD, GROSS MISTAKE, OR LATENT DEFECT



## REMEDIES

### **7.7 Fraud, Gross Mistake, or Latent Defects**

The Government's acceptance of contractor supplies and services is final unless

- The defect is latent;
- There is evidence of fraud; or
- There is evidence of a gross mistake amounting to fraud.

When defects are found after award and no warranties apply to their correction, your final tasks in proving or clearing contractor liability is to determine that fraud, gross mistakes, and latent defects are not involved.

### **Verify Whether the Failure Was Due to a Latent Defect**

For a defect to be latent it must be:

- Not susceptible to discovery using inspection methods that are reasonable under the circumstances; and
- In existence at the time of acceptance.

Deciding what is "latent" is essentially deciding what is reasonable. Exhibit 7-6, Steps in Verifying a Latent Defect, summarizes the necessary evidence.

#### **Steps in Verifying a Latent Defect**

1. Identify the contractor's liability for the defect.
2. Determine if the Government has fulfilled its obligations for inspection and acceptance.
3. Identify what test could have revealed the defect at the time of acceptance.
4. Identify whether such tests would have been reasonable under the circumstances.

#### *Exhibit 7-6*

A reasonable inspection is one that would normally be performed as a custom of the trade.

Under the standard inspection clauses, the contractor is responsible for latent defects discovered at any time after final acceptance. There is no expiration to liability for a latent defect, but the extent of its liability is prorated over the useful life of the item.

FAR 52.246-5(d)

A latent defect can be in the design of a product rather than in the manufacture of it.

FAR 52.246-8(f)

**Determine If Fraud  
(or Gross Mistake  
Amounting to Fraud)**

The only difference between fraud and a gross mistake is intent. To prove a gross mistake you need only prove that the mistake was truly irresponsible.

To prove fraud, you must show that the misrepresentation or concealment of fact was made with the intent to mislead.

So base the Government's case on gross mistake amounting to fraud when you can't establish intent to mislead, but all other factors apply.

**Prepare a Finding  
of Fact**

Document evidence of fraud in a finding of facts. A summary of all the necessary elements for a finding of facts is contained in Exhibit 7-7, Necessary Elements of a Finding of Facts for Fraud.

### Necessary Elements of a Finding of Facts for Fraud

A finding of facts for fraud must show evidence of:

1. A misrepresentation of fact (actual or implied),  
OR  
A concealment of a material fact.
2. Contractor knowledge of the fact concealed or misrepresented.
3. An intent to mislead the Government into relying on its misrepresentations or concealment.
4. Government injury suffered as a result of the concealment or misrepresentation.

*Exhibit 7-7*

## REMEDIES

The contractor can be forced to repair or replace the product or reperform the service at its own cost any time after acceptance when fraud is proven. The Government can avail itself of all other remedies, including termination for default.

### Report Evidence of Potential Fraud

Provide evidence of potential fraud to your agency's debarring official, Inspector General, and other officials who have a need to know.

Most agencies have "hot lines" for reporting incidence of fraud to the agency's Inspector General.

Your agency's debarring official will probably be identified in your agency's supplementation to FAR Subpart 9.6, but use normal supervisory channels to report information for consideration of a suspension or debarment.

### **ERIC'S FIRST CONCERN**

*Because of Farthington's inability to perform, Eric had a basis for default other than proving fraud. So he let the Inspector General (IG) deal with gathering evidence for criminal and civil action. His first concern was reprocurring for his requiring office so he was taking the quickest avenue of relief available.*

*Otherwise, he would have to be in close contact with the IG and it's progress to document a finding of facts on which to base the default. As it was, he could just write up his own, based on the evidence of financial difficulties he had documented after his conversation with Mrs. Farthington.*

*He really did feel sorry for her. The fact that only lower levels of management are involved in fraud is not a defense for a company's avoiding prosecution. She had inherited this mess and he didn't think she would be able keep the company afloat.*

**Contact the Contractor**

If you suspect fraud, notify the contractor only in coordination with your agency's Inspector General or debarring official. Otherwise, you are responsible for:

1. Obtaining the contractor's position and its reasons for taking that position.
2. Requesting a proposal to repair or replace the deliverable or reperform the service and/or make a downward price adjustment.
3. Preparing the Government position, using principles of cost and price analysis as you would on any other proposal. include it in the contract.
4. Negotiating a supplemental agreement with the contractor reflecting a new delivery schedule and/or consideration. As with any other negotiation, document the results and include it in the official contract file.

**Take Unilateral Action**

You may take unilateral actions if the contractor refuses to make restitution. Unilateral actions include:

- Determining the downward price adjustment and collecting it from the contractor.
- Correcting or replacing nonconforming deliverables from another source and charging the contractor for the costs incurred by the Government.

**7.8 Select the Most Appropriate Remedy**

Use the decision table on the next two pages when selecting the remedy for the given situation. Notice the type of remedy selected is based on delivery of the product or service.

**7.9 Withhold, Reduce, or Demand Payment from the Contractor**

Withholding or reducing payment to the contractor is appropriate when sufficient funds remain for payment. The Government has the right to demand payment from the contractor when the contract has been paid in full. Reduction of progress payments and advanced payments will be covered in detail in the Advanced Contract Administration course.

As with any modification, attempt to secure a supplemental (bilateral) agreement. You may reduce payment on a unilateral modification under the authority of the disputes clause in the contract when negotiations for a supplemental agreement fail.

<b>DECISION TABLE FOR SELECTING A FORMAL CONTRACTUAL REMEDY</b>		
<b>PROBLEM</b>	<b>OPTIONS</b>	<b>COMMENT</b>
<p><b>LATE DELIVERY</b></p> <p>Note: When the contracting officer has determined that the deliverable has been or will be delivered late and that the delay is non-excusable (based on steps outlined in Chapter 5).</p>	<ol style="list-style-type: none"> <li>1. Postpone the delivery date in exchange for consideration.</li> <li>2. Accept late delivery and invoke the liquidated damages clause.</li> <li>3. Send a cure notice (10 days or more prior to the contract's delivery date) or a show cause notice (immediately upon expiration of the delivery period).</li> </ol>	<p>Appropriate when (1) no liquidated damages clause was included in the original contract, (2) there is a reasonable probability of delivery by the new date, and (3) the requiring activity can live with the new date.</p> <p>But only if there is a reasonable probability of delivery by a date that the requiring activity can tolerate.</p> <p>When there is little probability of delivery by a date that the requiring activity can tolerate and/or the contractor has not offered adequate consideration.</p>
<p><b>THE DELIVERABLE HAS NOT BEEN ACCEPTED AND DOES NOT CONFORM TO THE CONTRACTS REQUIREMENTS</b></p> <p>Note: When the contracting officer has determined that the deliverable has not been implicitly or explicitly accepted and does not conform to the contract's requirement (given data from monitoring the contract per Chapter 4).</p>	<ol style="list-style-type: none"> <li>1. Accept the deliverable without consideration.</li> <li>2. Accept the deliverable in exchange for consideration.</li> <li>3. Accept the deliverable and invoke an express warranty to have the deliverable brought up to specification after acceptance.</li> <li>4. Reject the deliverable and obtain correction or replacement at no cost to the Government.</li> <li>5. Reject the deliverable and send a cure or show cause notice.</li> </ol>	<p>When the nonconformance is minor and obtaining consideration is not in the Government's interests (per FAR 46.407(f)).</p> <p>When the requiring activity can tolerate non-conformance (per FAR 46.407(c)).</p> <p>When there is an express warranty and immediate acceptance will benefit the requiring activity.</p> <p>When there is a reasonable expectation that a satisfactory replacement will be provided by the delivery date in the contract, or, for consideration, within a reasonable time thereafter.</p> <p>When there is little expectation of receiving an acceptable product within a reasonable time.</p>

<b>DECISION TABLE FOR SELECTING A FORMAL CONTRACTUAL REMEDY</b>		
<b>PROBLEM</b>	<b>OPTIONS</b>	<b>COMMENT</b>
<p><b>THE DELIVERABLE HAS BEEN ACCEPTED BUT DOES NOT CONFORM TO THE CONTRACTS REQUIREMENTS</b></p> <p>Note: When the contracting officer has determined that the Government has a reasonably strong case based on the terms and conditions of the contract (given data from monitoring the contract per Chapter 4).</p>	<ol style="list-style-type: none"> <li>1. Invoke an express warranty.</li> <li>2. Invoke an implied warranty.</li> <li>3. Demand that the deliverable be replaced or corrected and/or that the price be adjusted downward.</li> </ol>	<p>If an express warranty applies.</p> <p>If an implied warranty applies.</p> <p>If there was a latent defect or acceptance was based on fraud or gross mistake.</p>
<p><b>OTHER BREACHES</b></p> <p>Note: When the contracting officer has exhausted all efforts at informal resolution of the problem.</p>	<ol style="list-style-type: none"> <li>1. Invoke whatever remedy (if any) is established in the clause (e.g., liquidated damages for failing to comply with the subcontracting plan).</li> <li>2. Send a cure notice (10 days or more prior to the contract's delivery date) or a show cause notice (immediately upon expiration of the delivery period).</li> </ol>	<p>When the breach is of sufficient magnitude to warrant a default termination if not corrected.</p>

REMEDIES

*NOTES*

## CHAPTER 8

# PAYMENT

### WITHHOLDING PART OF THE FEE PAYMENT

*The negotiations for Dr. Murphy's change in sampling procedures for the small research study that Dr. Smith was managing had been somewhat lengthy for the dollars involved, but after two weeks of intense discussion, it had finally been settled, and a bilateral contract modification issued.*

*Joanne had authorized payment for the monthly invoice that had come in just after settlement. Dr. Smith had almost finished the contract during the billing month. As a matter of fact, Joanne knew from a conversation she had with Dr. Murphy that Dr. Smith had completed the research work, a fact that would be reflected on the next month's invoice. Since the contract was a cost-plus-incentive-fee arrangement, it called for monthly invoice submissions.*

*However, Joanne did not pay the full invoice amount. The amount billed would bring the fee portion of the total amount billed to above 90% of the target fee. Therefore, as authorized by the incentive fee clause in the contract, FAR 52.216-10, Cost and Payment, she withheld 10% of the fee portion of the invoice, according to Eric's instructions, which in turn reflected their agency's policy.*

*Dr. Smith was satisfied with the final outcome of the negotiations, but irritated with all the administrative hassle.*

*His irritation increased considerably when the billing department called to advise him that the agency had not paid last month's invoice in full, deleting a portion of the fee payment. He dialed Eric's number immediately. Eric wasn't in, so he talked to Joanne.*

*"There has been a mistake," he explained with obvious annoyance. "They didn't pay the entire target fee portion of last month's invoice."*

*"It's not a mistake, Doctor," Joanne told him. "The contract allows us to withhold up to 15% of the fee, but only after 85% of the target fee has been paid. It's our policy to withhold 10% of the target fee on the last 15% of target fee payments until the total actual fee payment has been calculated and approved. I left a message for you with your secretary on your first day of classes a week ago Monday. Didn't you get my message?" she asked.*

*"No," he answered coldly, "and I don't understand the reason for this."*

*"The agency policy is the result of some bad experiences where we paid more than the actual fee." Joanne told him. "The policy is only about a year old. So you may not have run into the deduction on previous contracts."*

*"No, I haven't." Dr. Smith said icily. "And I think it's extremely ill-advised. I have never performed below the target fee level. I've always gotten close to the maximum, if not the maximum. I don't appreciate being forced to pay for the incompetence of others."*

*Joanne tried to reason with him, assuring him that his competence was never in question, and reminding him that the total contract price on this contract had been reduced as a result of the change, so that the basis for the target fee for previous invoices, would be somewhat less as well. But after several more terse comments, Dr. Smith hung up, rather abruptly, it seemed to Joanne.*

## COURSE LEARNING OBJECTIVES

At the end of this course, you will be able to:

**Overall:** Process contractor invoices by determining whether they are accurate and making further disposition of the invoice according to that determination.

- Individual:**
- 8.1 Inspect invoice for completeness and notify contractor of any defects.
  - 8.2 Identify terms and conditions of the contract which bear on the amount to be paid.
  - 8.3 Obtain documents and determinations that bear on the amount to be paid.
  - 8.4 Identify withholdings and deductions or other corrections that are necessary.
  - 8.5 Determine whether an assignee is protected from the deduction or withholding.
  - 8.6 Determine the total amount due the contractor.
  - 8.7 Contact the contractor to explain any differences between the amount of the submitted invoice and the amount that the Government proposes to pay.
  - 8.8 Notify the contractor of final decision on paying a lesser amount.
  - 8.9 Forward the invoice to the payment office and set up a follow-up file.

# INTRODUCTION TO CONTRACT PAYMENTS

**Definition of Payment** Contract payments are most usefully described by categorizing them. There are:

- Delivery payments (SF 1034),
- Partial payments (SF 1440),
- Progress payments (SF 1443), and
- Advance payments (Formal Letter).

FAR 32.402

Payments can also be prompt, untimely, and final.

FAR 32.404

The Government generally does not agree to advance money before it receives items or services from its contractors. Usually advance payments require specific statutory authority and special approvals. However, there are some exclusions for this policy for such things as rent and subscriptions.

**Policy Regarding Invoice Payment**

Partial payments and progress payments are often confused. A partial payment is a method of payment based on **acceptance** of a particular part of contract performance. A progress payment is a form of contract financing made **before** work or deliverables are accepted.

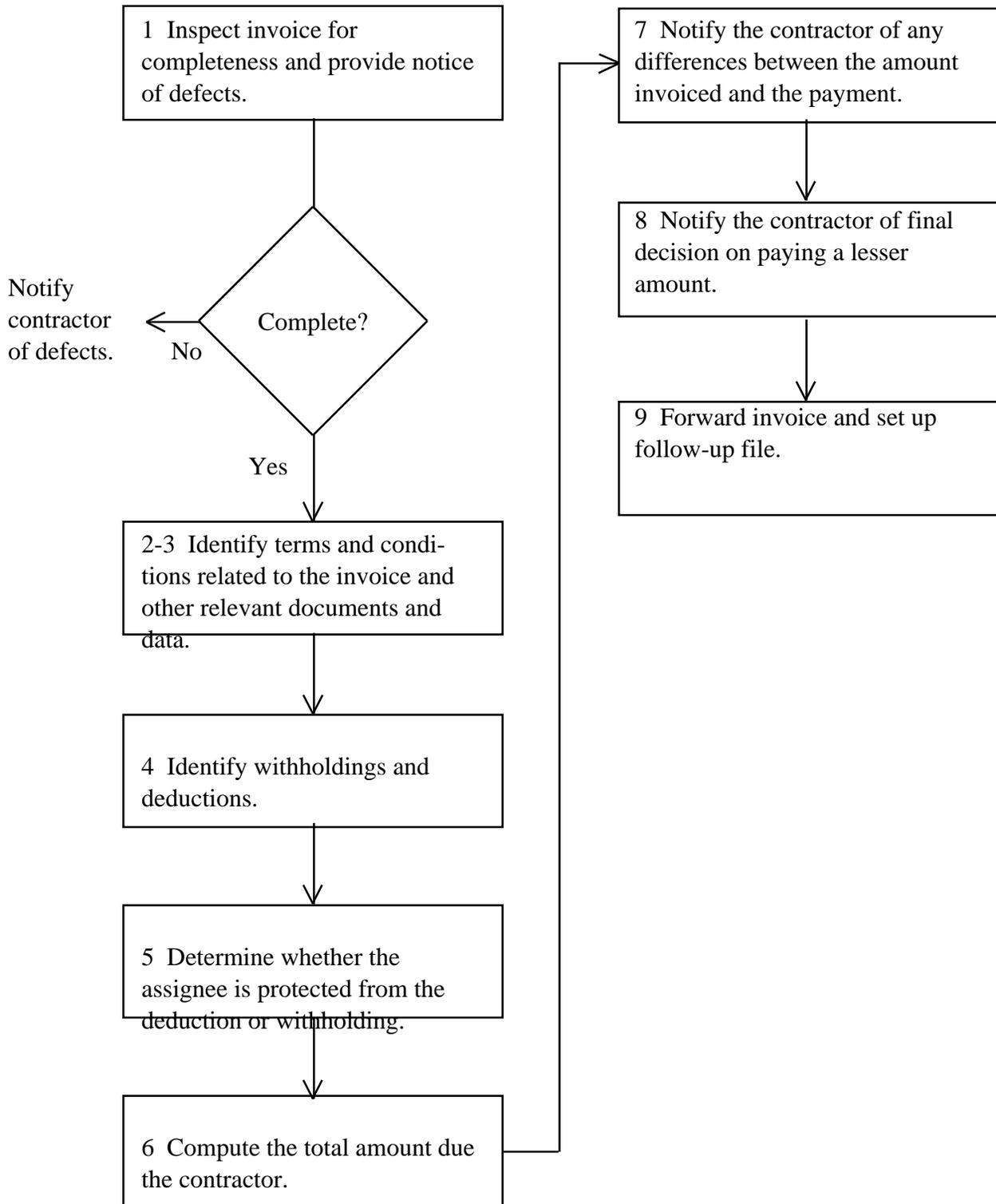
Some policies on payment of contractor invoices are required by law. The Prompt Payment Act, 31 U.S.C. 3901, as amended, is a source of many payment policies. However, additional laws, as well as administrative regulation, are the source of others.

**Steps in Performance**

The steps in determining the appropriateness of invoice payment, including the amount paid, are charted on the next page.

Several of the contract clauses discussed in this chapter will require an equitable adjustment in the contract price, contract schedule or both. The tasks you execute to make these equitable adjustments are included within the corrective steps outlined in Chapter 7.

# STEPS IN PROCESSING CONTRACT PAYMENTS



## PAYMENT

### 8.1 Inspect Invoice for Completeness and Notify Contractor of Any Defects

The contract may require that the contractor send its invoice to:

- The contract administrator,
- The contracting officer's representative (COR), or
- The payment office directly.

The contract must specify the designated billing office for receiving payment. However, the Prompt Payment Act infers that the person who first receives the invoice in the agency "receives" it for the agency for the purposes of payment. Agencies must pay the contractor within strict timeframes or the government will owe interest for late payment.

### Annotate Invoice Receipt Date

The contractor may inadvertently send its invoice directly to you whether or not you are specified as the billing office. If so, date stamp the invoice.

The date of the contractor's invoice will be used as the receipt date when the invoice is not annotated at the time received by the Government.

## PAYMENT

### Check Invoice for Completeness

FAR 32.905(e)

An invoice must have eight basic elements to be considered “complete” or proper for payment purposes. These are:

1. The contractor’s name and address.
2. An invoice date.
3. Contract number or other authorization for the items or services that are the subject of the invoice.
4. Description, quantity, unit of measure, unit price, and extended price of supplies delivered or services performed.
5. Shipping and payment terms, if any.
  - If Government bills of lading were involved, the bill of lading number and the weight of the shipment is required.
6. Name and address of contractor official to whom payment is to be sent.
  - This address must be the same as the address shown on the contract or on a proper notice of contract assignment.
7. When practicable, name, title, phone number, and mailing address of person to be notified in event of a defective invoice.
8. Any other information or documentation required by the contract. This kind of information may include items such as:
  - Taxpayer or Employer Identification Number;
  - Evidence of shipment or completion.

### Notify the Contractor of Any Defects

Notify the contractor of any defects you found in the invoice. There are two basic rules for this notice:

- It must be made within 7 calendar days after the agency receives the invoice.
- It must specifically state the defect.

Annotate When Defects  
Are Corrected

Keep a record of the number of days the contractor caused a delay by retaining necessary information. If you are sent a new invoice showing the date of the original invoice, annotate a statement as follows before sending to the payment office:

“After receipt of invoice, the contracting office waited \_\_\_\_\_ days for the contractor to supply necessary information for invoicing. Therefore, the invoice was not proper until \_\_\_\_\_ and any interest payment that may be due the contractor shall be based on this later date.”

**8.2 Identify Terms  
and Conditions  
Pertinent to Payment**

Terms and conditions that might generally have an effect on the payment amount include:

- Contract price
- Type of contract
- Method of payment
- Discounts
- Liquidated damages
- Service Contract Act

FAR 32.905(a)(1)(ii)

Implied or constructive acceptance may also have a bearing. For the sole purpose of determining an interest penalty, Government acceptance is based on:

**1. Constructive acceptance period**

Government acceptance is considered to have constructively occurred on the 7th day\* after delivery or performance (\*The contract may state a longer period.)

**2. Actual acceptance.** The actual acceptance not the constructive acceptance period is used for computing interest when:

- less than the constructive acceptance period was needed for acceptance, or
- acceptance was beyond the constructive acceptance period due to a properly documented disagreement over quantity, quality, or contractor compliance.

## PAYMENT

### **8.3 Obtain Documents and Determinations Pertinent to Payment**

Supporting data for invoice payment might include things such as:

- Inspection or receiving reports,
- Commercial or Government shipping documents,
- Determinations on the allocability of invoiced costs,
- Determinations on billing rates,
- Determinations on indirect cost rates,
- Reports on contractor indebtedness,
- Determinations for reductions in progress payments,
- Determinations for the adjustment of liquidation rates for progress payments.

A deduction implies that an amount is permanently subtracted. A withholding implies that a subtracted amount may be paid at a later date. However, payment of deducted amounts can be made if the contractor later provides appropriate supporting evidence.

Special terms of each contract may specify deductions under certain circumstances. Late delivery is an example. Some service contracts specify deductions for defects that do not meet a specific “acceptable quality level,” usually referring to the number of defects in a sampled service area. Common deductions include amounts for items shown on Exhibit 8-1.

## COMMON DEDUCTIONS

FAR REF.	TOPIC
52.232-8	Discounts for early payment.
46.407	Invoiced items not received or accepted.
52.232-11	Extras.
52.232-1(b)	Requested partial payments amounting to less than \$1,000 or 50% of the purchase price.
52.222-4	Unpaid wages.
52.222-41	
52.212-4	Liquidated damages.
52.233-1(c)	Adjustments for amounts that are disputed.
52.233-1(c)	Adjustments the contracting officer makes by issuing a final decision on a claim.
32.804	Setoffs for the collection of contractor debts, UNLESS -An assignee has not made a loan or commitment for a setoff, OR -The amount due on the contract exceeds the amount of any loans made or in process under a firm commitment for financing.
52.216-10(c)	Payment on the basis of a lesser fee under cost-plus-incentive fee contracts, that is, when the contractor is not likely to achieve the target.
52.242-1	Unallowable costs.
52.232-10	Discrepancies between invoiced prices and billing prices, when billing prices are reduced under fixed-price incentive contracts,
52.232-10	Discrepancies between billing prices and final prices for deliverables under fixed-price incentive contracts.
52.216-7(g)	Discrepancies between billings of indirect costs, in comparison with billing rates or final indirect cost rates for the period.
	Costs that are in excess of a contract ceiling amount. Ceiling amount restrictions may be in references to:
52.232-20	-A limitation of cost in a cost-reimbursement contract;
52.232-22	-A limitation of funds in a cost-reimbursement contract;
52.232-7	-Time-and-material or labor-hour contract ceilings;
52.216-26	-The limitation of reimbursement and reimbursement rates in letter contracts;
52.216-12	-The cost share limit on matching payments;
35.003(c)	-Recoupment under research and development contracts, that is, recovery by the Government of Government-funded nonrecurring costs from contractors that sell, lease, or license products or
	Taxes for which the Government is exempt from paying, when the tax is a state or local tax, furnish the contractor evidence of the tax exemption. These include:
52.229-3	-“After-imposed” Federal taxes;
52.229-6	-“After-imposed” or “after-relieved” foreign tax;
52.229-8,9	-Any tax or duty of a foreign Government from which the U.S. is exempt by specific agreement and that is billed under the terms of a cost-reimbursement contract.
42.1403	Improperly supported reimbursement for transportation charges.

*Exhibit 8-1*

PAYMENT

Royalties

FAR 52.227-9

Another deduction covers royalties in excess of the amount the Government owes. Royalty Payments are improper, for circumstances in which royalty payments are excessive. Approving invoiced amounts for a royalty is improper when:

- The Government has a royalty-free license covering the royalty.
- Amounts are billed at a rate in excess of the rate for which the Government is licensed.
- The royalties in whole or in part otherwise constitute an improper charge.
- The Government is entitled to a refund under FAR 52.227-9, Refund of Royalties.

**8.4 Identify Appropriate Withholdings**

Exhibit 8-2 identifies several common withholdings.

<b>COMMON WITHHOLDINGS</b>	
<b>FAR REF.</b>	<b>TOPIC</b>
52.232-16	Suspended or reduced progress payments.
52.216-11	Retaining 1% of total estimated costs, when appropriate in cost-no fee contracts
52.216-8, 10	Retaining up to 15% of the fee or target fee for cost-plus-fixed fee or cost-plus-incentive fee contracts
52.232-7	Retaining up to 5% of amounts billed for time charges under time-and-material and labor-hour contracts

*Exhibit 8-2*

## NO SURPRISES

*It was the authorized retainage contained in the clause at FAR 52.216-10 that had Dr. Smith so enraged.*

*Joanne dutifully informed Eric of the contractor's displeasure. One of the first things Eric had told Joanne when she started working as contract administrator was to make sure he was never "surprised."*

*So Joanne had always let him know when she felt trouble brewing.*

*Eric had nodded his understanding about Dr. Smith's anger. The policy was not his, the Director had imposed it on all the contracting officers. Eric did not personally care for an-across-the-board policy for situations that normally allowed contracting officer discretion merely because of a few unfortunate experiences. He much preferred to do things on a case-by-case basis.*

*He had pleaded his case for the allowance of discretion privately with the Director, but it fell on "deaf ears." One of the "unfortunate experiences" had turned into a highly sensitive and politically embarrassing situation and he simply would not entertain the existence of similar circumstances on any contract.*

*"The fact is, Eric," the Director had said, "some of my contracting officers don't have as good a business sense as you do. They won't recognize when full payment is a risk for the Government and when it isn't. You're good at analyzing risks, but all of my people are not."*

*Eric had been flattered, but nevertheless, frustrated—forced by the principles of good business dealings to uphold his boss's policy as he would his own, despite the fact that he did not personally support it.*

### **8.5 Determine Whether an Assignee Is Protected From the Deduction or Withholding**

An assignee is a bank, trust company, or other financial institution that has been transferred the right to receive a government contractor's payment due under a government contract.

FAR 32.804

You may find a no-setoff commitment in the government contract that protects the assignee from withholdings or deductions that might otherwise be appropriate according to the contract's terms.

FAR 32.803(d)

However, agencies may agree to no-setoff agreement terms for such assignments only in time of war or national emergencies.

## PAYMENT

When it applies, this protection from deduction or withholding extends to:

- Any contractor liability to the government independent of the contract you are administering;
- Any of the following contractor liabilities to the government resulting from the assigned contract you are administering:
  - Renegotiations required by statute or contract laws,
  - Fines,
  - Penalties except for amounts being withheld or collected for failure to comply with the terms of the contract,
  - Taxes or Social Security contributions,
  - Withholding or nonwithholding of taxes or Social Security contributions.

However, even when there is a no-setoff commitment, you can still pursue deductions or withholdings when:

- The assignee has not made a loan under the assignment and has not committed to do so, or
- The amount due on the contract exceeds the amount of any loans made or loan commitments.

In the latter case, you can withhold or deduct as long as the setoff does not exceed the amount that it is excess to loans or loan commitments. You will have the amounts of any loan assignments in your contract file.

Chapter 9 discusses payment assignments in more detail.

### **8.6 Determine the Amount Due the Contractor**

With all appropriate deductions and withholdings identified, determining the amount due is merely a mathematical calculation.

### **8.7 Notify the Contractor of Differences**

As with other notifications you make to contractors, your main reason for giving notice of payment for a lesser amount is to get feedback. Present all factual data that justifies the lesser amount and be willing to listen to any evidence for paying an increased amount or the full amount.

Another reason for prior notice is to defuse any unfavorable reactions. Providing the supporting facts in a business-like manner may diminish adverse emotional responses.

### A LESSON LEARNED

*Eric had listened to Joanne's briefing on Dr. Smith's adverse emotional response, nodding his understanding. He noticed that she was obviously upset by the bitterness of the contractor's reaction.*

*"Joanne, why in the world didn't you tell him we were going to withhold part of the fee?" he asked softly. "Did I forget to tell you to do that? If I forgot, I'm sorry. I thought we had talked about it."*

*"Oh, we did talk about it." Joanne said ruefully. "I did call him, but the day I called was the day his classes started up again. He was switching offices with another professor at the University, plus the three times I placed a call that day to both numbers, he was always in class. I didn't want to hold on to the invoice so I didn't want to leave a message for him to call me and have him call me back several days later. I finally left a message the third time I called with a woman who said she was his secretary. I went into detail about the withholding and she seemed to understand exactly what I was telling her. She told me she would let him know so that he could get back to me if he had any questions."*

*"Some people are better actors than others," Eric observed.*

*"Yes," Joanne admitted. "He obviously didn't get the message at all."*

*"Well, we'll just chalk it up to experience, Joanne," he told her. "A 'lesson learned,' so to speak." He knew better than to dwell on an employee's mistake when she obviously was well aware and showed true remorse for it.*

*"Oh, I'll remember this lesson," Joanne said. "I still have a chill in my bones from the sound of his voice."*

#### **8.8 Notify the Contractor of Final Decision on Paying a Lesser Amount**

If the contractor presents no evidence rebutting the initial decision, advise the contractor of the Government's final decision to:

- Pay in full;
- Pay after deducting or withholding inappropriate amounts; OR
- Reject the invoice, specifying the exact reasons for rejection, and returning it to the contractor for correction and resubmission.

In any event, make this notification within 7 days after receipt of a properly submitted invoice, and carefully document it to avoid any interest payment that might otherwise be due the contractor under the provisions of the Prompt Payment Act.

## PAYMENT

### **8.9 Forward the Invoice**

Certify the proper invoice for payment and send it on to the payment office. Since agency procedures vary somewhat, follow your agency's procedures. One of the purposes for certifying the invoice is to acknowledge that the supplies or services were acceptable. Paying offices cannot make a payment until they have received:

- A proper invoice, and
- Evidence the supplies or services were acceptable.

You may be required to provide a certification on the original or duplicate invoice or you may need to provide a separate receiving report evidencing approval of the supplies or services.

#### Set Up a Follow-up File

A reasonable follow-up date is 30 days after receipt of a proper invoice. However, individual contract terms may require quicker payment. They would rarely, if ever, authorize a later payment.

Examples of standard earlier payment requirements are:

**FAR 8-709**

- Payments under contracts with a sheltered workshop for the Blind or Other Severely Handicapped, for which a 20-day payment is normal;
- Payments under contracts with UNICOR, for which a 20-day payment is also standard. Read payment terms for individual UNICOR product schedules.

## CHAPTER 9

# CONTRACT CLOSEOUT

### THE FINAL DETAILS

*Pat Schwartz had gone to Haverford to investigate current contract costs and all had gone well. After several weeks, she got the money to fund the overrun and the Haverford contract continued on schedule. No time extensions were necessary. As a matter of fact, the contract was completed a week ahead of schedule and the research goals had not only been achieved, but were exceeded. The breakthrough that Dr. van Camp anticipated had been realized.*

*Joanne had the final invoice in hand.*

*Eric had given her some job aids for contract closeout, which she carefully reviewed.*

*One item on the checklist that applied to this contract was a patent report. Dick Maynard, the Contracts Manager for Haverford and a seasoned veteran of many Government research and development contracts, had attached the patent report to the final invoice.*

*Joanne did not have a chance as yet to investigate why the patent report was required. Eric had alerted her that they should get one.*

*The next step was an audit report. She was still not quite clear on how the final audit was to be handled, or how long it would be before she could submit the final invoice for payment.*

*She asked Eric for clarification.*

*“It gets a little complicated, Joanne,” Eric answered, “but you don’t have to worry about the details of the audit. The audit group has very specific procedures for it.”*

*“Cost-type contracts generally take a lot longer to close out than fixed-price contracts,” Eric continued. “It usually takes a while to verify all costs in an audit. This one will go faster than most though. Dick Maynard’s people are super organized and know what to expect. They have an excellent working relationship with the audit group. Plus, the contract is under \$1 million, so it is relatively small, and Haverford has already negotiated their indirect cost rates with the Government. The FAR allows 20 months to close out this type of contract. I predict you’ll close this one out within 12 months.”*

*“Did you notify the audit group yet?” he asked her.*

*“Yes,” she answered “I sent them a copy of the final invoice and requested that they advise us when the audit is scheduled.”*

*“Good,” he said. “Then just follow up with them in a couple of weeks if we don’t hear from them.”*

## COURSE LEARNING OBJECTIVES

At the end of this course, you will be able to:

**Overall:** Develop the ability to carry out contract closeout procedures effectively and efficiently.

- Individual:**
- 9.1 Verify that the contract is physically complete.
  - 9.2 Obtain all forms, reports, and clearances required for closeout.
  - 9.3 Verify that the Government and the contractor have met other applicable terms and conditions for closeout.
  - 9.4 Settle any outstanding issues.
  - 9.5 Verify that there are no outstanding claims or disputes.
  - 9.6 Make final payment or collect overpayments from the contractor.
  - 9.7 Identify and recommend deobligation of excess funds.
  - 9.8 Prepare contract completion statement and dispose of contract files.
  - 9.9 Determine whether to invoke the Government's rights under the Continuity of Services clause (FAR 52.237-3) for phase-in/phase-out services.

# INTRODUCTION TO CONTRACT CLOSEOUT

## **Definition of Contract Closeout**

Contract closeout refers to the procedure of verifying that all administrative matters have been concluded on a contract that is otherwise physically complete, that is, the contractor has delivered the required supplies or performed the required services and the Government has inspected and accepted the supplies or services.

## **Policy on Contract Closeout**

It is the Government's policy that the contracting officer administering the contract sign a contract completion statement confirming that all administrative actions have been performed.

FAR 4.804-5

FAR 4.804-1

Standard times for closing out a contract vary depending on the contract type.

Small purchases are considered closed with evidence of receipt of supplies or services and final payment.

Fixed-price contracts that are not small purchases should be closed out within six months after receipt of evidence of physical completion.

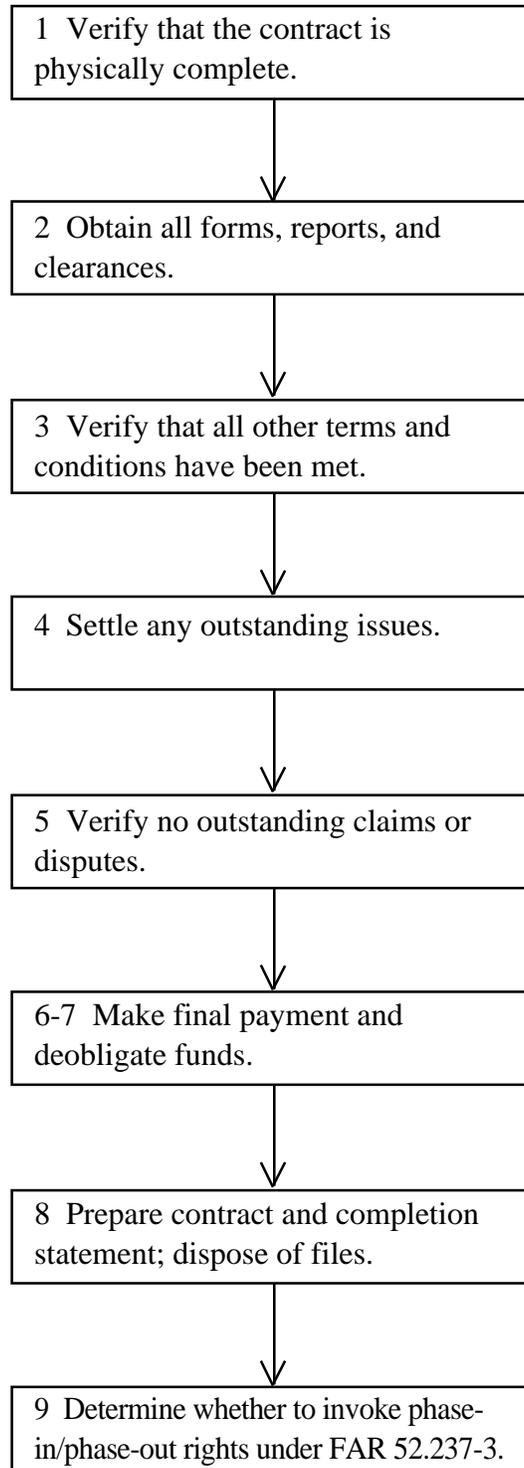
Contracts requiring settlement of indirect cost rates should be closed out within 36 months after receipt of evidence of physical completion.

Other contracts should be closed out within 20 months after receipt of evidence of physical completion.

## **Steps in Performance**

The steps in closing out a Government contract are charted on the next page. Following the flowchart, each step is discussed in turn.

## STEPS IN CONTRACT CLOSEOUT



## CLOSEOUT

### 9.1 Verify That the Contract Is Physically Complete

A contract is physically complete when one of two events has occurred:

- All required supplies or services have been delivered or performed, inspected, and accepted and all existing options have been exercised or have expired.
- A contract termination notice has been issued to the contractor.

### 9.2 Obtain All Forms, Reports, and Clearances Required at Closeout

The purpose of closeout is to ensure that there is no further administrative action necessary on the contract. Part of the task is to make sure that all paperwork has been submitted. Forms, reports, and clearances that may be outstanding after a contract is physically complete include:

- Contractor's final invoice
- Contractor's closing statement or release of claims
- Final patent report
- Clearance for the final patent report
- Final royalty report
- Clearance for the final royalty report
- Plant clearance report
- Property clearances
- Closeout audit report for cost-type contracts

FAR 4.801(c)(3)

Your agency may also have forms to evaluate contractor performance. Document the contractor performance file in a standard form or format.

### 9.3 Verify That Other Applicable Terms and Conditions Have Been Met

Administrative tasks, incidental to contract performance may need to be accomplished before you can close out your file. Final payment cannot be authorized until the contractor has accomplished all administrative tasks, such as:

- Return or other disposition of Government-furnished property;
- Proper disposition of classified material;
- Settlement of terminated subcontracts;
- Procedural requirements of termination proceedings

## CONTRACT CLOSEOUT

### **9.4 Settle Any Outstanding Issues**

There may be unsettled issues related to basic contract performance that have not yet been resolved. These kinds of unsettled issues include:

- Unresolved value engineering change proposals;
- Disallowed costs;
- The final total price of a fixed-price incentive contract;
- The award amount of an award-fee contract;
- The final fee of a cost-plus-incentive-fee contract;
- Contractor settlement costs under terminated contracts.

### **9.5 Verify That There Are No Outstanding Claims or Disputes**

There may be some issues that the contractor may not have raised as issues yet. To avoid having to reopen a file that has been closed, some agencies make it a standard practice to request a release of claims from a contractor as a condition of final payment. An example of a format for obtaining a release of claims and other required information is contained in Exhibit 9-1, Notification of Closeout Action Format.

When a contractor provides a conditional release, document the file with as much information as you can gather on the issue that the contractor excepts from the general language of the release. If the contractor does pursue the issue a year after closeout, the memories of your contract administration team may very well be blurred or forgotten.

## Notification of Closeout Action Format

(Contractor name and address)

Dear \_\_\_\_\_ :

Reference \_\_\_\_\_ (agency) \_\_\_\_\_ Contract No. \_\_\_\_\_

for \_\_\_\_\_ (describe supplies or services) \_\_\_\_\_ .

In order to expedite final payment and contract closeout, please forward the following items to my attention by \_\_\_\_\_ (date) \_\_\_\_\_ :

(List only items that apply, renumbering paragraphs after deleting an item.)

1. Any outstanding reports or data items such as technical manuals, or instruction manuals per \_\_\_\_\_ (reference contract line-item number or paragraph citation) \_\_\_\_\_ .
2. Government-furnished property.
3. Inventory schedules for Government property.
4. Contractor's release of claims (form enclosed).
5. Final voucher (cost type contracts only).
6. Other (cite specific requirement).

(Use the following paragraph only if it applies:)

Under the terms of the contract, a warranty (describe) is still in effect. Final payment and contract closeout do not relieve you of your obligations to the Government under the warranty clause.

(signed)

\_\_\_\_\_  
Contracting Officer

*Exhibit 9-1*

**9.6 Make Final Payment or Collect Overpayment From the Contractor**

The contract may not give you an active role in final payment. The payment office may make payment based on the contractor's invoice and its receipt of a receiving report from the requiring agency.

On more complex requirements, you generally have a more active role.

Overpayments can result from a variety of reasons:

- Assessing excess costs of reprocurement on a defaulted contract;
- Assessing liquidated damages can result in an overpayment;
- Adjustments after an audit on a cost-type contract;
- Unliquidated progress payments;
- Retroactive price reductions;
- Advanced payments.

The Advanced Contract Administration course devotes a chapter to overpayments and how to collect debts from a contractor.

**9.7 Identify and Recommend Deobligation of Excess Funds**

Identify the amount of any funds remaining on the contract and, if there is no known potential for their future use on this contract, recommend that they be deobligated. Since many agencies have taken cuts in some of their basic programs, this step is becoming increasingly important in order to use scarce funds to their maximum benefit.

**9.8 Prepare Contract Completion Statement and Dispose of Files**

FAR 4.804-5(b)

The contracting officer in charge of contract administration is required to sign a contract completion statement that contains all of the information required by Exhibit 9-2, Content Requirements of a Contract Completion Statement. As the contract administrator, it is your job to prepare this statement.

### Content Requirements of a Contract Completion Statement

1. Contract administration office name and address (if different from the procuring contracting office).
2. Contracting office name and address.
3. Contract number.
4. The last modification number.
5. Last call or order number.
6. The contractor's name and address.
7. Dollar amount of excess funds, if any.
8. Voucher number and date of final payment.
9. Invoice number and date, if the final approved invoice has been forwarded to the payment office of another agency or organization and you do not know the payment status.
10. A statement that all required contract administration actions have been fully and satisfactorily accomplished.
11. Name and signature of the contracting officer.
12. Date.

#### *Exhibit 9-2*

Place the original document in the official contract file. When preaward and contract administration responsibilities are split between two offices, forward the original to the procuring contracting office for inclusion in their official contract file record, and place a copy in the contract administration file.

FAR 4.805

Individual agencies prescribe procedures for the handling, storage and disposal of contract files. Sometimes files are stored in a different building and occasionally in a different part of the city or even in another

city. In these cases, retrieving files to settle unresolved issues can be quite time-consuming, making your thoroughness of closeout review particularly important. The contract administration activity may keep a log of closed out files containing such information as:

- The date the file was closed out;
- The date the file was physically transferred to a storage center;
- Where it was sent for storage;
- A filing location provided by the storage facility. (Note: It is of vital importance to record and safeguard the container number for the stored contracts. The storage facility may not retain such and may not be able to locate your particular contract.)

FAR 4.805

Some information in your contract files must be kept for a specific number of years. These recordkeeping retention requirements are sometimes the result of a legal requirement and sometimes the result of administrative regulations.

### **9.9 Invoke the Government's Rights Under the Continuity of Services Clause**

FAR 37.110(c)

FAR 52.237-3

When the Government anticipates difficulty in transitioning from an incumbent contractor to a possible follow-on contractor for essential services, it includes a Continuity of Services clause in the incumbent contract. This clause specifies that the incumbent contractor will provide training services to the follow-on contractor for a period of 30 to 90 days, but only if the contracting officer provides notice that the Government will require these services.

The contractor is reimbursed at cost plus a fee or profit that does not exceed the fee or profit percentage of the basic contract for these services if it provides them.

You clearly do not need the services if the incumbent contractor has the award for the follow-on contract. Additionally, you also may not need these services if:

- The follow-on contractor provided the service under another contract;
- The follow-on contractor is hiring a substantial number of employees of the incumbent contractor for work under the follow-on contract.

Further, the extent to which the services are needed varies depending on the experience of the follow-on contractor with the specific service and with Government contracts and your agency in particular.

Notify the incumbent contractor of your need for phase-in/phase-out service. In this notice, include all of the elements outlined in Exhibit 9-3, Minimum Content Requirements For a Phase-In/Phase-Out Notice.

### **Minimum Content Requirements for a Phase-In/Phase-Out Notice**

1. Specify a time frame, by calendar date, during which the Government requires phase-in/phase-out services.
2. Specify a date for the contractor to submit a training program for Government review.
3. Outline specific areas that this training program should cover.
4. Specify a date when the responsibility for contract performance will be transferred from the incumbent contractor to the follow-on contractor.

#### *Exhibit 9-3*

After you have activated the requirement for phase-in/phase-out services, administer them as you would any other contract requirement. The invoice for these services would then become a part of your final invoice.

CONTRACT CLOSEOUT

*NOTES*

## CHAPTER 10

# DISPUTES, CLAIMS, AND TERMINATIONS

*Mark Finnigan, Eric's seasoned contract administrator, was angry. The agency had bent over backwards to cooperate with McFadden Manufacturing. Yet they continued to miss contract delivery dates. Tom McFadden had made a good living from his small company, initially supplying parts to several of the major farm implement manufacturers. But several years ago, those companies had cut back on their orders and Tom was afraid he would eventually have to close down.*

*The answer came from an unexpected source. The visitor to his plant was a retired general from one of the branches of the military. He was an expert in procurement, particularly in the area of small business. He felt that McFadden Manufacturing could produce castings to meet the needs of several Government agencies. They worked out a consultant agreement. He would work with Tom and teach him how to get on the bidder's list for several agencies and how to respond to Government solicitations.*

*The general knew his stuff. The orders rolled in. Tom delivered on time and his products were good. He continued to bid on more and more and got a glut of small Government contracts. What he didn't have was a good production schedule to let him know he was getting into trouble.*

*Tom McFadden, the company's President and sole proprietor, sat across the conference table from Mark. He had flown in that morning after a heated phone conversation two days ago about a show cause letter the agency issued on the most critical contract.*

*"We have re-established this delivery schedule two times and you haven't made either one. Why should we establish another one?" Mark Finnigan asked him.*

*"Look, I'm really sorry about this," Tom said and he truly was. He was appalled at the backlog situation his company was in, but he didn't know what to do except throw more people at it. "I've hired twenty-five more people to work on this contract only." Tom continued. "I'm sure we'll make it this time. I'll put them on overtime, if necessary."*

*Mark raised his eyebrows. The skill level required to perform the work was not great, but it did require several month's training.*

*It was just as Mark suspected. Tom McFadden had no organized plan for delivery.*

## COURSE LEARNING OBJECTIVES

At the completion of this course, you will be able to:

**Overall:** Understand when a claim is valid and know the steps to processing claims.  
Identify the actions required in terminating for convenience or default.

**Individual:**

10.1 Given a dispute between the Government and the contractor:

- Identify the major provisions of the Contract Disputes Act.
- Recognize when a dispute becomes a claim.
- Identify the features of contractor's demand which establishes validity of the claim.
- Know the prescribed procedures once it becomes a claim.

10.2 Use the terminations remedy as a last resort.

10.2.1 Termination for Default.

10.2.2 Termination for Convenience.

## INTRODUCTION TO DISPUTES AND CLAIMS

<b>Disputes</b>	<p>A “dispute” is formed under a contract when a controversy develops as to the interpretation of:</p> <ul style="list-style-type: none"> <li>• payment,</li> <li>• time, or</li> <li>• money due to either party:</li> </ul>
<b>Claims</b>	<p>A written demand by one of the contracting parties seeking:</p> <ul style="list-style-type: none"> <li>• payment of money</li> <li>• adjustment or interpretation of contract term(s)</li> <li>• other relief arising under or relating to the contact</li> </ul>
<b>Contracting Officer's Role</b>	<p>The importance of the contracting officer’s role just prior to and during a dispute cannot be overemphasized:</p> <ul style="list-style-type: none"> <li>• Role as “arbiter of first resort” with respect to contract disputes,</li> <li>• Final decision which must be made under the Disputes clause, and</li> <li>• Dilemma concerning whether to terminate or not to terminate.</li> </ul>
<b>Policy</b>	<p>To resolve all contractual issues by mutual agreement at the Contracting Officer's level without litigation.</p>
<b>Contract Disputes Act</b>	<p>The Contract Disputes Act (CDA) establishes procedures and requirements for asserting and resolving disputes and claims by or against contractors arising under or relating to a contract subject to the Act. It provides for the litigation of contract disputes by establishing:</p> <ul style="list-style-type: none"> <li>• Contracting Officer's Final Decision</li> <li>• Contract Appeals Board, or</li> <li>• Claims Court and Court of Appeals for the Federal Circuit</li> </ul> <p>The CDA requires that the disputes procedures be used by all Federal agencies. The major provisions of the Act are illustrated in Exhibit 10-1.</p>

### Major Provisions of the Contract Disputes Act of 1978

1. Civil penalties for contractor claims that are fraudulent or based on a misrepresentation of fact.
2. The requirement for contracting officer's final decisions.
3. Certification of contractor claims in excess of \$50,000.
4. The payment of interest regarding claims.
5. Provides the contractor a choice to proceed to the boards or direct to the Claims Court.
6. Introduced the language "all claims **relating** to contract", as opposed to "**arising**" under the contract.
7. Gives the Government the right to appeal board decisions to the courts.
8. Allows agencies to require the contractor to continue performance pending final appeal, suit or settlement.
9. Provides that all claims must be in writing, and be submitted directly to the contracting officer.

*Exhibit 10-1.*

## PROCESSING DISPUTES/CLAIMS

### 10.1 Disputes

There are usually warning signs that signal a potential dispute. Experience in dealing with such matters will quickly provide you with an awareness of possible trouble. Exhibit 10-2 explores some of the warning signals which may alert you to a potential dispute which may ultimately lead to a claim. Some are subtle, others are graphic.

#### Warning Signs of a Potential Dispute

- There is a lack of specific information from the contractor during the Preproposal Conference as to how the job will be completed.
- Failure of the contractor to begin work within approximately 10% of the total contract duration.
- Repeated failure of the contractor to meet dates on the critical path of the project schedule.
- Repeated safety violations/accidents, indicating poor management.
- Repeated incidents of poor quality or rework.
- Complaints from site workers to Government personnel about conditions.
- Refusal by the contractor to sign bilaterally negotiated contract modifications or agreements containing the required “release” language.
- Letters are received from the contractor that allude to field problems, but without specific details regarding the problem.
- Receiving a barrage of correspondence from the contractor requiring replies to very insignificant matters, creating a nightmare in paperwork.
- Persistent complaints from the contractor concerning the behavior, motives or requirements of the inspector or contract administrator that are found to be without foundation.
- Receipt of complaints from subcontractors concerning late payments or nonpayment.
- Excessively long punch lists.

*Exhibit 10-2*

### Sources of Disputes

**Scope.** Many of the controversies stem from disagreements about the precise scope of the Government/contractor bargain:

- Complexity of projects in terms of interrelationships;
- Lengthy contract documents and number of drawings;
- Weather conditions and other unforeseen conditions
- Constructive Changes

Resolution of disagreements which lead to disputes may determine:

- Amount or quality of work to be performed;
- Price to be paid; and
- Identity of the party bearing responsibility for problems that occur.

**Contract Language.** When interpreting contract clauses, there are no sets of rules or well-defined analytical framework to follow as far as the courts and BCAs are concerned. You do need to ascertain the parties' intent by

- Performing an analysis of the language contained in the contract documents; and
- Examining the evidence, extrinsic to the contract documents, pertaining to facts and circumstances surrounding contract formation and performance.

If this effort fails to compel an applicable interpretation, then you should consult with your legal council to review the various rules of interpretation that the courts and boards have applied.

In the quest for seeking reasonable, logical interpretations, the courts and boards look to find the real meaning of the contract language and will reject interpretations which:

- are twisted or strained;
- would render any provision meaningless; or
- would cause a conflict.

Exhibit 10-3 outlines the interpretive rules which generally are followed by the courts and boards.

### Rules in Aid of Contract Interpretation

1. Read the contract as a whole.
2. Determine the order of precedence by reading the clauses.
3. If enumerated items are called for in one place and not in another, apply one of the two basic rules, i.e.
  - If the contract contains a specific list of items without words of qualification, the contractor may reasonably assume, absent other contract provisions to the contrary, that those items **not** listed **are not** included.
  - Where words of qualification are included, and where the meaning of a word is doubtful, it will take its coloring from, and be limited by, the words with which it is associated.
4. Consider evidence outside the contract document - extrinsic evidence:
  - Discussions and concurrent actions. This type of evidence consists of parties' discussions and actions occurring prior to the submission of bids or proposals, such as:
    - Requests for clarification;
    - Pre-bid conferences;
    - Pre-dispute interpretations;
    - Pre-dispute actions which may have led to evidencing an interpretation.
    - Failure to act, which was interpreted to be acquiescence.
  - Prior course dealing.
  - Custom and trade usage.
5. Post-Interpretation ambiguities.
  - Interpretation against the drafter of the specification.
  - Duty to seek clarification.

*Exhibit 10-3.*

Remember, honest disputes over performance and interpretation of contract clauses occur in the smoothest of contract relationships. Even clear contract terms and conditions can give rise to the necessity of interpretation.

## DISPUTES, CLAIMS AND TERMINATIONS

### Resolving Disputes

Techniques for avoiding a claim and settling the dispute include:

- Continuing to consider, discuss and negotiate the various elements of the disagreement, especially during this early stage of the process.
- Dividing the problem into separate elements, such as the technical and monetary aspects, will aid in bringing the parties closer together. This method provides the parties with the opportunity to discuss the merits of the technical aspect, without considering the dollar impact. From that may spring the basis of entitlement, and later the financial aspects can be considered.
- Talks by individuals who have not participated substantially in the matter can offer aid in resolution of differences, particularly if an impasse is reached.

Both the Government and the contractor must be in a position of being able to “rebuild” on paper, the events leading to the dispute. Only by careful documentation can you protect the interest of the Government.

The methods selected to monitor contractor performance will play an important role in analyzing a dispute. Regardless of the format, the manner in which a report is written is what is important. It is essential that persons reviewing the report understand its basic purpose and be aware of the key issues which might arise later.

### Alternative Disputes Resolution

FAR 33.204, 33.214
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Agencies are encouraged to use Alternative Dispute Resolution (ADR) procedures to the maximum extent possible to resolve issues in controversy. ADR procedures may include such efforts as assisted settlement negotiations, mediations, factfinding and minitrials.

The Contracting Officer may delegate to the Contract Administration Office the authority to use ADR procedures to resolve differences. ADR cannot be used when another Federal agency is authorized to resolve the dispute or when fraud is involved.

The contracting officer may elect to use ADR procedures at any time; however, ADR procedures are best used when:

- An issue in controversy exists
- Both parties voluntarily participate with officials authorized to resolve the issue
- Both parties agree on procedures and terms
- Formal litigation will not be used

The need for effective disputes management is a must. Exhibit 10-4 lists criteria for the practical side of good management.

### Criteria for Effective Disputes Management

- Meet the issues head-on: Before arguments and disputes can escalate, both you and the contractor should recognize that a difference of opinion exists. Separate the side issues and concentrate on the REAL issues.
- Resolve disagreements quickly: After the issues have been identified and the facts have been gathered, the parties should move to resolve disputes quickly.
- Manage the dispute: Your duties do not end with the identification of a dispute. Often, resolution is difficult because of “unreasonable” positions taken. Avoid taking the attitude that the situation is “hopeless”. Reassess your own position and request that the contractor do the same. Dismiss any negatives you may have in your personal feelings. Don’t hesitate to ask for assistance.
- Negotiate the dispute: Be timely; Be prepared; Know the issues on which you may compromise: Know the ones that you cannot. Be fair; Be professional, and once a bona fide compromise is reached, delineate all of the matters discussed and promptly obtain full accord and satisfaction agreement.
- Recognize that disputes are “time sensitive”: Whether you are looking at internal disposition procedures, the contractor’s demands, or time constraints pursuant to regulations, there are constant pressures brought to bear. Given the nature of the actions required, you have a reasonable time to act, but there is no room for delays.
- Proper contract file maintenance: This is the key to having the critical documentation that the Government requires in order to provide a timely response to a dispute.

*Exhibit 10-4.*

Claims

If you are dealing with an experienced contractor who becomes convinced that the arguments being presented are not persuasive, the contractor will usually make it known to you that a claim will be filed. This is referred to informally as "putting you on notice of a claim." Exhibit 10-5 defines a claim.

**Definition of a Claim**

FAR 33.201

“**CLAIM**” means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. A claim arising under a contract, unlike a claim relating to that contract, is a claim that can be resolved under a contract clause that provides for the relief sought by the claimant. However, a written demand or written assertion by the contractor seeking the payment of money exceeding \$50,000 is not a claim under the Contract Disputes Act until certified as required by the Act and 33.207. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim. The submission may be converted to a claim, by written notice to the contracting officer as provided in 33.206(a), if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

*Exhibit 10-5*

Everyone involved in contracting needs to develop an appreciation of claims because they are an important element of managing contracts

- The manner in which claims are handled, from the time that a dispute manifests itself until final action is taken is a reflection on your activity, as well as your agency.
- You need to know not only the basics in analyzing a claim, but to be able to put together a quality claims package.

It takes skill, persistence, and clear knowledge of the regulations concerning disputes and claims in order to perform these tasks.

You may find to your surprise that there are few new skills required in analyzing a claim. **For example,**

- The same skills are used in evaluating the merits of an agency protest against a proprietary specification or an “experience” clause in a construction contract.

- If you have looked at a request for bid correction in terms of the question of whether the contractor has presented clear and convincing evidence of the existence of a mistake and the intended bid, you have performed the same kind of examination that takes place when reviewing a claim submitted under the Disputes clause.
- The skills required in allowing time extensions are the same as used in analyzing a delay claim.

### Responding to a Claim

When “trouble” initially appears and a claim seems to be inevitable, the matter is not merely placed in the hands of a Government lawyer to resolve. Everyone who participated in the situation which has led to “the trouble” will be directly or indirectly involved. Although the contracting officer is the one ultimately responsible for arriving and issuing the final decision, you may be responsible for:

- Assembling all of the information needed,
- Proposing a recommendation based on your analysis, or
- Identifying and consulting with those who will be:
  - conducting the legal review,
  - providing the technical analysis, and
  - responsible for making the final decision at a higher level.

Contracting Officers are authorized to decide or settle all claims arising under, or relating to a contract subject to the Contract Disputes Act, except for:

- Claims or disputes for penalties or forfeitures prescribed by statute or regulation that another Federal agency is to administer; or
- Claims covered by the False Claims Act

The bulk of contract claims involve equitable adjustments as a result of contract performance, although there are other typical claims issues:

- Data rights,
- Warranty responsibilities
- Reinstatements of terminations

## DISPUTES, CLAIMS AND TERMINATIONS

### Appropriate Claims under the CDA

Determining what is, and what is not a claim is not always obvious. Unfortunately there is no criteria which can be applied in every instance to reach a fail-safe decision. If you receive a letter from a contractor which raises more questions than it answers and you are uncertain about the contractor's intentions, you may consider:

- Talking to someone who may have already dealt with the problem you are facing for the first time.
- Consulting your staff attorney and seeking advice.
- Writing a letter to the contractor and ask if a claim is being submitted, and offer some reminders as to what needs to be furnished.

The contracting Officer's denial of the contractor's request does not automatically convert it into a claim. A claim simply does not arise upon the occurrence of a dispute or controversy. The contractor must first assert a "demand" upon the Government by requesting that a final decision be issued by the Contracting Officer. For a contractor's communication to constitute a claim it must manifest a clear intent to seek relief as a matter of right.

### Non-monetary Actions

There are some actions regularly taken by the Government under a contract which do not involve immediate Government claims for money, but which may or may not give rise to Government or contractor claims for monetary relief later. Some common examples:

- Default termination
- Asserting rights under the Patent Rights clause
- Rejection of work under inspection or warranty clauses
- Rescission of the contract

There is some uncertainty as to whether the Contract Disputes Act of 1978 requires that these actions be made the subject of a Contracting Officer's decision in order to be adjudicated under the disputes process. However, in the case of default terminations the Government has traditionally followed the disputes procedures. In contrast, the Government has not followed the procedures in cases involving rescission.

### Subcontractor Claims

Subcontractors have no privity of contract with the Government. Therefore, a subcontractor cannot file a direct claim and instead must file its claim through the prime. An exception is made for SBA 8(a) contracts. Even though the prime contractor is technically SBA and the subcontractor is the 8(a) firm, 8(a) contractors are allowed to submit claims directly to the contracting officer.

## Written Requirements

Before a dispute can be elevated to formal status as a claim, the following must occur:

- Contractor must submit the claim in writing;
- It must be submitted directly to the contracting officer;
- It must assert any specific rights or basis for the specific monetary relief being sought;
- Contractor must request a valid contracting officer final decision;
- Claim must be **properly certified** if in excess of \$50,000.

Proper certification means:

- Statement that the claim is made in good faith;
- Supporting data are accurate and complete; and
- Amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable.
- Signed by a duly authorized official on behalf of the contractor

(Note: The Contract Disputes Act provides for a penalty for contractor claims that are fraudulent or based on a misrepresentation of fact.)

To determine the dollar amount of a claim, you must aggregate the increased and decreased costs involved.

**For example:** A contractor, requesting a net price increase of \$10,000 for a change involving \$40,000 of added work and \$30,000 of deleted work, would be required to certify since the combination of the two amounts would exceed the \$50,000 threshold.

When the written demand does not meet all the criteria for a claim, return it, explaining how it is deficient, according to the disputes clause of the contract.

## Reaction to a Claim

Upon receipt of a claim the natural tendency may be for you to develop an adversarial attitude concerning the contractor. Although some claims may lack merit, not every one is fraudulent or over-inflated. When confronted with a contractor's demand for extra compensation, the best policy for you to follow is to

- Set personal feelings aside and give the claim careful, unbiased, thorough, and reasonable consideration.
- Solicit the technical advisors to provide information as to the validity of the claim and to obtain information. Take advantage of their technical expertise and familiarity of the project.

Assuming that the contractor gives you a complete claims package, the general procedure which should be followed in analyzing a claim is outlined in Exhibits 10-6 and 10-7.

### Initial Claim Review

1. Read the contractor's letter and identify the issues involved. It is the contractor's claim. Allow ample opportunity and your undivided and impartial attention to the basis of the claim.
2. Review the contractor's documentation to develop a chronology for each of the separate issues involved.
3. Review the contract file and other contract documents to further develop or substantiate the chronology of events.
4. Review the relevant contract provisions and identify the kind and type of information called for.
5. Return to the contractor's letter and identify each of the allegations made. Using the data provided by the contractor, and data you have collected yourself, prepare a point-by-point response to each of the allegations.

*Exhibit 10-6*

### Detailed Analysis of the Claim

- Step One: Based on the initial analysis, ascertain whether the basic facts alleged are true, not true, or partially true and determine if the claim has standing.
- Step Two: Make a technical analysis of a claim, which should consist of a thorough analysis of the specifications, both as originally written and as changed. It should be performed, when possible, by the persons connected with the initial drafting of them, or by someone who has the technical expertise to do so.
- Step Three: Have a technical expert perform an analysis of the engineering approach which was employed by the contractor, if necessary. Establish the reasonableness, from an engineering standpoint, of the additional time and man-hours expended.
- Step Four: Perform a cost analysis (including an audit if applicable)\* of the costs claimed by the contractor to verify that:
- The costs are actually recorded on the contractor's books in accordance with generally accepted accounting principles;
  - They are allowable and allocable to the contract as claimed; and
  - Their recovery is not prohibited by law or regulation.
- Step Five: Subject the claim to a legal analysis.

\*Note: The Defense Contract Audit Agency or Federal Contract Audit Office

*Exhibit 10-7.*

Exhibit 10-8 provides a checklist to serve as a reminder of the issues to be reviewed prior to meeting with the contractor. It is particularly useful in briefing team members and planning an agenda in preparation for negotiations to settle a claim.

Factor Analysis Checklist for a Claim	
Contract Number _____	Date _____
Government Estimate _____	Contractor's Proposal _____
<ul style="list-style-type: none"> <li>• Job size, points, and areas of work. (Brief Description) _____</li> </ul>	
<ul style="list-style-type: none"> <li>• Plans and Specifications have been examined. _____</li> <li>• Quantity and quality of materials has been verified. _____</li> <li>• Labor and equipment usage and cost. <span style="float: right;">Cost            \$            _____</span></li> <li>• List idle time, wasted time, or dragged out time. (list dates extracted from monitoring reports) _____</li> <li>• List possible over-manning or over-equipping: _____</li> <li>• Materials, labor, equipment and overhead over consumption or diversions into this change: _____</li> <li>• Contractor diligence and production efficiency: _____</li> </ul>	
<ul style="list-style-type: none"> <li>• Work environment factors:                             <ul style="list-style-type: none"> <li>___ Dust</li> <li>___ Weather</li> </ul> </li> </ul> (Remarks) _____	
<ul style="list-style-type: none"> <li>___ Temperature</li> <li>___ Wind</li> <li>___ Access and congestion</li> <li>___ Quality and availability of Labor: _____</li> <li>___ Superintendency</li> <li>___ Overhead support</li> <li>___ Supplier support</li> <li>___ Government cooperation</li> <li>___ Morale</li> </ul>	
<ul style="list-style-type: none"> <li>• Quality of work? _____</li> <li>___ CQC</li> <li>___ Contractor on schedule?</li> <li>___ Contractor behind schedule? By _____ number of days.</li> <li>• Number of change orders to date _____</li> <li>• Audit available? _____</li> </ul>	

*Exhibit 10-8.*

Once a claim has been identified it is never too early for you to begin preparing the claim file. The assembly of evidence must be undertaken if the case goes to litigation, so it is worth doing at the outset, and worth doing well. Evidence can be obtained from many places and take many forms, for example:

In DOD, all documentary evidence in support of the Government's case in a claim is referred to as the "Rule 4 File."

The documents submitted by both parties constitute the appeal file. Exhibit 10-9 is a checklist of some of the important items that need to be assembled in order to research and prepare a claim file.

<b>Preparation of the Claim File</b>	
(a) The contract specification and drawings	Include all modifications.
(b) Correspondence files	As a minimum, these should include the engineering, preaward, contract administration and legal files.
(c) Working drawings	Of particular importance are those which were originally approved, plus those which have incorporated all of the changes. An analysis as to why changes were made, and the dates.
(d) Inspection Records	Daily records, if applicable, and logs or reports by inspectors and contractor personnel.
(e) Memorandum of meetings	Include only those pertinent to the claim.
(f) All Progress charts and information concerning progress.	CPM and Bar Charts, originals, and all changes.
(g) Copy of the Postaward conference notes of meeting.	These may be particularly useful because these notes are frequently of critical value in establishing expectations and understandings of both parties with respect to a particular provision of the specifications, or anticipated problem discussions which were held.
(h) Copy of contract clauses	These are important for general reference purposes and should be reviewed during the course of the claims preparation. In some cases, the contract may incorporate by reference a clause which should be studied in full text.
(i) Copy of all photographs taken.	Photographs can and should be used to document key points wherever possible.
(j) Copies of pertinent logs.	Logs, such as change order logs, or submittal approval logs are often beneficial.
(k) Copies of interim or final performance evaluations of the contractor.	Interim performance evaluations are sometimes issued during the contractor's performance. These will point out weaknesses.

*Exhibit 10-9*

## The Final Decision

FAR 33.211(a)
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Conceptually, the analysis process leading up to a final decision may be categorized into five phases:

- Identifying the issue(s)
- Performing an impact analysis
- Evaluation of the project documentation
- Performing a price/cost analysis and damage apportionment
- Preparing a report

In some offices, the contract specialist, with technical assistance, is expected to perform the task.

A final decision under the Disputes clause is the last resort after efforts to settle the manner by an agreement have failed. The decision may reflect:

- Complete rejection of the claim
- Complete acceptance of the claim
- Partial acceptance/rejection of the claim

The decision must be in writing and it should be dispatched to the contractor by certified mail, return receipt requested. It should contain, as a minimum the following elements:

- Reference to the contract involved;
- Summary of the contractor's claim, including a statement of the additional compensation sought, and a succinct statement of the factual basis of the contractor's claim. This includes a reference to particular parts of the specification (and drawings, if applicable), and how the contractor uses them to support its position.
- Findings of Fact
- Determination, and reasons for the decision reached, supporting rationale and a statement of factual areas of agreement and disagreement;
- Closing statement, identifying it as the final decision of the Contracting Officer and advising the contractor of the right to appeal.

## DISPUTES, CLAIMS AND TERMINATIONS

The Contracting Officer's final decision is the very foundation of the appeal process. Without it, there is no issue, no appeal, and no review. The final decision must be:

- Responsive to all issues of the claim
- Personal and independent
- Impartial and unbiased
- Able to withstand sound legal opinion

### Timely Response

The Contracting Officer has 60 days in which to issue a decision on claims for \$50,000 or less. If the claim is larger than \$50,000, and it is determined that more time is needed, the Contracting Officer may elect to notify the contractor in writing of the time in which a decision will be issued. The Contracting Officer is not obligated to render a final decision for a claim over \$50,000 with a defective certification.

A failure to issue a timely decision can be viewed as a claims denial and allows the contractor to file and appeal or suit on the claim.

### Appealing the Final Decision

A Contracting Officer's final decision is final and conclusive and not subject to review by any forum, tribunal or Government agency unless appealed by the contractor after receipt of the decision to:

- a board of contract appeals within 90 days; or
- the Claims Court within 12 months

The contractor must initially choose one or the other. It may not seek a ruling from both.

The Contracting Officer's final decisions committed to discretionary measures by law or contract terms are not reviewable by the boards under the Contract Disputes Act. For example:

- Processing of payment vouchers;
- Settlement of contract claims;
- Reinstatement of previously terminated contract;
- Decision to terminate a breached contract for default;
- Decision to accept or reject nonconforming items.

An appeal made to a board of contract appeals is considered an administrative review while an appeal to the Claims Court is a judicial review.

## Where to File

The Contractor may make his selection of where to file as follows:

**Board of Contract Appeals** Offers a quicker review, particularly for smaller claims. Generally this is less expensive to the Contractor.

**Claims Court** Time Limit Restrictions. The Claims Court's time limit on filing an appeal is longer than the board's time limit: one year, as opposed to 90 days, after the Contracting Officer's final decision was issued. If the contractor procrastinated in deciding whether to appeal, it may have no other choice.

Greater Independence. This may be particularly important to contractors for claims involving an agency-wide practice that is not standard Government-wide. The contractor may feel the wiser choice is the Claims Court because of its organizational independence and broader experience with practices of other agencies.

A decision rendered by either the Board of Contract Appeals or the Claims Court can be further appealed to the **Court of Appeals for the Federal Circuit.**

The issuance of a final decision and the filing of an appeal by the contractor does not deprive the Contracting Officer of the authority to negotiate and execute an agreement settling a claim at any time. The Contracting Officer may settle a claim **during litigation** at the boards of contract appeals but not at the Claims Court.

## Forgo the Appeal

There are practical and legal considerations the contractor must weigh in deciding whether or not to appeal the final decision. Some of the most frequently used criteria include:

- the chance of success
- cost of litigation
- impact of business relations
- the desire to establish legal precedent
- the extent of disruption it will cause

## DISPUTES, CLAIMS AND TERMINATIONS

### Notice of Appeal

To appeal the Contracting Officer's decision, a contractor must submit a Notice of Appeal which indicates that the decision is being appealed. To be legally effective, it must contain six basic requirements:

#### **Notice of Appeal Requirements**

1. Be in writing;
2. Express discontent with the final decision;
3. State an intention to seek review of the decision by higher authority;
4. Identify the Contracting Officer, the agency or department location;
5. Provide the contract number and description; and
6. State the decision from which relief is being sought.

*Exhibit 10-10*

### Modify the Contract

If the decision is in favor of the contractor, the Contracting Officer may negotiate an equitable adjustment, unless the dollars and time has already been established in the decision. In any event, a contract modification is the vehicle by which you would use.

The Government must pay interest on a contractor's claim on the amount found due and unpaid computed from:

- The date the Contracting Officer receives a properly certified claim; or
- The date payment otherwise would be due, if that date is later, until the date that payment is made.

### Pay Interest

The interest rates are adjusted every six months by the Secretary of Treasury, and vary considerably. The rates are published in the Federal Register every six months, but may also be obtained from the Accounting and Finance Center of your agency. A claim which has gone from the "final decision" stage through the appeal process can span several periods of different interest rates which must be calculated on a daily basis.

## Claims against the Contractor

The filing of a claim and the availability of remedies are not one-way streets. The Government also may file claims “under the contract” and seek remedies against the contractor for reasons such as:

- Defective performance,
- Violation of statutes (civil and criminal),
- Violations of the regulations, or
- Demands for excess costs in procurement as a result of default.

In order to file a claim against the contractor, the contracting officer must

- be familiar with all of the available remedies and what actions are necessary, and
- fully understanding the principal elements of each type of claim, their defenses, and how to invoke the best remedy.

Guidelines are found in Exhibit 10-11 on what steps to take when the Government wishes to file a claim against a contractor.

### **Guidelines in Filing a Claim Against a Contractor**

- Take prompt action to determine the claim’s dollar amount and collect it.
- The claim must be thoroughly researched and reviewed before it is asserted. Have it reviewed by engineering, accounting and legal experts in order to assure that the claim is well founded.
- The demand for payment should contain a concise statement of the claim. Where there is reason to believe that negotiations may be futile, or there is reason to expedite collection, the demand should be cast in the form of a final decision.
- Make sure deferment agreement are in agreement with agency policy.
- Make sure that all Government claims are represented in bankruptcy proceedings.
- Do not overlook the possibility of asserting common law damage claims as: Supplement to an excess procurement cost claim; delay in performance; and defective performance not covered by the inspection and warranty clauses.
- Final decisions should be prepared in the same manner as in a contractor claim, and include, at least, a statement of the original contract requirements, the conduct which gave rise to the liability, and the amount and nature of the price adjustment or damages claimed. It should state that it is issued under the Disputes clause and contain advice concerning the appeal process.

*Exhibit 10-11*

## 10.2 Termination

The administrative process exercising the Government's contractual right to completely or partially discontinue performance under a contract. There are two types of terminations:

- Termination for Default: Contractor *fails* to perform in accordance with the contract.
- Termination for Convenience: The contractor is *required* to discontinue performance when it is in the Government's best interest.

It is preferred that you effect a no-cost settlement without using termination procedures, but only if:

- You know the contractor will accept one
- No Government property was furnished under the contract
- There are no outstanding payments, debts, due the Government, or no other contractor obligations
- The supply or service can readily be obtained elsewhere.

### 10.2.1 Termination for Default

The potentially high price to pay for a wrongful termination certainly warrants your careful review of contract clauses and surrounding circumstances prior to making a decision to recommend termination.

The fact that the Government has the legal right to terminate is not the only factor to be considered. The most crucial issue is how to best complete the project:

- It may be decided that the most promising of the choices is to continue working with the contractor in spite of a continued delinquency, or
- Immediate default action may be the quickest and the best means of finishing the project.

The decision is highly discretionary, based upon the business judgment of the contracting officer, and the business advisors who will assist in making that decision. Exhibit 10-12 lists some criteria to consider before initiating termination action.

#### Factors to Be Considered Before Terminating

FAR 49.402-3

- Clauses of the contract and applicable laws and regulations;
- Specific failure of the contractor and the excuses made by the contractor for such failure;
- Availability from other sources;
- Urgency of the need and the period of time which would be required to work by other sources as compared with the time in which completion could be obtained from the delinquent contractor;
- Degree of essentiality of the contractor, such as unique contractor capabilities;
- Availability of funds to finance repurchase costs which may prove to be uncollectible from the defaulted contractor, and the availability of funds to finance termination costs if the default is determined to be excusable; and
- Any other pertinent facts and circumstances.

*Exhibit 10-12*

## DISPUTES, CLAIMS AND TERMINATIONS

Events that alert you to the possibility of a termination action include:

- The contractor's response to the Government's cure or show cause notice fails to show that the contract will be completed in accordance with its terms.
- There is no longer a need for the items or service under the contract.
- Funds are not available for continued contract performance.
- There has been a radical change in the requirement that goes beyond the contractor's expertise
- For contracts awarded after June 30, 1987, you have evidence of a violation of Government export control policies
- The surety notifies you that they are aware that the bonded contractor is in default, and requests the Government to withhold progress payments because of the contractor's
  - failure to progress,
  - bankruptcy, or
  - failure to pay subcontractors or material men.

Not complying with the bonding company's request may result in the Government being liable to the surety.

**NO MORE CHANCES**

*Mark was in Eric's office going over the available alternatives for the McFadden delinquencies.*

*"So you really think we should go ahead and terminate this small business?" Eric asked him, rolling his eyes in mock pain.*

*"I know they'll be some political flack, Eric. But the laboratory badly needs the castings. With the increase in unskilled labor at the plant, his scrap rate has increased, and the rejection rate is increasing along with it."*

*They talked about other alternatives.*

*"We can't reprocur quickly with a termination for convenience. We'd have to go out on another solicitation." Mark pointed out and continued, "And there was clearly a breach of contract on a material contract term, the delivery time. There's not a hint of excusable delay anywhere. Darn it, Eric, these guys aren't entitled to termination costs. And we ought to make them pay for any excess reprocurement costs."*

*"It doesn't seem to me that there's much hope for continued performance," Mark told Joe Sanchez, the manager of the lab.. "There's no surety on the contract and trying to get McFadden to firm up a good subcontract would be more time-consuming than doing it ourselves. He's never subcontracted any of his manufacturing out."*

*"The delinquency on this contract has two of our projects at a dead standstill," Joe told him emphatically. "Do whatever it takes to get some decent castings fast."*

*"That's a default termination," Mark said.*

*"Okay," Joe said.*

*"We're in agreement then. We'll default. We talked earlier about the bad publicity we could get," Mark continued.. "McFadden's retired general probably has friends in high places too. We can back up the default. Don't worry about that. But I just want you to know that they'll be some flack and I want you to assure me that you can provide back up for the urgency of this requirement because we'll be taking most of the heat in the contracting office. Some good hard facts on the need for these castings could quiet things down in a hurry."*

*"I can show you graphically how it's effected my project schedules," Joe said. "I just prepared a briefing for my Director. Come down to Luanne's office. She's putting the finishing touches on the charts. You can have copies of whatever you want."*

**10.2.1 Termination  
for Default**

**FAR 52.249-10**

The right to terminate a contract may originate from either the general principles of contract law or the express terms of the contract. Contracts may be terminated for default in accordance with the following:

• **Failure to make progress so as to endanger performance:**

If the contractor fails to perform in a timely manner, the contractor is in default and the contract can properly be terminated. The presence or absence of the Government's insistence that time is of the essence is often the controlling factor in determining the acceptability of late performance.

• **Deliver the supplies or to perform the services within the time specified :**

Prior to 1966 the general rule was that the Government could insist on completion by the exact due date, because timely delivery on any Government contract was considered "of the essence". However, in 1966 the former Court of Claims issued an important decision indicating that contractors may be entitled to a reasonable time after the contract completion date to correct minor deficiencies in work that was considered substantially completed.

In the years following this decision, the boards and courts have increasingly applied the doctrine of substantial completion. In most cases the Government does not consider Termination for Default actions when only minor corrective work remains on the contract. (A legal consideration that should be decided by Contracting Officers only after obtaining legal advice).

• **Repudiation of the contract by the contractor:**

A repudiation or anticipatory breach occurs when a contractor clearly indicates to the Government that it cannot or will not perform on the contract.

Examples indicating an anticipatory repudiation may exist include:

- A letter stating an intention of nonperformance;
- Job abandonment;
- A bankruptcy filing

The contractor's intent must be clear and unequivocal. Therefore, whenever possible, it should be obtained in writing.

• **Perform any of the other provisions of the contract**

The termination or default clause is not the only place in the contract that authorizes terminating a contractor for default. Exhibit 10-13 provides of list of other clauses, statutes and provisions.

### Termination Clauses, Statutes, or Regulations

- Covenant Against Contingent Fees clause
- Equal Opportunity clause.
- Anti-Kickback Act violations.
- Walsh Healey, Service Contract, or Davis Bacon.
- Failure to obtain required bonds within the time specified.
- Defective workmanship.
- Failure to submit progress schedule.
- Fraud.

#### *Exhibit 10-13*

Even though the power to terminate is expressly reserved by the contract, you must exercise the termination power in good faith based upon the stipulated conditions of the termination clause or upon a material breach of the contract terms.

In determining matters such as “good faith” of the Government, the courts will look beyond the facts that immediately preceded the termination and investigate all of the circumstances under which the contract was executed, including the conduct of the parties throughout the contract’s performance.

It should be recognized that default clauses are included solely for the purpose of protecting the Government from loss or damage. They are not to be used for arbitrary, coercive, or punitive damages.

The termination for default decision has broad ramifications for all parties. Exhibit 10-14 examines some of them from each of the party’s viewpoint.

<b>The Effect of Termination on All Parties</b>	
Viewpoint	Affects
CONTRACTOR	<p>Termination for Default is undoubtedly a most traumatic experience for the construction contractor. Not only does the action put an end to performance of the contract and, in all probability, to the contractor's hopes for a profit on the contract, it also subjects the contractor to possible liability for the Government's extra costs of having the contract completed by another contractor. It has a negative connotation concerning the contractor's management and ability to perform on future contracts. Not infrequently it can lead to a contractor's financial ruin.</p>
GOVERNMENT	<p>From the Government's point of view, default termination is the ultimate method of dealing with a contractor's unexcused present or prospective failure to perform in accordance with the contract specifications and schedule. The default action for failure to perform is permissive and is not mandatory. Since termination causes a cessation of performance, with still further delays to be encountered in carrying out the procedure, to terminate for default is considered a drastic action to be taken. For this reason, it is unusual for the Government to immediately take action to default a contractor upon its initial failure to perform.</p>
CONTRACTING OFFICER	<p>Termination for Default procedures provide for excess costs to the Government in reprocurement. However, under the provisions governing reprocurement costs, routine "overhead" and other administrative costs are not recoverable. In reality, the Contracting Officer is cognizant of the adverse impact and added burden on the staff administering the contract in terms of costs of added manhours, in paperwork, the time and effort which must be spent in resoliciting and negotiating, and the pressures which are brought to bear on completing the project. Since the procedure is unanticipated, the extra administrative burden must somehow be absorbed into an already busy schedule. It is a necessary act at times, but one that no Contracting Officer, nor a member of the staff, relishes.</p>
BANKRUPTCY COURT	<p>Occasionally the Government will find itself "holding the bag" by a contractor filing for bankruptcy and abandoning the project either before, during, or after termination proceedings. When a contractor files for bankruptcy the Government must participate in the bankruptcy proceedings to protect its interests. In such cases the Government is generally bound by the same restrictions as any other creditor. However there are some important exceptions. The Act provides, for example that "contingent debts and contingent contractual liabilities" and "claims for anticipatory breach" may be proved and allowed. It will also be allowed priority in recovery second to that of payment of taxes.</p>

*Exhibit 10-14*

<b>The Effect of Termination on All Parties</b>	
Viewpoint	Affects
BOARDS and COURTS	<p>A termination for default is also considered by the courts to be a drastic measure; thus the Government is accordingly required to be strictly accountable for any such termination. Absent complete substantiating evidence, the Government's decision to terminate may be overturned for such reasons as:</p> <ul style="list-style-type: none"> <li>• Terminating too soon.</li> <li>• Should have terminated sooner.</li> <li>• Substantial completion by the contractor has been accomplished.</li> <li>• Government's actions constituted a waiver due to lack of discretion.</li> </ul> <p>However, when the courts or boards are convinced that discretion has been exercised in making the decision to terminate the contract, it will not substitute its judgment for that of the Contracting Officer.</p>
BONDING COMPANY	<p>The obligation of the surety under the performance bond is to indemnify the Government up to the amount of the bond in the event of the contractor's default. However, the courts have ruled that the Government owes an equitable obligation to a contractor's surety. In <i>Ohio Casualty Ins. Co. v. U. S.</i>, 12 Cl. Ct. 590 (1987), the Claims Court held that by failing to terminate an irresponsible, dishonest, incompetent and abusive contractor whose performance was two years behind schedule, the Contracting Officer had abused the discretion and consequently violated the equitable duty owed to the surety. Therefore a surety does not contract to assume the risk of a Contracting Officer's unreasonable conduct which results in excess payments to the subcontractors, suppliers, and expenses. The surety has a right to demand partial payments be made direct to them in certain instances when default is eminent or in process. The courts have consistently held that the surety who satisfies the contractor's obligations to pay laborers and material men under the payment bond has an equitable interest in the contract. In addition, the bonding company has the right to decide whether to complete the work, provide a subcontractor to complete the work, or rely on the Government to complete the work in-house (cases were there is substantial completion), or in a reprocurement contract.</p>

*Exhibit 10-14 (Continued)*

Alternatives to Default      The Government does have some alternatives that should be considered in lieu of default. Since default is highly discretionary, the courts and boards have found default terminations invalid in the absence of discretion in making the decision.

Some of the Government's alternatives to default that must be considered in order to demonstrate that discretion was used in making the decision are contained in Exhibit 10-15.

### Alternatives to Default Action

- No action with respect to default proceedings: Permit contractor to continue so long as the contractor provides clear and convincing evidence that performance will be cured by the completion date already established. However, the Contracting Officer should document the findings of fact and notify the contractor in writing that:
  - Government accepts the contractor's commitment to cure performance; and
  - Contractor's failure to cure the performance and/or to fulfill the contractually specified requirements will reinstate the Government's contractual right to terminate for default.
- Revision of the completion schedule: Permit the contractor or the surety to continue under a revised completion schedule. Advise the contractor that under the revised schedule, liquidated damages will not be assessed until after the revised delivery date passes. Obtain consideration for the change in the form of a reduced price, improved work methods, etc.
- Completion of the contract by a third party contractor. You may allow continued performance by a subcontractor or other comparable arrangement. The third party must be acceptable by the Government. Assurances must be provided that performance and payment bonds, as well as insurance, will be provided. {FAR 49.402-4(b)}
- Surety Takeover: If the surety for the failing contractor offers another firm to complete the work, this can be accomplished by a four party agreement. (i.e. the Government, existing contractor, new contractor and the surety). This is normally an agreeable arrangement unless there is evidence that the proposed contractor is not competent or not qualified. {FAR 49.404}
- No-cost settlement: Occasionally, the project requirement is no longer valid and you are already contemplating default proceedings. In this case you may use the no-cost settlement arrangement if the contractor has not incurred costs and is not liable for damages. {FAR 49.402-4(c)}
- Deductive contract modification: You may consider a deductive modification for a project that is nearing completion. With this method you can quickly resolve the issues and complete the project by other means.

*Exhibit 10-15*

## Forbearance

Because of the gravity and consequences of a decision to terminate for default, the boards of contract appeals and courts generally recognize the need for some period of time beyond scheduled performance, during which time the Government may pause and reflect upon such action. This is called a period of forbearance.

A default termination is a drastic sanction. Exercising a reasonable period of forbearance also demonstrates that you are exercising discretion.

## Waiver of Rights

The doctrine of waiver of rights may come into play if the forbearance period is lengthy; it may actually constitute a waiver of the default rights. During the forbearance period, the contracting officer may terminate at any time, without notice. However, it is frequently difficult to establish when the forbearance period ends and a waiver of the default has occurred.

The Government frequently attempts to preclude a finding of waiver of rights by expressly reserving its right to terminate during the period of reasonable forbearance. One version that is included in a “show cause” letter which states:

FAR 49.607 (b)

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

General Services Administration has adopted an additional paragraph which is more specific:

“None of the following shall be regarded as an extension, waiver, or abandonment of the delivery schedule or a waiver of the Government’s right to terminate for default: (i) the delay by the Government in terminating for default; (ii) acceptance of delinquent deliveries; and (iii) acceptance or approval of samples submitted either after default in delivery or in insufficient time for the contractor to meet the delivery schedule.”

The exact time you may be allowed is not clear, nor have the courts agreed as to what constitutes a reasonable time for forbearance. Exhibit 10-16 contains general information that offers guidance concerning waivers based on court and board findings. You are cautioned, however, not to use these statements as precedent. Every situation must be evaluated on its own merit.

### General Guidance Concerning Waivers

- If you encourage in some way the contractor to continue performance, and in reliance upon this inducement, the contractor does continue, a waiver may be found to have occurred.
- Approving a revised schedule may create a waiver if the contractor follows the approved schedule.
- Entering into negotiations for, or issuing a change order to the contract, will constitute a waiver if a new completion date is required but not established.
- If the contractor is incurring costs in a continued effort to perform, you have an obligation to act quickly in making a decision on whether to terminate.
- An indispensable element constituting a waiver is the Government indicating in some manner a willingness to have the contractor continue performance. This can be manifested by such actions as stalling for an unreasonable length of time in initiating default actions, or making express statements to the contractor about the delinquency, leading the contractor to believe the late completion “is forgiven”.
- If by your silence your action would be interpreted as meaning that you have elected to permit the contractor to continue performance, you may have waived the rights to default.

#### *Exhibit 10-16*

If you make statements reminding the contractor that liquidated damages will be collected on late completion, it does not constitute a waiver. To the contrary, it shows that withholding liquidated damages demonstrates that the Government has not waived their right to default .

Following a waiver and in order to assert that time once more is of the essence, the right to terminate must be reestablished. Failure to do so will waive future rights to terminate. You can accomplish this by giving the contractor notice of a new completion date established unilaterally by the Government, or through a bilateral agreement. If the date has been set unilaterally, the Government has the burden of proving that the date is reasonable.

## Notice of Termination for Default

Contracting officers shall terminate contracts for convenience and default by giving written notice to the contractor. When the notice is mailed, it shall be sent by certified mail, return receipt requested. Copies of the notice shall be distributed to ① the surety, ② any known assignee or guarantor of the contractor, and ③ to the same distribution as was made of the contract.

The notice must state:

- Contract is being terminated.
- Effective date of the termination.
- Extent of the termination.
- Reasons for the termination
- Contractor's appeal rights.
- Government's right in charging excess costs.
- That delivered materials not incorporated are to become the property of the Government.

Exhibit 10-17 gives five practical rules you should remember when exercising the right to issue a termination notice.

### **Rules to Remember in Issuing Termination Notices**

1. If the contractor receives notice of the termination and the notice does not say whether it is a termination for default or a termination for convenience, and the contractor believes it to be a termination for convenience and acts accordingly, the boards and courts have issued decisions that under these circumstances it will be considered a termination for convenience.
2. You may not call a termination for default a termination for convenience in order to protect the contractor's reputation.
3. If there is genuine uncertainty on the part of the Government when either a termination for default or one of convenience is appropriate, the termination for convenience should be used.
4. Termination for convenience is a final action; you cannot issue a termination for convenience and tomorrow change it to termination for default.
5. You can, in fact, reinstate a terminated part of a contract, but only with the contractor's written permission.

*Exhibit 10-17*

You must accompany a Notice of Determination for Default with a request that the Government be advised if the surety desires to enter into any arrangement for completion of the work.

In addition, you must also notify your activity disbursement officer to withhold further payments under the terminated contract pending further advice which will be furnished at the earliest practical time. You will need to work closely with the disbursement officer during all phases of the reprourement or takeover procedures.

Exhibit 10-18 explores the impact from the Government and the contractor’s point of view as to what now takes place upon issuance of the termination notice.

<b>Some Consequences of Termination for Default</b>	
<b>Government</b>	<b>Contractor</b>
<ol style="list-style-type: none"> <li>1. Government not liable for un-accepted work.</li> <li>2. Entitled to return of all payments (Progress, advanced, or partial).</li> <li>3. Government has right, (not duty) to appropriate any residual material. (Negotiate a price for material).</li> <li>4. Delays.</li> </ol>	<ol style="list-style-type: none"> <li>1. Liable for excess costs of reprourement.</li> <li>2. Liable for actual, liquidated damages.</li> <li>3. Subcontractors are notified to stop work immediately.</li> <li>4. Inventory of materials on hand must be initiated.</li> <li>5. Must cooperate with the bonding company in an effort to mitigate damages.</li> </ol>

*Exhibit 10-18.*

## Warning Signs

Upon occasion you may see evidence or hear rumors to that the contractor is in “financial trouble”. Warnings of an impending bankruptcy or financial difficulties sometimes goes hand-in-hand with a delinquent contract:

- Contractor fails to pay subcontractors on time;
- Late deliveries are being made of materials to the job site, usually brought in on a C.O.D. basis;
- Contractor is falling behind schedule;
- Complaints by laborers on the job;
- Telephone calls go unanswered; or
- Sloppy performance and workmanship is evident.

If all indications are pointing in the direction of the possibility of bankruptcy, and you are already contemplating default actions, discuss your concerns with the contracting officer and legal counsel, at once.

Exhibit 10-19 is the full text of the BANKRUPTCY clause which provides for the actions a contractor must take upon entering into proceedings relating bankruptcy.

### Bankruptcy (Apr 1991)

FAR 52.242-13

In the event the contractor enters into proceedings relating to bankruptcy, whether voluntary or involuntary, the contractor agrees to furnish, by certified mail, written notification of the bankruptcy to the Contracting Officer responsible for administering the contract. This notification shall be furnished within five days of the initiation of the proceedings relating to bankruptcy filing. This notification shall include the date on which the bankruptcy filing. This notification shall include the date on which the bankruptcy petition was filed, the identity of the court in which the bankruptcy petition was filed, and a listing of Government contract numbers and contracting offices for all Government contracts against which final payment has not been made. This obligation remains in effect until final payment under this contract.

*Exhibit 10-19*

## Surety

Having notified the surety of the termination for default, you must provide an opportunity for the bonding company to assess the situation and make their decision as to what course they choose to take.

If the surety decides they do not wish to complete the work and you are so informed in writing, your other options include:

- Accomplish the work by your own forces; or
- Proceed with reprocurement.

If the surety decides that they wish to complete the work, completion should normally be permitted, unless you have reason to believe it is not in the best interest of the Government. (i.e., you believe that the construction firm that the surety proposes to employ is not reliable or incompetent in a takeover agreement.)

#### Takeover Agreements

Because of the possibility of conflicting claims over unpaid prior earnings of the defaulted contractor, the surety may condition its offer of completion upon the execution by the Government of a **takeover agreement**, fixing the surety's rights to payment from those funds:

- Surety will take over management of the contract in order to assure its completion,
- In accordance with all the terms and conditions of the original contract, and
- Government will pay the surety's costs and expenses, which will be the balance of the contract price at the time of default, subject to several conditions (See Exhibit 10-20).

#### Conditions of a Takeover Agreement

- Any unpaid earnings of the defaulting contractor, including retained percentages and progress estimates for completed work prior to default, shall be subject to claims by the Government against the contractor.
- The agreement does not waive or release the Government's right to liquidated damages.
- If the contract has been assigned to a financial institution, the proceeds from the contract will not be available to the surety unless the surety enters into an agreement with the bank.
- In no event shall the surety be entitled to be paid any amount in excess of its total expenditures necessarily made in completing the work and discharging its liabilities under the payment bond.

*Exhibit 10-20*

### Accomplishing Work by In-house Forces

The contract default clause gives the Government the right to “take over the work and complete it by contract or otherwise”:

- Normally only occurs when the work is substantially complete.
- Done with the approval of the bonding company, if applicable.
- May use materials brought to the site, but not yet incorporated.

Excess costs are generally recoverable when

- Urgent need can be demonstrated;
- There is no reasonable alternative under the circumstances; and
- You can prove that there would have been such excess costs if a completion contract had been awarded to a private firm.

### Accomplishing Work by Reprocurement

Reprocurement is one of the Governments rights in the event it suffers damages as the result of default by the contractor under a fixed-price construction contract. The Government can assess the costs of reprocurement against the account of the defaulted contractor.

However, the Government is expected to act reasonably in the soliciting and awarding of the reprocurement contract in order to protect both the interests of the contractor and the Government. Failure to do so could result in the conversion of the termination for default into one of convenience if the contractor can show that the Government failed to act reasonably in mitigating costs.

In order to successfully assess damages against the defaulted contractor, you must present a good case that:

- You reprocured within a reasonable time;
- The price you obtained was reasonable;
- Reasonable efforts were made to mitigate damages; and
- The reprocurement contract was, in fact performed, and the reprocurement contractor was paid.

Reprocurement by the Government is subject to various limitations such as found in Exhibit 10-21

### **Guidelines for Reprourement**

- Work will need to be completed by awarding a new contract based on the same plans and specifications
- The Government must reprocore substantially according to the terms and conditions of the original contract.
- Equitable adjustments due the contractor prior to default will have to be offset against excess costs
- The Government cannot recover overhead or routine administrative costs in the reprocurement
- The Government may enter into negotiations rather than sealed bidding. It may also be negotiated sole source, if justified.
- The Contracting Officer shall exercise reasonable diligence to obtain the lowest price available for completing the contract.
- Failure to act reasonably to minimize reprocurement costs in awarding the reprocurement contract may result in the inability to recover excess costs.

#### *Exhibit 10-21*

Common Contractor  
Defenses

Two of the most common defenses raised by contractors in excess cost assessment cases are:

- The Government acquired dissimilar work, or the reprocurement contract was dissimilar in material respects; and
- The Government failed to mitigate its damages as a result of an unreasonable reprocurement method, time, or price.

## Timeliness

The Government is allowed a reasonable time in which to conduct the reprocurement. However, unreasonable delays which result in higher reprocurement costs is a defense where the contractor can show it has been prejudiced by the delay.

For example, fluctuating steel prices may have escalated in price, or some other commodity may have taken a rapid increase. Labor wage rates could have also escalated due to a new bargaining agreement.

Factors relating to the reasonableness of the reprocurement and the similarity in accomplishing it obviously have a significant impact upon the price of the reprocurement contract.

## Appeals

A contractor who believes that its contract has been defaulted unfairly or improperly can contest that action by appealing to the

- appropriate Board of Contract Appeals or
- U. S. Claims Court.

Even when a contractor fails to take a timely appeal from the termination for default, he can still challenge the propriety of that termination, as well as the propriety of the reprocurement procedure.

## Damages

The Government is entitled to recover actual damages for breach of the contract just as any other party to a contract:

- Cost of Government supervisory personnel such as inspectors and engineers incurred during a contractor caused delay,
- Costs caused by the delay which the Government had to pay to another contractor on the same, or a related projected or
- Any unliquidated progress payments.

**10. 2.2 Termination  
for Convenience**

The right of the Government to terminate a contract when its completion is no longer in the Government's best interest has long been recognized. It has been the subject of many court and board decisions. The Government has the right to terminate without cause and limit the contractor's recovery to costs incurred, profit on work done and the costs of preparing the termination settlement proposal. Recovery of anticipated profit is precluded. Termination for convenience can occur by the Government's election to do so, or by constructive termination acts or inaction.

The TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED PRICE) *Alternate I* clause is required in all construction contracts estimated to exceed \$100,000. It establishes the basis for and measure of compensation which may be due a contractor as a consequence of termination. It serves two purposes:

1. Provides an expeditious procedure for processing the contractor's termination claims; and
2. Relieves the Government from liability for breach of contract damages.

The courts and boards have provided some guidance through past decisions on criteria to apply when terminating for convenience:

- Contracting officer believes the contractor is in default, but the contractor has raised some defenses on its behalf that may threaten the position of the Government;
- Technical obsolescence; and
- Lack of availability of funds.

The Decision to Terminate for Convenience

FAR 49.101(b)

There is no guidance in the FAR clause as to the criteria that need to be considered before termination for convenience, except that FAR provides some assistance in describing instances when it may be in the best interest NOT to use the clause to cancel the contract. You will find a logic chart in Exhibit 10-22 providing some criteria to be considered when making the decision.

<b>Logic for and Against Termination for Convenience</b>	
<b>FOR</b>	<b>AGAINST</b>
<ul style="list-style-type: none"> <li>• When in the best interest of the Government</li> <li>• Budget considerations make it necessary</li> <li>• The requirement no longer exists</li> <li>• Termination for convenience would eliminate unnecessary losses</li> <li>• Propriety of an award must be resolved</li> <li>• Requested by GAO or the Courts and Boards</li> </ul>	<ul style="list-style-type: none"> <li>• Cost of termination for convenience is prohibitive               <ul style="list-style-type: none"> <li>-No-cost settlement should be attempted <u>before</u> issuing a termination for convenience.</li> <li>-Undeliverable balance of the contract is \$5000 or less</li> </ul> </li> <li>• Relationship the termination may have to other contracts</li> <li>• Contractor's reputation would be affected if terminated for default. Termination for convenience should not be used in lieu of default merely to save a contractor's reputation.</li> </ul>

*Exhibit 10-22*

The CO Makes the Decision

Although recommendations may be made by the engineers, legal or technical staff, it is the Contracting Officer **alone** who makes the decision.

The Termination Process

Once the decision is made to terminate in this fashion, there are procedures established in the FAR which must be followed. Exhibit 10-23 describes each briefly.

<b>The Termination for Convenience Process</b>	
<b>FAR Reference</b>	<b>Requirement</b>
Notice of Termination: FAR 49.102	The contractor must be notified in writing that the contract has been terminated for convenience.
Initial Conference: FAR 49.105(c)	The Contracting Officer, the contractor, and important subcontractor personnel discuss the effect of termination and the procedures to be followed in effecting a settlement. (Particularly beneficial on large construction projects.)
Prepare and Submit Inventory Schedules by the Contractor: FAR 45.508-1	The contractor must list the property acquired for and allocable to the terminated proposal.
Disposal of Termination Inventory: FAR 45.603	The terminated inventory must be disposed of by purchase or retention by the contractor, return material to suppliers, use by the Government, by donation, sale, destruction, or abandonment. Termination inventory may result in a credit against the amount the Government owes the contractor in the final settlement.
Submission of Settlement Proposal: FAR 49.206-1	The contractor must submit a proposal for compensation under the clause.
Inventory or total cost basis: FAR 49-206.2	Proposals are submitted on one of two basis: FAR requires that only the total cost basis may be used for fixed price construction contracts for complete terminations. However, the inventory method may be used for partial terminations. Contractor must submit no later than one year from date of notice.
Audit Report: FAR 49.107 or FAR 49.303-2	Obtain audit report if applicable.
Settlement by Negotiation: FAR 49.109	The Government and the contractor negotiate the amount of the final settlement. If both parties agree to a sum of money, the settlement is by negotiation. If the parties fail to agree, the Contracting Officer must make a unilateral determination of the amount due the contractor. The determination may be appealed.
Settlement Negotiation Memorandum: FAR 49.110	The memorandum shall be written explaining the basis for the settlement in order to assist reviewing authorities.
Settlement Agreement: FAR 49.109 or FAR 49.303-4	The Government and the contractor enter into a final agreement on the amount of the settlement. If some areas of the settlement are disputed, the contractor will be paid the amount the Government believes proper, pending final resolution of the appeal. The C.O. is responsible for the release of excess funds.

*Exhibit 10-23*

## CHAPTER 11

# CONSENT TO SUBCONTRACTS

### MANY QUESTIONS

*Of all the times for Mark Finnigan to go on a three-week vacation.” Joanne said quietly to herself. “He just awarded a major new contract and off he and his wife go to Europe.”*

*Joanne knew she was being unfair. After all, Mark and his wife had planned the trip a year ago. He had no way of knowing it would take so long to award this particular contract. Joanne was flattered that Mark had enough confidence in her to ask Eric if she could monitor the contract until he returned. The only contract action required during the three weeks Mark would be gone was to review and recommend that Eric consent or not consent to the placement of up to four subcontracts.*

*Actually, Mark hadn't known when the contractor would submit the advance notices to subcontract. They might all come in after he returned, but it would give Joanne an opportunity to become familiar with the entire process. Eric agreed. No sooner had Mark left when the first advance notice came in.*

*The first thing Joanne did was to review Mark's contract file. Mark had apparently gotten some upfront informal information about the possibility of this firm being a subcontractor. Joanne found several notes in Mark's file. She hadn't realized that this firm was a major DoD contractor. In fact, it was consistently among the top 50 Government contractors each year. This certainly didn't fit her idea of a subcontractor. She also wondered why Mark, in some of his notes on the prime contractor, had mentioned the company's approach to make-or-buy programs for several DoD contracts, and the fact that the company had recently undergone a CPSR, whatever that was, and had its purchasing system approved for another 3 years.*

*“What did all this have to do with her agency's contract requirement?” Joanne asked herself. “And why had Mark taken note of a purchasing system approval by a DoD Administrative Contracting Officer (ACO)? What did that approval have to do with their own agency's contract?”*

*Joanne decided she had better dig out the pertinent sections of the FAR to answer her questions regarding the significance of these items.*

# INTRODUCTION FOR CONSENT TO SUBCONTRACTS

<b>Definition of Consent to Subcontracts</b>	Refers to the contracting officer's written consent for the prime contractor to enter into specific subcontracts. The contracting officer provides consent or declines to consent based on an advance notice provided by the prime contractor to the Government.	
<b>Policy on When Consent Requirements Are Required</b>	Consent to subcontracts is required when the subcontract work is complex, the dollar value is substantial or the Government's interest is not adequately protected by competition and the type of prime contract or subcontract.	
<table border="1"><tr><td>FAR 44.102</td></tr></table>	FAR 44.102	The contracting officer can waive consent requirements when the contractor's purchasing system has been reviewed and approved through the procedures outlined in FAR Subpart 44.3.
FAR 44.102		
<b>Steps in Performance</b>	The steps in providing Government consent to subcontracts are charted on the next page. Following the flowchart, each step is discussed in turn.	

## TO CONSENT OR NOT TO CONSENT

### 11.1 Determine Whether Consent Is Required Under the Contract

#### Step 1

**Review the contract.** As in earlier chapters that required you to determine whether specific contract administration actions were needed, here again your key in determining whether the Government has the right to consent or reject a subcontractor is in the contract itself. Your first step is to review it carefully. In your review, pay close attention to:

- FAR clauses incorporated in the contract,
- Special clauses relating to subcontracting,
- The type of contract and subcontract
- The contract and subcontract dollar amount.

Generally, Government consent to a subcontract is required in a prime contract when the Government's interest in subcontractor selection is not protected by the contract type or when the Government's interest is not protected by competitive practices of the prime contractor.

FAR 44.201-1(b)

FAR 44.205

However, consent may also be required when a subcontract is recognized in the preaward phase of the procurement as being particularly critical to overall contract performance even though the Government's interests are generally protected by the contract type and/or competitive practices. These critical subcontracts may be specified in the schedule of the prime contractor's Government contract as one that requires the Government's consent, while other subcontracts that the prime contractor may let for contract performance will not be subject to consent restrictions. The prime Government contract may even specify other special surveillance requirements for these critical subcontract(s), such as Government approval of the subcontractor's quality control program, and so forth.

## WHY THE DOD ACO WAS INVOLVED

*Joanne was relieved after reading FAR Subpart 44.3.*

*“One less thing to worry about,” she thought. It made good business sense to waive further subcontracting consent requirements when a CPSR results in an approved system. There was a good deal of assurance that the Government’s interests are adequately protected by competition.*

*But, her initial reaction had been parochial: “Why would this ACO have any motivation to look out for my agency’s interests?” she had wondered.*

*She understood the DoD ACO’s involvement now. With resident surveillance personnel assigned to this subcontractor’s plant, the FAR gave this ACO responsibility for conducting the CPSR.*

*In carefully reviewing the procedures, she realized that this ACO would be looking out for her agency’s interest in the process of protecting DoD’s interests. The objective of the review is to evaluate the efficiency and effectiveness of the management system used to spend Government funds and carry out Government policies as a whole.*

*Further, by being on-site in the plant, this ACO was in a better position to detect changes or deficiencies in that management system and to respond by exercising the Government’s right to increase the normal three-year review cycle to assure that continued approval was warranted.*

### **11.2 Identify the Types of Subcontracts for Which Consent Is Required**

You have just identified those prime contracts that contain clauses making the submission of subcontract information a requirement under specific circumstances. If the contract you are administering is not one of those contracts, your contracting office does not concur to the prime’s subcontracting. However, if the contract you are administering is one of those contracts you just identified, you must now consider which subcontracts need a notice for consent from the contractor. The prime contractor is not required to submit an advance notice for all of them. Generally, prime contractors need only submit notices for those subcontracts with a substantial dollar value or those that contain complex requirements. Identify these in a contract clause: either a standard clause required by FAR 44.204 or one unique to the contract you are administering used to specify a particular critical subcontract as one that requires an advance notice and, perhaps, other special surveillance requirements.

### 11.3 Obtain and Review Advance Notices to Subcontract and Identify Any EEO Clearances Required

FAR 52.244-1

FAR 52.244-2

Standard FAR clauses that apply to subcontracts resulting from unpriced modifications to fixed-price contracts and generally to contracts that are not fixed-price, require contractors who do not have an approved purchasing system to provide notice to the contracting officer prior to entering into any subcontract.

#### Step 1

**Check advance notices for content requirements.** Standard FAR subcontracting clauses not only require an advance notice, but also outline content requirements for it. Those content requirements are listed within Exhibit 11-1, Assessing the Adequacy of the Advance Notice to Subcontract. Use the checklist to make sure that this advance subcontracting notice meets all of the contract's content requirements.

#### Step 2

**If you did not receive all information required, request revisions or additions to the advance notice.** If, in your review of content requirements in Step 1, you identified:

- Any obvious mistakes or inconsistencies,
- Omissions, or
- Other deficiencies,

request either a revised notice or an amendment to the notice you have that clarifies mistakes or inconsistencies, adds omitted material, or otherwise corrects deficiencies in the original notice. Request an amendment when only a few corrections are required. Otherwise, return the original notice and request a revised one that conforms to contract content requirements.

<b>Assessing the Adequacy of the Advance Notice to Subcontract (continued)</b>			
	YES	NO	N/A
9. Does this memorandum of negotiation reflect:			
• The principal elements of the subcontract price negotiations?			
• The most significant considerations controlling the establishment of initial or revised prices?			
• The reason why cost or pricing data were or were not required?			
• The extent, if any, to which the prime contractor did not rely on the subcontractor's cost or pricing data in determining the price objective and in negotiating the final price?			
• The extent, if any, to which it was recognized in the negotiation that the subcontractor's cost or pricing data were not accurate, complete, or current?			
• The resulting action, if any, taken by the prime contractor and subcontractor as a result of the defective pricing?			
• The effect of any such defective data on the total price negotiated?			
• The reasons for any significant difference between the prime contractor's price objective and the price negotiated?			
• If incentives were used in the subcontract, a complete explanation of the incentive fee or profit plan?			

*Exhibit 11-1 (continued)*

**11.4 Determine  
Whether the FAR  
Prohibits Consent**

FAR 9.405-2
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FAR 44.203
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After you determine that all content requirements have been met, examine the advance notice to subcontract for any FAR prohibitions requiring the contracting officer to withhold consent for this subcontract. These FAR prohibitions are contained in a checklist format in Exhibit 11-3, FAR Prohibitions Against Subcontracting.

<b>FAR Prohibitions Against Subcontracting (continued)</b>			
	YES	NO	N/A
7. Does this subcontract make the results of arbitration, judicial determination, or voluntary settlement between the prime and sub binding on the Government as well? <sup>2</sup>			
8. Does this subcontract, in consonance with other subcontracts under this prime contract, show a repetitive or unduly protracted use of cost-reimbursement, time-and- materials or labor-hour contracts?			
9. Is this proposed subcontractor on the List of Parties Excluded From Procurement Programs? <sup>3</sup>			
10. If this subcontract requires an EEO clearance (see Exhibit 11-2), has it been refused clearance by the appropriate regional Office of Federal Compliance Programs?			
11. If this proposed subcontract contains a requirement for jewel bearings and related items, is a clause that requires these items be obtained from the William Langer Plant absent from this subcontract?			
<p><sup>2</sup> You are not to answer “yes” to this question merely because the subcontract contains a clause giving the sub the right of indirect appeal to an agency board of contract appeals, as long as this clause does not attempt to obligate the contracting officer or the appeals board to decide questions that do not arise between the Government and the prime contractor or that are not a matter for dispute under the Disputes clause, FAR 52.233-1.</p> <p><sup>3</sup> The contracting officer has some leeway to consent to a subcontract award to a firm on this List. See FAR 9.405-2 and FAR 52.209-6.</p>			

*Exhibit 11-3 (continued)*

## Discretionary Factors in Consenting to Subcontract

The contracting officer takes the following discretionary factors into account in deciding whether to consent or withhold consent on a subcontract:

1. This subcontract's effect on the total amount of subcontracting when the clause at FAR 52.219-14 is included in the prime contract.
2. The necessity for subcontracting.
3. The consistency of this subcontract to the prime contractor's make-or-buy program.
4. The availability of special test equipment or facilities from Government sources that would otherwise be procured under the subcontract.
5. The technical justification for the selection of specific supplies, equipment, or services.
6. The prime contract's requirements regarding labor surplus area or small business subcontracting, including, if applicable, its subcontracting plans, as discussed in FAR Subparts 19.7 and 20.3.
7. The adequacy of price competition or justification for its absence.
8. The contractor's assessment and disposition of alternate proposals from subcontractors, if offered.
9. The basis for selecting the particular subcontractor and determining its responsibility.
10. The adequacy of contractor's cost or price analysis.
11. Whether the contractor obtained accurate, complete, and current cost or pricing data, including any required certifications.
12. The type of subcontract, given the risks involved and current policies on the use of that type of contract.
13. The adequacy of consideration to the Government for any proposed subcontract involving the use of Government-furnished facilities.
14. The adequacy and reasonableness with which the contractor has translated prime contract technical requirements into subcontract requirements.
15. Compliance with applicable cost accounting standards for awarding the subcontract as discussed in FAR 30.201-2.

*Exhibit 11-4*

### **BUSINESS AS USUAL**

*After reading FAR 15.7, Joanne began to see why Mark had been interested in the DoD make-or-buy programs.*

*Mark would not be getting a make-or-buy program for the contract. It was slightly under \$5 million and there was good reason to think that the subcontracting potential was not particularly substantial.*

*But this prime contractor, according to these DoD programs, had a policy of devoting work in its facilities to the prototype and development stages of a system rather than the production phase. The company took pride in its engineering troubleshooting abilities. After it had solved problems encountered in the engineering phases, it would send the product out to others on a production quantity contract.*

*The advance notice that Joanne had in her hands from this prime contractor was for a large production quantity contract with the subcontractor who was among the top 50 Government contractors.*

*Thanks to Mark's notes on the DoD make-or-buy programs, Joanne felt comfortable that this somewhat unusual way of doing business was a consistent policy for this particular company. She felt no need to delve into the issue any further.*

FAR 19.7

Also observe item #6 in Exhibit 11-4. Small business subcontracting plans and labor surplus area subcontracting programs are both usually requirements in contracts that

FAR 20.3

- May exceed \$500,000 with large business, OR
- Otherwise offer substantial subcontracting potential.

The reasons for your close observation of subcontract inconsistencies with these programs are summarized in Exhibit 11-6.

this contract type. Your micromanagement of its decisions is not appropriate. Voice subcontracting concerns on a fixed-price contract only when there is an obvious cause for concern. For instance, when you discover that the subcontractor is on the List of Parties Excluded From Procurement Programs.

Note that you will not have terms and conditions of the subcontract as a part of your advance notice. Standard FAR clauses only mandate a few specific terms and conditions for Government subcontracts. You assume that your prime is complying, absent evidence to the contrary. In actuality, what often happens, particularly on major acquisitions, is that prime contractors insist on passing on Congressional and regulatory restrictions to its subcontractors. Many industry analysts have recognized this as the main reason for a reduced participation by lower-tier subcontractors in Government business. These smaller firms are not equipped or inclined to handle this paperwork burden. So do not question your prime's assumption of these burdens; it is probably a wise business decision, promoting competition among its subcontractors.

## Step 2

**Concentrate your negotiation efforts on the extent of competition in subcontracting.** There is little data on the extent of competition in subcontracting Government-wide. Further, there is a general consensus that a comprehensive subcontract data collection system would not be cost effective and is not necessary. However, there is also a consensus of opinion in the Government contracting community that competition at the subcontractor level can and should be increased. The Office of Federal Procurement Policy recommends that agencies develop procedures to reach this goal in specific areas. Exhibit 11-7, Ways To Increase Subcontractor Competition, summarizes these recommendations.

In the process of consenting to subcontracts, you can only attain the

Do negotiate management subcontracting changes when you have reliable evidence to back up the reasons for these changes, but realize that there is generally room for compromise. Different managers seek solutions to the same problems in different ways.

When you agree to the wisdom of a contractor's divergence from a make-or-buy plan that was incorporated into the contract and became a contract requirement, you must seek the contracting officer's written approval, not necessarily a formal modification, according to FAR 52.215-21, which is required for contracts that incorporated the make-or-buy plan.

### **11.7 Consent or Nonconsent, Document the Decision**

**Document your decision in the contract file.** As in other aspects of contract administration, you must back up the decisions for your actions so that there is no second-guessing at a later date, if problems subsequently arise that cast doubt on the wisdom of contract administration decisions that you make or recommend.

Use the checklists provided within this chapter as one means of documenting the decision process.

**Document your decision to the prime contractor.** There are only a few regulatory rules in regard to this documentation:

FAR 44.202-2(c)

- It must be prompt.
- It must be in writing.
- It can include a requirement for changes or corrections.

Those are the requirements, but you could also include suggestions for the prime's consideration.

For example, in consenting to a subcontract, you could voice concern for any noncompetitive aspects of the subcontract, even though price analysis appeared adequate. You might include suggestions for enhancing competition, perhaps with the help of your agency's Competition Advocate's Office.

## CHAPTER 12

# LIMITATION OF COSTS

### THE 75% LETTER

*Dick Maynard, Contracts Manager for Haverford Laboratories, was not happy about writing the so-called “75% letter” to Eric Schmidt.*

*He wondered why they called it the “75% letter.” The ceiling amount was often 80% or even 85%. In any event, he hated to write this particular one because he had to inform Eric that the project was in a cost overrun status. He was afraid that some of the Haverford management would view that as the fault of his cost estimate, even though they were aware of at least some of the changes in direction on the project.*

*Working with Haverford’s Director of Electronic Engineering Applications, the eminent Sean Cassidy Sprott, Ph.D., Dick Maynard had developed the cost proposal without telling Dr. Sprott that he had added additional monies to several of the cost items to cover changes he knew would occur.*

*The Government program manager was another nationally recognized scientist, Klaus Van Camp. Dick knew from his 18 years’ experience in scientific research that when you put two top-notch scientists together on a research project, they would feed on each other’s genius. The result would be mushrooming costs for improvements they wanted to make in the program. But they had gone beyond even his padded projections.*

*Dick wrote the letter and then called Eric Schmidt to tell him the letter was on its way.*

*Eric went to Joanne’s office. “Well, our good Dr. Van Camp is at it again. We are going to have to buy a money machine to keep his research study going. I don’t know if Van Camp has the money. All the programs were cut some this year.”*

*“I was talking to his budget analyst yesterday,” Joanne said, with a smile. “She’s afraid he will be out of money before the fiscal year is over.”*

*“Would you go over and tell Dr. Van Camp that Haverford is sending us a cost overrun status?” Eric asked and added, “Also, tell his budget analyst what’s going on. Dick Maynard has given me a verbal estimate of \$100,000 to finish the study as well as fabricating and testing the prototype.”*

*Joanne had dealt with Dr. Van Camp before. He never worried where the money would come from. He was a scientist and his science was all-important to him. He let the budgeteers worry about the dollars.*

## INTRODUCTION TO COST LIMITATIONS

### **Definition of Limitation of Costs**

Limitation of costs, within the context of this chapter, refers to the ceiling amount contained in all cost- reimbursement that is used as a:

- Cost control measure, and
- Means of assuring compliance with the Anti-Deficiency Act.

### **Policy on Contract Cost Limitations**

FAR 32.703

FAR 32.704

No officer or employee of the Government may create or authorize an obligation in excess of the funds available. Government personnel encouraging a contractor to continue work in the absence of funds may be subject to a civil or criminal penalty. Establishing a ceiling will limit the contractor to performance within that amount.

### **Steps in Performance**

The steps in controlling costs through a contractual cost limitation are charted on the next page. Following the flowchart, each step is discussed in turn.

## LIMITATION OF COSTS

Under a firm-fixed-price contract, the contractor is obligated to deliver the goods or perform the services for the firm price, regardless of actual costs. The Government does not normally track actual costs except when progress payments or advanced payments have been authorized.

Under a cost-reimbursement contract, the Government pays actual costs, not a fixed price. The contractor's activities require tracking to conserve funds and stay within the contract's obligated dollar ceiling.

When cost ceilings or fund limitations are used, the parties agree that:

- The contractor's best efforts will be used to perform the work within the cost estimate negotiated before award and stated in the contract (exclusive of any applicable fee).
- There is no obligation of contractor performance when costs exceed the cost estimate or funding level in the contract.
- There is no obligation for Government payment for any work in excess of contract ceiling amounts.

### 12.1 Determine If the Contractor Is Nearing the Estimated Cost or Fund Limitation

To control costs and stay within funding limitations, you must be able to determine if the contractor is approaching:

1. The estimated cost specified in the schedule (or task order),
2. The limit of funds allocated, or
3. The ceiling price.

Notification

FAR 52.232-20

FAR 52.232-22

The contractor is usually the first one aware of any problem with the amount of funds available. The contract should include one of several standard clauses requiring the contractor to notify the Government when 75% (or 85% in some cases) of the cost ceiling or fund limit will be reached within the next 30 days (or up to 90 days as specified in the contract).

The contractor is required to provide either a revised estimate of the total cost or the amount of additional funds needed to continue. The contrac-

**JOANNE'S MEETING**

*Klaus Van Camp listened very politely to Joanne, smiling at her pleasantly over his glasses. "I'm afraid I'm not very good at money matters, my dear Ms. Davidson," he had said. The truth was he found budget matters utterly boring and so dealt with them as little as possible. "Why don't you take this up with Ms. Schwartz?" Dr. Van Camp suggested. "She is so very good with this sort of thing."*

*Pat Schwartz was Dr. Van Camp's budget analyst.*

*"I certainly will do that," Joanne told him, "but I need to discuss with you what direction you think we should take. There's a whole series of possibilities besides getting more money, assuming that there's some around for the overrun. We could diminish the scope of the research, for instance. Or maybe we could terminate the contract entirely and pick up the effort ourselves within the agency."*

*Klaus Van Camp had gotten very flushed in the face, his wide in amazement. "My dear, Ms. Davidson!" he finally sputtered. "This is unthinkable! Dr. Sprott is within `inches' of the breakthrough we are looking for. There must be no changes to this contract. I do not have the facilities here to carry on this work." He leaned forward and peered over his desk at her earnestly, "Please, dear Ms. Davidson, I cannot even bear to think of it."*

### FUNDING THE OVERRUN

*Joanne's meeting on contract alternatives with Dr. Van Camp was very succinct. Usually there is much more discussion and political maneuvering. At any rate, she had her decision direct from the project manager. Fund the cost overrun.*

*When Joanne briefed Pat Schwartz, Dr. Van Camp's budget analyst, on the cost overrun, she shook her head and threw up her hands.*

*"Here we go again," she exclaimed to Joanne. "I wonder who that lovable old man's keeper was before I got here! Joanne, I'm not sure where I can find the funds. Money's tight around here, as you know. Dr. Van Camp's budget may be identified as 'no-year' money, but they do have some controls."*

*"Dr. Van Camp says that the project must continue," Joanne told her. "I thought he'd have a heart attack when I mentioned the possibility of termination."*

*"Oh, yeah," said Pat, "but he won't be able to tell us where the money's gone. Can we have an auditor go over to Haverford to answer a few basic questions?"*

*Joanne suggested that Pat go herself as the agency auditor. It would be the quickest way. Pat told her she could probably get the basic information she needed in one day. She had been an auditor for the agency's inspector general so she knew all the rules of the game.*

*Joanne explained that they would have to get Eric's authorization since he was the contracting officer. "He'll probably want to know what kind of information you want and provide a data list to Haverford. That way the company can get the information together ahead of time. I think Eric may ask you to look into a few things for him too, while you're there."*

#### **12.4 Deobligate Excess Funds**

After the contract is completed and you find funds were in excess of the amount needed:

- Informally notify the contractor of the Government's intent to remove excess funds under the contract.
- Obtain feedback from the contractor regarding this action.
- Consult the program office and prepare a revised estimate of cost:
  - To complete the work, and
  - The amount of excess funds remaining.
- Issue a unilateral modification to the contract deobligating and removing the excess funds.

## CHAPTER 13

# ASSIGNMENT OF CLAIMS

### A MISSED OPPORTUNITY

*Joanne and Eric were sitting in Eric's office discussing the fiasco of the Farthington contract.*

*"So the bank has taken over all the assets of the Farthington Company," Eric noted from an article in the local paper. "You know, they could have arranged for payment of the material they needed for production of our Widget VIs."*

*"Who would have given them a loan?" Joanne asked incredulously.*

*"You haven't run into this yet, Joanne," he told her, "but the reference you see in most of the contracts you are administering to the Assignments of Claims clause, allows a contractor to divert payment for a contract directly to a financing institution."*

*"I meant to investigate what that was all about," Joanne admitted, "but it seems like I'm always busy putting out fires."*

*"Welcome to the world of contract administration!" he said with a laugh.*

*"If the Farthington middle managers had elevated their credit problem to top management," he explained, "the company could have taken out a loan for the contract amount, assigned payment to the financing institution, and gotten money for the materials plus additional money to pay off other existing debts or to keep current operations going. Surely, Mrs. Farthington could have worked something out with her husband's cousin. And the police are recovering part of the money that the Finance Director embezzled."*

*"So an assignment of claims," concluded Joanne, "may have given Mrs. Farthington just enough time to recover and get the company back on track. Is that what you're saying?"*

*"That's right," Eric agreed. "It would've been worth a shot anyway. But the middle managers decided to make that substitution and by the time Mrs. Farthington and the Government found out about it, the contract was too far along. The company would have had to start from square one again, that would have meant the contract would no longer have been a money-maker. Plus, of course, the finance company would've probably found out about the fraud investigation which would've made them queasy about the loan too. The damage was done. There was no successful way out for them."*

*"There are some guidelines to follow when authorizing an assignment on a Government contract," he said, reaching into his bottom file drawer. "I made up this handy checklist of things to look out for after I darn near got myself in a mess of trouble over a payment assignment years ago. Here you can have a copy of it, just in case you get that perpetual fire put out and you find yourself with nothing to do."*

*"Thanks," Joanne said wryly. "I'm looking forward to that." Then out of curiosity she asked, "What sort of trouble could you possibly have gotten into over a payment assignment?"*

*"Uh, well," Eric appeared to start to say something and then changed his mind. "It wasn't all that big a deal really," he said finally. "Not even worth talking about."*

# INTRODUCTION TO ASSIGNMENT OF CLAIMS

## **Definition of a Payment Assignment**

The transfer, initiated by a Government contractor or by the direction of a Federal court, of a contractor's right to payment under a specific Government contract, to a bank, trust company or other financing institutions, as security for a loan, or in consideration of money owed to the financing institution.

## **Policy on Assigning Payments**

FAR 32.803

When aggregate remaining payments on a Government contract amount to \$1,000 or more, the Government generally allows the contractor to assign its financial interests to financial institutions. The financial institution then becomes the "assignee."

The Government recognizes that such assignment will make it easier for the contractor to obtain a loan. Since that loan may be crucial in allowing the contractor to complete its obligations under the terms of the Government contract, the Government allows the assignment on the basis that it is generally in its own interests to do so.

Under an indefinite quantity or requirements contracts, the Government will generally allow the assignment of individual orders of \$1,000 or more.

FAR 32.806(b)

However, individual contracts may prohibit the assignment of claims when the Government determines that individual contract circumstances makes potential assignments contrary to its best interests.

## **Steps in Performance**

The steps in assigning payments on a Government contract are charted on the next page. Following the flowchart, each step is discussed in turn.

## ASSIGNMENT OF CLAIMS

An assignment of claims can be initiated by a contractor or by a Federal court. This chapter concentrates only on those assignments that are initiated by a contractor's request. When a Federal court orders an assignment, your agency does not have the discretion to act against the court's direction. You would use the court order to lift any contractual prohibition on payment assignments.

### 13.1 Determine If Assignment Is Permitted by the Contract

Before processing any requests for assigning payment, determine whether the contract addresses this issue. Either of two clauses would apply:

- FAR 52.232-23, Assignment of Claims
- FAR 52.232-24, Prohibition of Assignment of Claims

You may process a request even if the contract is silent on the issue but only when:

1. The contractor provides an appropriate consideration for modifying the contract to include the right to assign claims, and
2. There is no reason to prohibit an assignment of claims

### 13.2 Determine If the Request Is Proper

The contractor must submit a "true" copy of the assignment instrument. A "true" copy is either a certified duplicate or a photostat.

Exhibit 13-1 provides a summary of conditions required to permit an assignment of claims.

An assignment should be properly executed based on the character of the contractor:

<b>If the Contractor Is Organized as a:</b>	<b>Then the assignment must:</b>
Corporation	<ul style="list-style-type: none"> <li>• Be executed by an authorized representative;</li> <li>• Be attested by the secretary or assistant secretary of the corporation;</li> <li>• Be impressed with the corporate seal; OR</li> <li>• Be accompanied by a certified copy of resolution of the corporation’s board of directors authorizing the signing representative to execute the assignment.</li> </ul>
Partnership	<ul style="list-style-type: none"> <li>• May be signed by one partner IF it is accompanied by a certification that the signer is a general partner of the partnership;</li> <li>• Contain the signatures of all partners unless there is a certification for the signature of a general partner.</li> </ul>
Single Proprietorship	<ul style="list-style-type: none"> <li>• Be signed by the owner and</li> <li>• Be notarized.</li> </ul>
Notification	<p>The contractor should transmit the assignment by written notice. The Government must acknowledge receipt after examining the notice. The notice of the assignment should contain language similar to the sample format in Exhibit 13-2, Notice of Assignment Format.</p>

The contractor must submit an original and three copies of the written notice with the true copy of the assignment to each of the following:

1. The contracting officer/agency head.
2. Surety of any bond.
3. Disbursing officer designated to make payment.

### **13.3 Determine If Assignment Already Exists**

Once an assignment of claims has been made, the financial institution, trustee or agent may further assign (or reassign) its rights to another qualified source. Reassignment is permitted under the Assignment of Claims clause.

Before processing any request, you must verify that the:

1. Contract permits reassignment;
2. Conditions of the reassignment are satisfactory;
3. Documents executing the reassignment are proper.

The documentation to support reassignment require the new assignee to submit:

1. A written notice releasing the contractor from the assignment and restoring its right to payment under the contract; AND
2. A copy of the release instrument itself;
3. A written notice that the rights to payment under the contract has been further assigned or reassigned, but only if the contract allows further assignment or reassignment; AND
4. A copy of the actual document that further assigns or reassigns the right to payment under the contract, if appropriate.

## CHAPTER 14

# PROPERTY ADMINISTRATION

### A TALE OF TWO PROPERTY PROBLEMS

*Eric had asked for the remission of liquidated damages through his agency head to GAO for the Bollingbrook Company, but the inadequacies of the company's former management continued to cause problems for the company's new managers. Two problems centered around Government-furnished property.*

*The contract now at GAO for consideration of remitting liquidated damages used Government-furnished equipment for production testing. Right after the contract was awarded, Eric had the testing equipment delivered to the Bollingbrook Company. A member of the agency's laboratory staff made a trip to Bollingbrook to install the test equipment and train two technicians to operate it.*

*During the initial testing of preproduction models at Bollingbrook, one of the two technicians trained by the agency did the testing. However, during fabrication of the first fifteen units, the testing was done by a new company technician who had received only minimal training on using the equipment. The new technician was trained by one of the two Bollingbrook technicians rather than by a member of the agency's laboratory.*

*Something went wrong during the tests of the first 15 units. The test equipment would not function correctly. The plant manager at Bollingbrook had authorized the repair of the test equipment without getting an estimate or notifying the agency. To his astonishment, the cost of the repair was \$5,000.*

*The plant manager maintained that the equipment only functioned sporadically prior to the time it stopped functioning totally. Consequently, he had contended that the Government should pay the cost of repair. John Gress, the Government engineer who had installed and tested it at Bollingbrook, maintained that this was not the case.*

*"It worked just fine after I installed it," he had told Joanne. "The two technicians I trained for them didn't have any complaints about it. They would have known if there was a problem with it."*

*This matter had not been settled with Eric and Joanne when the new company managers took over.*

*The other problem involved two Government agencies. Prior to one of his early visits to the Bollingbrook facility, Jake Richards had been contacted by a friend of his at another Government agency. That agency had furnished Bollingbrook a numeric-controlled device for use on one of its contracts. The contract was complete for some time, but the agency, for one reason or another, had not removed the equipment.*

*"Will you check on it for me, Jake?" his friend asked. "I don't even know what kind of shape it's in. The guy who had this job before me had been in charge of it. I've never seen it and the records are vague." So Jake checked with Bill Wright, the new Director of Manufacturing at Bollingbrook, who knew nothing about the Government-furnished property (GFP), but, after questioning the plant manager, directed Jake to the location of the equipment. To Jake's amazement, it was in operation. To his greater amazement, it was being used on one of the few commercial contracts that Bollingbrook had, rather than on one of the other Government contracts.*

*The plant manager saw nothing wrong with this. Bill Wright was perplexed. Jake's friend, after Jake reported back to him, was furious.*

## COURSE LEARNING OBJECTIVES

At the end of this course, you will be able to:

**Overall:** Develop the ability to determine contractor liability for Government property and assess appropriate amounts for losses or damage to Government property.

- Individual:**
- 14.1 Establish reporting requirements to keep contracting officer abreast of property administration.
  - 14.2 Monitor delivery of the Government property as stipulated in the contract.
  - 14.3 Monitor the contractor's property control system and use of Government property.
  - 14.4 Determine whether to decrease the property to be provided or substitute other property and the amount of any related equitable adjustment.
  - 14.5 Evaluate and document evidence indicating that Government property has been lost, damaged, or destroyed, or has been misused.
  - 14.6 Identify the extent to which the contractor is liable for Government property damage under the contract.
  - 14.7 Prepare written conclusions on the extent and value of damages.
  - 14.8 Issue the contractor a written demand for payment or make any equitable adjustment for the repair of property when the Government has assumed the risk.
  - 14.9 At the end of contract performance, recover or dispose of Government property.

# INTRODUCTION TO PROPERTY ADMINISTRATION

## Definition of Property Administration

Property administration means those policies and procedures:

- You are required to use when providing Government property to contractors;
- Contractors must follow in using and managing Government property;
- Both you and the contractor must follow in reporting, redistributing, and disposing of Government property.

Definitions of key classifications of Government property are essential to your understanding of how these policies and procedures are applied.

Several definitions relating to property are key to understanding how and when to apply specific property administration procedures:

- Government property. All property owned by or leased to the Government or acquired by the Government under the terms of a contract. It includes both Government-furnished property (GFP) and contractor-acquired property.
- Government-furnished property (GFP). Property in the possession of, or directly acquired by, the Government and subsequently made available to the contractor.
- Contractor-acquired property. Property acquired or otherwise provided by the contractor for performing a contract and to which the Government has legal title.

## Policy on Property Administration

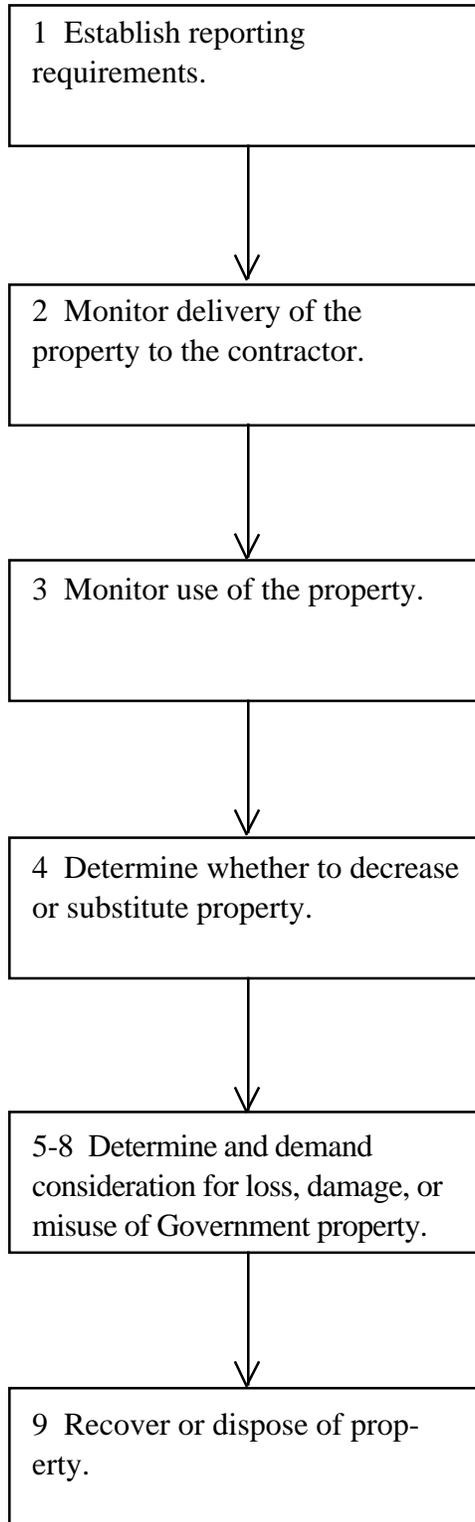
Since contractors are generally required to furnish all property necessary to perform Government contracts, you ordinarily will not need to be concerned with property administration. However, when there is a clear cost or competitive advantage to the Government in providing property or acquiring property under the terms of a Government contract, the Government uses specific clauses that relate to different classifications of property it furnishes or acquires and detail:

- Risk assumption of both Government and contractor in relation to that property;
- Control and recordkeeping procedures that must be used for that property;
- Other responsibilities of both contracting parties in regard to the property.

## Steps in Performance

The steps in supplying and controlling Government property provided to contractors under the terms of a Government contract are charted on the next page. Following the flowchart, each step is discussed in turn.

## STEPS IN PROPERTY ADMINISTRATION



## PROPERTY ADMINISTRATION

### 14.1 Establish Reporting Requirements

Establish reporting requirements to effectively manage property administration under a contract. Request a report from the contractor only when the contract contains a requirement for submitting the report. Your contract administration plan detailed what type of reporting requirements contract administration team members would submit.

Standard reports that have a bearing on contract administration include:

- Reports on the contractor's overall property control system;
- Contractor notification that the equipment is damaged or in need of repair;
- Reports of any shortages, losses, damage, destruction, or misuse;
- Periodic property audits.

### 14.2 Monitor Delivery of Government Property

Ensure that Government property is made available according to the schedule. Make sure the exact property described in the contract is provided in the quantities stated in the contract.

#### Suitability

FAR 45.308

The Government is responsible for providing GFP in serviceable condition. The Government, in effect, warrants that GFP will be suitable for its intended purpose except when the property is furnished "as is." The contractor is put on notice that if it decides to use the property, it does so at its own risk. This does not mean, however, that the Government is completely protected from contractor claims. Unless disclaimers are very clear, the courts and boards of contract appeals have usually found them ineffective.

It is not necessary that material be defective in order to be unsuitable. The standard for suitability is the industry norm. However, if a solicitation puts a contractor on notice that the property does not meet the industry norm and specifies the degree to which it does not, courts and boards will generally not provide relief for its substandard condition.

## PROPERTY ADMINISTRATION

**Repair or Replacement**      The contractor is required to provide written notification of any GFP deficiencies. When the property is deficient, you must direct the contractor to:

- Repair it,
- Modify it,
- Return it, or
- Dispose of it.

**Equitable Adjustment**      A deficiency, as well as late delivery, can result in delay for the contractor. The contractor may be due additional time or money as a result of the deficiency.

### A \$5,000 REPAIR HEADACHE

*Bill Wright, Bollingbrook's Director of Manufacturing, tossed some headache pills into the back of his mouth and washed them down at the water fountain in the hall outside Eric's office.*

*The intricacies of Government contracting nearly drove Bill Wright crazy. He had never been involved with Government contracting until the new Bollingbrook managers hired him several months ago.*

*Joanne had told him of Eric's final decision that the Government would not pick up the \$5,000 repair on the Government equipment.*

*She had showed him the language in the Government Property clause of the contract that clearly stated his company's responsibility to provide written notification to the Government for repair of any GFP in its possession. He knew that his company was required to take care of all preventive maintenance on GFP so this had come as a surprise. He didn't like surprises. And he was getting them too frequently. His plant manager, a holdover from the old management team, was usually involved.*

*Joanne had given him one main reason for not paying the repair bill. "Your company didn't give us notice so it had no authority to have the equipment repaired," she had said.*

*"If it wasn't for that," she had continued, "we would be investigating whether the damage was due to normal wear and tear or misuse." She couldn't help adding, "It was almost brand new." "Furthermore," she had gone on, "if the GFP was deficient when Bollingbrook received it, it was your company's responsibility to tell us that then, before it accepted the equipment for use."*

*He had appealed directly to Eric. From the liquidated damages issue, he felt that Eric had an unusual sense of fair play, but Eric and his contract administrator were definitely of one mind.*

*"If your company had given us the required notice, there wouldn't be any \$5,000 repair bill for anyone to pay," Eric had said. "We could have fixed it in-house."*

*Bill Wright understood the Government's position. But he was not going to enjoy explaining it to his Executive Vice President back at the plant.*

**14.3 Monitor the Contractor's Property Control System**

The contractor is required to maintain a property control system for all GFP. Monitor that system and the contractor's use of GFP to ensure that the contractor fulfills its responsibilities. Contractor obligations are summarized in Exhibit 14-1.

FAR 45.104

**A Contractor's GFP Responsibilities**

- Upon delivery of the property:
  - Files a statement of any overages, shortages, or damages.
  - Identifies, marks, and records property actually received.
  - Furnishes a receipt, if necessary.
- During the contract period:
  - Maintains the property control system.
  - Obtains all required approvals for property use.
  - Uses the property for authorized purposes.
  - Segregates Government property from contractor property.
  - Maintains, repairs, protects, and preserves the property.
  - Periodically inventories the property.
  - Keeps required property records.
  - Files all required reports.
- When the property is no longer needed:
  - Prepares inventory schedules.
  - Corrects inaccurate or incomplete inventory schedules.
  - Executes the inventory schedule certificate.

*Exhibit 14-1*

**FAR 45.505**

The contractor's records should provide a complete, current, and auditable record of all transactions that have occurred. The records must be:

- Readily accessible to authorized Government personnel;
- Safeguarded from tampering or destruction.

**FAR 45.105**

Some contracts may specify that the Government maintain property control records, rather than the contractor.

Exhibit 14-2 lists the basic information required.

**Basic Information for GFP Records**

1. Name and description, including national stock number, if known or applicable.
2. Quantity received (or fabricated), issued, and on hand.
3. Unit price and unit of measure.
4. Contract number or equivalent code designation.
5. Exact location of the GFP.
6. Disposition after use.
7. A posting reference and date for each transaction.

*Exhibit 14-2*

Some specific categories of GFP require additional or more specific information. These categories are:

FAR 45.505-3

- Material. Government-furnished material (GFM) consists of property that may be incorporated into or attached to an end item or that may be consumed during contract performance, such as component parts, raw materials, small tools and supplies.

The contractor is required to maintain custodial records for items issued to individuals for use in their work under the contract. Because material is more cumbersome to control, the Government sometimes allows substitution of a recordkeeping system normally required for Government property for one that is more suited for material control. These substitute systems are:

1. **Cross-referenced system in lieu of stock records**. This type of system evidences receipt, issue, and use of Government-provided material issued for immediate consumption, and is therefore, not entered in inventory records. You can only appropriately authorize a cross-referenced system for the following material categories:
  - Material charged through overhead;
  - Material under research and development contracts;
  - Subcontracted material;
  - Nonstock or special items;
  - Material produced for direct charge to a contract, or acquired for installation upon receipt, and not subject to spoilage;
  - Items issued from contractor-owned inventory direct to production or maintenance.

2. **Multicontract cost and material control system in lieu of the requirement for a physical identification system.** This system depends on financial accounting rather than a physical accounting and allows:

- Commingling of GFM with other material (but exceptions may exclude specific GFM, for example, on the basis of high-dollar value or short supply); and
- Usage analysis to be the determining factor for whether GFM is being used and expended properly.

Prerequisites for authorizing such a system are listed in Exhibit 14-3, Criteria for Authorizing a Multicontract Cost and Material Control System.

### **Criteria for Authorizing a Multicontract Cost and Material Control System**

Contracting officers may authorize multicontract cost and material control system if:

1. It will result in:
  - A cost savings,
  - Improved operations, OR
  - Other benefits to the Government.
2. It is applied to existing Government contracts only.
3. The contractor's accounting system is adequate to:
  - Provide a clear audit trail;
  - Reflect separate inventory balances for GFM and contractor-acquired material;
  - Determine material cost for each material item;
  - Calculate amounts for cost reimbursements and progress payments by applying unit costs to specific contract line items; AND
  - Track GFM for one contract to another follow-on contract for which the same GFM is authorized, assuring credit for the initial contract.

*Exhibit 14-3*

FAR 45.505-4

- Special tooling and test equipment. Special test equipment consists of units engineered or modified to accomplish special purpose testing during contract performance. Special tooling consists of specialized items, excluding special test equipment, that are so specialized that, without modification or alteration, their use is limited to the development or production of specific items or to the performance of a specific service. Common examples of special tooling include:
  - Jigs
  - Dies
  - Fixtures
  - Molds
  - Patterns
  - Gauges

Additional recordkeeping procedures require identifying special tooling and test equipment by referencing the identification number and item to which it applies.

FAR 45.505-5

Special tooling and special test equipment may be identified and reported by a specific retention category, such as, assembly tooling or critical tooling for spares.

- Plant equipment. Plant equipment consists of personal property of a capital nature used to manufacture supplies, to perform services, or to achieve any administrative or general plant purpose. By its general use definition, it would exclude special tooling and special test equipment, but would include general purpose test equipment and most machine tools, and can include such things as overhead cranes, compressors, generators, desks, chairs, and so forth. All contractor records of GFP that is classified as plant equipment, must also include:
  - Federal Supply Code for the manufacturer,
  - Federal Supply Classification, and
  - Manufacturer's model or part number.

For plant equipment that exceeds a unit cost of \$5,000 or more, contractor records must also include:

- Serial number and year made, if available;
- Government identification/tag number; and
- References to acquisition and disposition documents and dates.

You may authorize the use of summary stock records for Government-furnished plant equipment of less than \$5,000 or may require that additional recordkeeping requirements for plant equipment of \$5,000 or more apply to specific equipment below that threshold. Make an individual determination based on what is needed for effective control, calibration or maintenance.

FAR 45.505-7

- Real property. Real property consists of land, buildings, or other things permanently attached to or growing upon the land and buildings. Real property includes the area below the surface of the land as well as the area above the land. The latter is commonly referred to as “air rights” to real property. In addition to the basic recordkeeping information, contractors must include a record of all alterations and construction work, including sites connected with such alteration and construction. These additional records would include such things as:
  - Maps
  - Plans
  - Drawings
  - Specifications

FAR 45.505-7 contains guidelines for when the contractor must capitalize costs associated with real property.

FAR 45.505-8

- Scrap or salvage items. Scrap is an item that has no value except for its material content. Salvage is property that, because of its worn, damaged, deteriorated, or incomplete condition or specialized nature, has no reasonable prospect of sale or use as serviceable property without major repairs, but has some value in excess of its scrap value. Recordkeeping requirements for scrap or salvage items are listed in Exhibit 14-4.

### **Recordkeeping Requirements for Scrap or Salvage Items**

1. Contract number, if practical, or equivalent code designation from which the scrap or salvage derived.
2. Nomenclature or description of salvaged items or a classification by material content of scrap.
3. Quantity on hand.
4. Posting reference and date of transaction.
5. Disposition.

*Exhibit 14-4*

FAR 45.104(c)

When the contractor's property control system is not in compliance, notify the contractor in writing. Requirements for this notification are contained in Exhibit 14-5, Requirements for Property Control System Defect Notices.

### **Requirements for Property Control Defect Notices**

Property control defect notices must:

1. Be in writing;
2. Establish a schedule for completion of actions to correct defects;
3. Caution that a failure to correct deficiencies may result in withholding or withdrawing system approval; AND
4. Inform the contractor that its liability for loss or damage to Government property may increase if approval is withheld.

*Exhibit 14-5*

Commingling With  
Other Property

FAR 45.507

Generally, Government property must be physically separated from a contractor's own property and the property of its commercial customers. However, there are exceptions. For example, commingling of scrap or salvage items is authorized when:

- Scrap of a uniform nature is produced from both Government-owned and contractor-owned material, making physical separation impractical;
- Scrap produced from Government-owned material is insignificant when compared to the cost of segregation and control; OR
- Government contracts involved are fixed-price and provide for the retention of the scrap by the contractor.

Non-Government Use  
of GFP

FAR 45.407

Any non-Government use of plant equipment requires the contracting officer's advance written approval. However, before the contracting officer can authorize non-Government use that constitutes 25% or more of total use for any piece of equipment, special approvals are required.

**HANDING OVER A "HOT POTATO"**

*The numeric-controlled equipment at the Bollingbrook plant definitely was not scrap or surplus material. No separate authority existed for its commingling much less its direct use for commercial work.*

*Jake's friend had quickly arranged for the equipment to be shipped back to his agency.*

*Bill Wright, while not fully understanding the rules of Government property administration, nevertheless understood that his company had been using it, and therefore decreasing its value through normal wear and tear, without any authority to do so.*

*Bill was showing a great deal of deference to Jake's friend. He was not sure if any kind of charges could be made or penalties assessed. Jake's friend hadn't said a word about any consequences. Bill believed that if you can't stand the answer, don't ask the question. So he never asked. He hoped that it would be too much of an administrative bother for the agency to pursue it any further.*

Preventive Maintenance Program

FAR 45.509

Rather than monitoring individual preventive maintenance tasks, you monitor the contractor's program that manages and schedules those tasks. Preventive maintenance is maintenance performed on a regularly scheduled basis to prevent the occurrence of defects and to detect and correct minor deficiencies before they result in serious damage. The contractor is responsible for proper care, maintenance, and use of Government property in its possession. This obligation remains even when the property is in storage or is earmarked for transfer. Refer to Exhibit 14-6, General Factors for an Effective Preventive Maintenance Program, for guidelines to assess the adequacy of a contractor's preventive maintenance program.

**General Factors for an Effective Preventive Maintenance Program**

1. Inspection of buildings at periodic intervals to assure detection of deterioration and the need for repairs;
2. Inspection of plant equipment at periodic intervals to assure detection of maladjustment, wear, or impending breakdown;
3. Regular lubrication of bearings and moving parts per a lubrications plan;
4. Adjustment for wear, repair, or replacement of worn or damaged parts and the elimination of causes of deterioration;
5. Removal of sludge, chips, and cutting oils from equipment that not used for a period of time;
6. Exercise of precaution to prevent deterioration caused by contamination, corrosion, and other substances; and
7. Proper storage and preservation of accessories and special tools furnished with an item of plant equipment, but not regularly used with it.

*Exhibit 14-6*

## Contractor Inventory Practices

FAR 45.508

The contractor, with the approval of an authorized member of the Government contract administration team, establishes the type, frequency and procedures for performing physical inventories of Government property under its control. The type and frequency of inventory procedures is based upon:

- The contractor's established practices;
- The type and use of the Government property involved;
- The quantity and dollar value of Government property involved; and
- The reliability of the contractor's property control system.

Unless the contractor's organization is extremely small, personnel who perform the physical inventory should not be the same individuals who maintain the property records or who have physical custody of the property.

## Contractor's Final Inventory Schedule

FAR 45.606

At the completion or termination of a contract, accept the contractor's inventory schedules only when you or a Government contract administration team member has verified that:

- The property is present at the indicated location.
- The property is allocable to the contract.
- The quantity and condition of the property are correctly stated.

FAR 45.605-2

- The contractor has tried to direct inventory items to other Government work, or return contractor-acquired property to the original supplier for appropriate credit at the close of the contract, or when it is no longer needed.

The requirement for an end-of-contract physical inventory can be waived when the property is authorized for use on a follow-on contract, **but only if:**

- The Government has established the adequacy of the contractor's property control system, with an acceptable degree of variance, through past experience with that system; and
- The contractor provides a statement indicating that
  - Record balances have been transferred in lieu of preparing a formal inventory list, AND
  - The contractor accepts responsibility and accountability for inventory balances under the terms of the follow-on contract.

**14.4 Determine Whether to Decrease or Provide Substitute GFP**

The contracting officer is allowed to unilaterally decrease or substitute GFP, but must bilaterally modify the contract to increase the amount of GFP.

You may want to decrease GFP when the estimated need for it was overstated. This is more common with material than with other types of property.

You may also need to substitute GFP when it is deficient or otherwise not suited for contract purposes.

**14.5 Evaluate and Document Evidence of Loss, Damage, or Destruction**

Evaluate and document any evidence indicating that Government property furnished under the contract has been lost, damaged, stolen, destroyed, or misused. Establish a complete record of such information for the official contract file.

**14.6 Identify Contractor Liability**

FAR 45.103(a)

The basis for contractor liability is contained in the Government Property clauses in the contract. Unless these clauses state otherwise, the contractor is responsible and liable for Government property in its possession.

There are several standard FAR clauses that relate to the contractor's loss liability for Government property. They are:

FAR 52.245-2

- FAR 52.245-2, Government Property (Fixed-Price Contracts). This is the “basic” fixed-price clause that places liability for all risk on the contractor except for reasonable wear and tear or consumption of the property in normal performance of the contract. Due to a shorter standard clause, this clause is sometimes referred to as the “long form” clause. Alternate I of this clause further limits the contractor’s risk to losses:
  - Caused by contractor negligence;
  - Expressly required to be insured under the terms of the contract;
  - Covered, in fact, by the contractor’s insurance, OR
  - For which the contractor is otherwise reimbursed.

Alternate I is generally used for negotiated contracts that are not based on adequate price competition and for service contracts on a Government installation when Government personnel also have potential access to the property.

Alternate II to this basic clause is used for basic or applied research at nonprofit institutions and has a limited risk of loss stipulation essentially the same as the Alternate I.

FAR 52.245-4

- Government-Furnished Property (Short Form). The risk of loss is the same as the basic fixed-price clause without any of its alternates: the contractor assumes the risk of loss, except for reasonable wear and tear, to the extent that property is consumed in the performance of the contract. This clause is used for fixed-price, time-and-material and labor-hour contracts involving property that is \$50,000 or less.

FAR 52.245-5

- Government-Furnished Property (Cost-Reimbursement, Time-and-Material, or Labor-Hour Contracts). This basic “cost-type” clause assigns liability to the contractor only for negligence and for risks covered under its ordinary business insurance.

FAR 45.103(f)

A prime contractor providing Government property to a subcontractor is not relieved of any of its responsibility to the Government under the terms of its prime contract.

**FACTFINDING WAS KEY**

*In deciding what to do with the \$5,000 repair bill for the test equipment at Bollingbrook, Eric and Joanne had to look beyond the Government property clause. Their factfinding had indicated that not only had the Government not authorized the repair, but it hadn't even been made aware of the need for repair.*

*Their conclusion was based on the circumstances involved. The risk assumption for the property outlined in the Government property clause was only a starting point.*

**14.7 Prepare Written Conclusions on Extent and Value of Loss or Damage**

Estimate the value of the loss or damage by:

- Obtaining proposals from the contractor to repair or replace the damaged property, and
- Obtaining Government estimates and/or audit reports.

The value of lost or damaged items usually includes depreciation. Prepare the Government's position on the loss amount and the most appropriate Government remedy for the loss or damage. The general rule outlined throughout this course, for giving the contractor an opportunity to present its position and the supporting data for it, applies to this specific situation as well. If it is the Government's position that it must assume the risk of loss or damage, an equitable adjustment to the contractor for property repair may be appropriate.

**14.8 Issue a Written Demand for Payment, When Appropriate**

The method for this demand for equitable compensation for loss when the contractor is liable depends on the contractual circumstances, but a contract deduction is the most common one used.

**14.9 Recover or Dispose of Government Property**

At the end of contract performance, or when the Government property is no longer required, obtain control of the property or properly dispose of it, as outlined in your agency's procedures. Methods of recovery or disposal are listed in Exhibit 14-7, Disposal or Recovery Methods for Government Property.

FAR 45.603

**Disposal or Recovery Methods for Government Property****(Contractor Inventory Only)**

1. Delivery to the Government agency that provided it.
2. Return of contractor-acquired property to suppliers.
3. Use by another Government agency through prescribed screening procedures. Refer to FAR 45.608.
4. Donations to eligible donees. Refer to FAR 45.609.
5. Sale, including purchase or retention at less than cost by the prime contractor or subcontractor.
6. Donation to public entities instead of abandonment.
7. Abandonment or destruction.

*Exhibit 14-7*

*NOTES*

# MONITORING METHODS

## METHOD 1

# THE BAR CHART METHOD OF MEASURING PROGRESS

### Development of a Bar Chart Schedule

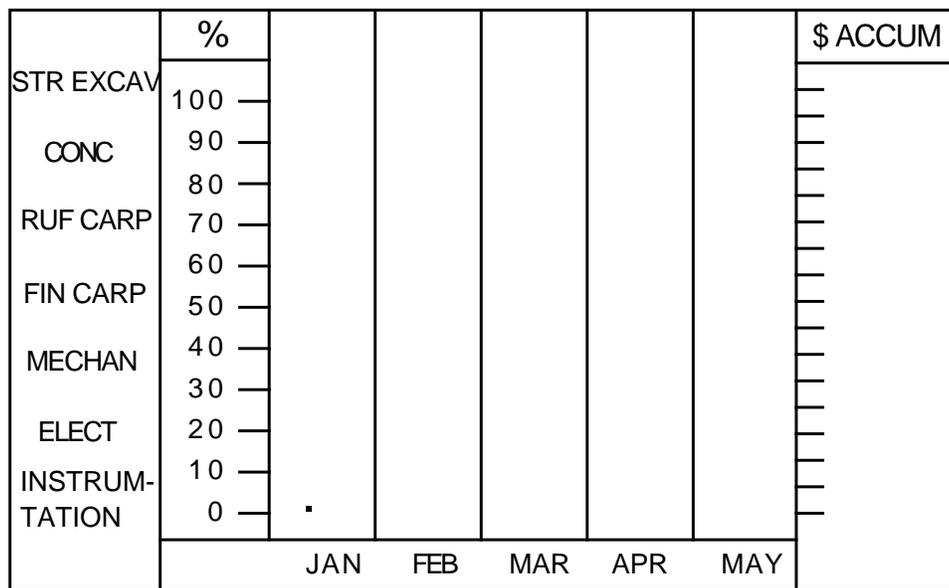
Bar Charting is a simple planning technique that is widely used as an economic control tool. The schedule essentially plots progress as opposed to a cumulative percent of completion. The progress bars compare targeted versus actual progress. It is easily prepared and updated and can be used as a stand-alone document.

In the following text we are going to create a Bar Chart in a step by step process.

### Step One: Chart Material Layout

After first obtaining a large piece of chart paper or posterboard, set up vertical columns to allow enough room across the bottom to accommodate the entire project duration. Draw vertical lines to form columns for the activities, a column for percentages and following the last month you wish to chart, establish a column for dollars accumulated. The procedure is illustrated in Exhibit A-1. This exhibit has been set up for a four and one-half month long project to build a tune-up garage.

JOB PROGRESS REPORT: INITIAL PAPER LAYOUT



KEY:

BARS: TARGET ACTUAL   
 "S" CURVE: TARGET ACTUAL

*Exhibit A-1.*

Step Two: Activity Identification

The second step you must take is to break the project down into specific major activities, much the same as you did in setting up a CPM. Now assign each activity with a duration. The duration chosen is determined by one who is knowledgeable or experienced in the project. Duration is based on:

- Complexity of the work.
- Volume of work.
- Crew sizes available.

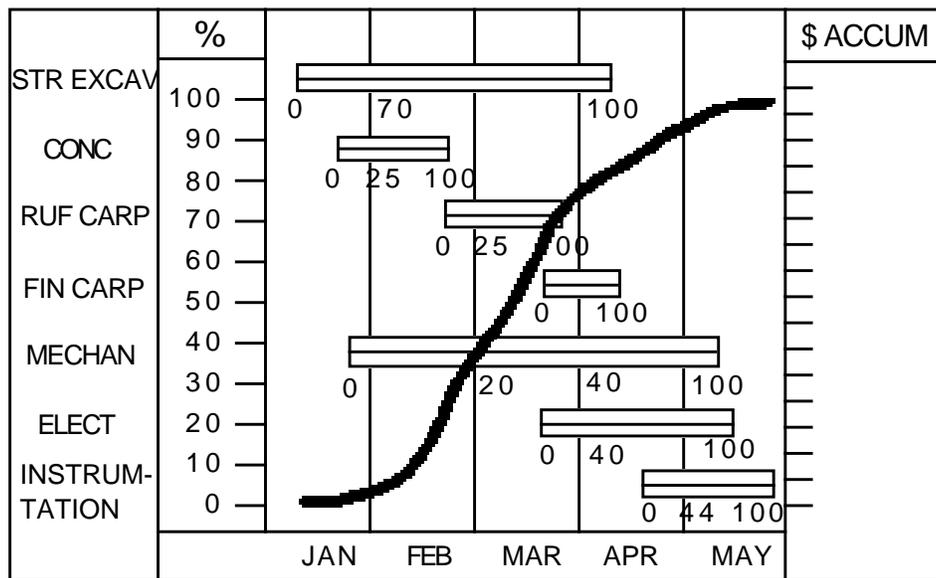
The activities are normally placed on the chart in general order of precedence with the earliest on top and the latest on the bottom. Now, determine the date that each activity can, or should begin. Take into consideration the submittal review time, material purchase delivery, and utility outages, etc. An estimated dollar value (including material and labor values) for each activity should also be determined. The sum of the estimated values should equal the contract price. Record these on scratch paper and arrange as necessary. The contractor must submit the work to you for approval. That is why your analysis must be accurate. It will be a valid tool to check the contractors' progress.

# MONITORING METHODS

Step Three: Activity Placement

The third step is to place the activities on the chart. You must list the activities according to the general precedence and by the dates in which they are to start. Review the chart for coherent logic. If the relationship of activities one-to-another is unreasonable, adjust them as necessary. Also, review the project duration for reasonableness. Refer to Exhibit A-2 to verify the procedure thus far in developing your chart. Note: The heavy black line is an "S" curve and will be discussed next.

JOB PROGRESS REPORT: FIRST SCHEDULE FROM CONTRACTOR



KEY:

BARS: TARGET ACTUAL   
 "S" CURVE: TARGET ACTUAL

Exhibit A-2.

Step Four: Drawing the "S" Curve

The fourth step is to determine the accumulated percentage of completion for each month of the project. As each "dot" is plotted along each monthly axis corresponding to the accumulated percent complete, it will generally take on a curve in the shape of an "S" when connected together. The accumulated percentage of completion is determined by:

- Choosing each monthly axis line and identifying the activities it crosses as you go down the line.
- The point in time where the monthly axis crosses the activity.
- Multiplying the percentage (in decimal form) by the estimated dollar value of each activity.
- The sum of these values added together and divided by the total contract value to obtain the accumulated percentage of completion.
- Plotting the value for each respective month on the monthly axis connecting the points.

Refer back to Exhibit A-2 for the procedure thus far in plotting the "S" Curve.

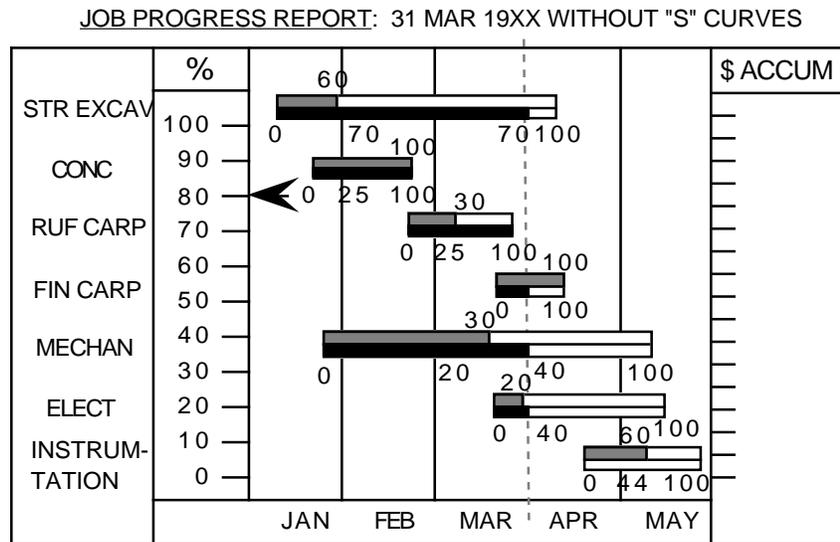
Updating Bar Chart Schedules

You will find that updating bar charts is a simple process once the chart is put together. Each activity bar will have a space in which to draw in the actual progress each month. Updating the chart involves two steps.

Step 1: Determine the Percentage of Completion

For each activity, determine the actual percent of completion. This is done by estimating the actual progress in the field. Sketch this percent on the top bar for each activity using hatched symbols. Refer to Exhibit A-3, "Job Progress Report", illustrating the procedure which indicates progress.

# MONITORING METHODS



KEY:

BARS: TARGET  ACTUAL

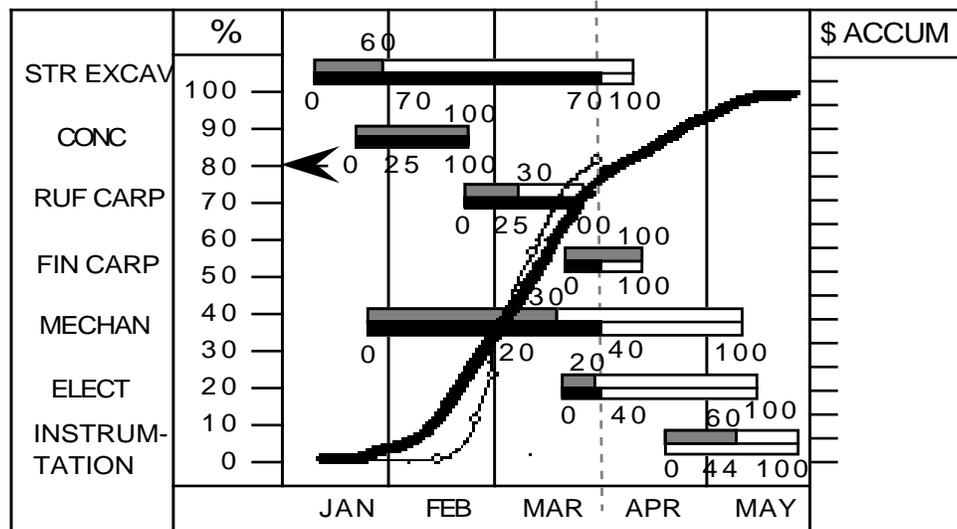
"S" CURVE: TARGET  ACTUAL oo

*Exhibit A-3*

Step 2:

Now the final step for you is to draw the new "S" curve. Using the actual percentage of completion, follow the same steps outlined in step four. Use a different color line or style to plot the actual progress as opposed to the scheduled progress. Comparing the actual accumulated percentage with the schedule will readily inform you how far behind or ahead of schedule the contractor is. Multiplying the actual percent by the contract value will result in a figure which represents the accumulated work-in-place (WIP). See Exhibit A-4.

JOB PROGRESS REPORT: 31 MAR 19XX WITH "S" CURVES



KEY:

BARS: TARGET ACTUAL   
 "S" CURVE: TARGET ACTUAL

Exhibit A-4.

Determining the Cause of the Delay

Now that you have developed a thorough written record and a complete Critical Path Schedule, you can analyze the schedule for the effects of delays. Identification of the amount and responsibility for a delay to a critical path activity is usually quite straightforward. A delay to the critical path in a network will cause a like amount of delay in the project's completion date.

Work Added by Modification to the Contract

Time extensions for additional work that is added by a contract modification must either:

- Delay the project by impacting a task on the critical path, or
- Add additional critical path work.

The additional time will be the estimated time that it would require to do the work now.

*Note:* If work is deleted from the project that effects an item on the critical path, DO NOT subtract time from the contractor. However, you may use the deleted time to offset a time extension for additional critical work or delayed work.

### Method 2

# THE CRITICAL PATH METHOD (CPM) METHOD OF MEASURING PROGRESS

#### Description of Critical Path Method (CPM)

A CPM network will have at least one path throughout the network which controls the overall project duration. This will be the longest route, called a pathway, through the diagram. For those activities not on the critical path, there exists some amount of flexibility as to when each one can start or finish. This flexibility is known as "float". The amount of float for each activity can be calculated.

The following instruction will lead you through the process of setting up a CPM. For purposes of this instruction you are to presume that you are administering a contract to build a garage. You should have already completed several of the initial steps of the process, such as:

- \* Identifying all of the activities;
- \* Establishing precedence; and
- \* Determining activity durations.

Exhibit A-5, entitled "Project Activity List" will be used throughout the exercise. You will be asked to refer to it often, so arrange it for easy access and reference.

#### STEP 1

Now we will begin to transform this information into a graphic representation of the schedule. This graphic display will enable you to see the interdependency of the activities. There are three basic principles which govern the construction of a network schedule. Study them one at a time, making sure that you understand each one before going on to the next.

- (a) Remember that everything in the diagram has meaning.
- (b) Activities are shown as arrows.
- (c) All activities must begin at some point in time and end at some point. The points are known as EVENTS and are shown as circles. They are numbered in any order that you may choose.
- (d) An activity depends upon and cannot begin until, the completion of all preceding activities.

<b>PROJECT ACTIVITY LIST</b>		
<b>Acty / Name</b>	<b>Duration</b>	<b>Depends On</b>
A Mobilize	1 Day	START
B Deliver Material	7	A
C Excavate & Form Footings	6	A
D Pour Footings	2	C
E Rough Framing	5	B, D
F Rough Electrical	2	E
G Install Door & Window	1	E
H Install Roof	3	E
I Install Siding	3	H
J Paint Interior	2	F, G, I
K Finished Electrical	1	J
L Paint Exterior	2	G, I
M Cleanup	1	K, L, N
N Construct Driveway	3	B, D

*Exhibit A-5.*

## MONITORING METHODS

### STEP 2

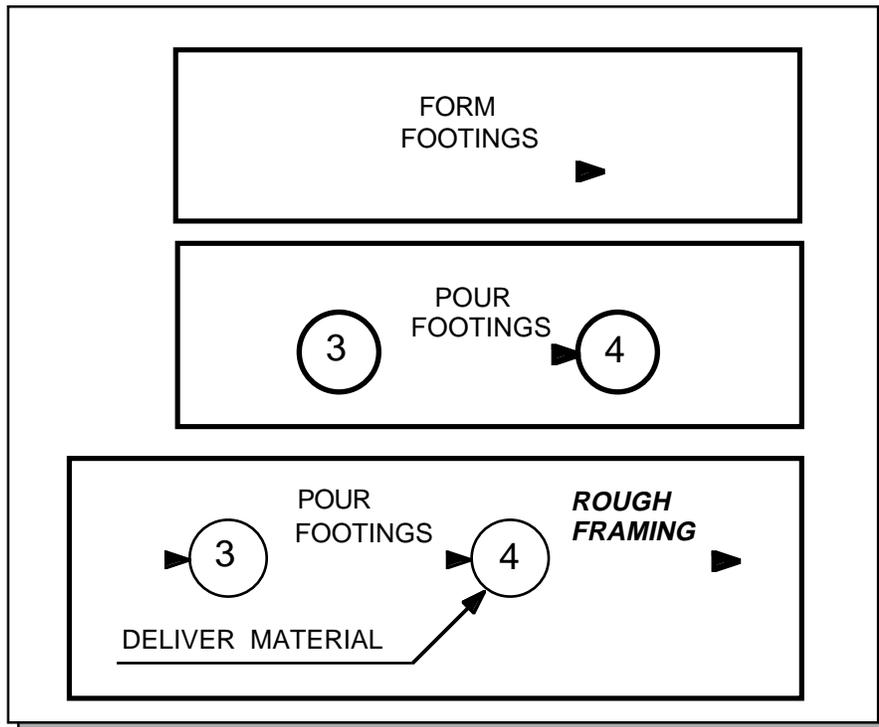
Refer to the Project Activity List (Exhibit A-6). Note that “Rough Framing” depends upon, and cannot start, until completion of the activities “Pour Footings” and “Deliver Construction Material”.

#### Principle One:

**Principle One** is illustrated in the three construction examples contained in Exhibit A-6. Study them carefully.

As you have learned in Principle One, all activities have a single definite starting point and ending point and they are shown as arrows. Placing an arrow in the diagram will answer two questions:

- ① **Which one of the activities must be completed first before another activity can begin?**
- ② **Which activities cannot start until another activity is not completed?**



*Exhibit A-6.*

**Principle Two:**

Suppose that you have a series of activities and you want to add the activity which illustrates delivery of the construction material. Study the example of logic illustrated in Exhibit A-7, along with the Project Activity List (Exhibit A-5) and you should be able to answer the two questions.

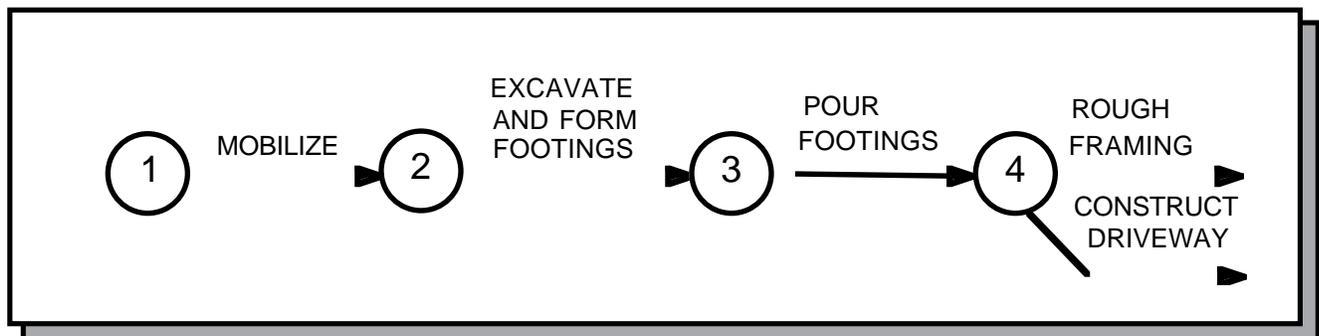
Notice that the activity “Deliver Construction Material” starts at event number 2 and ends at event number 4 as shown in Exhibit A-7.

Question No. 1: Which activities can be completed before you can deliver the construction material?

(Answer: *The activity entitled “A-Mobilize”*)

Question No. 2: Which activities cannot start until the material is delivered?

(Answer: *The activities “E-Rough Framing” & “N-Construct Driveway”*)



*Exhibit A-7.*

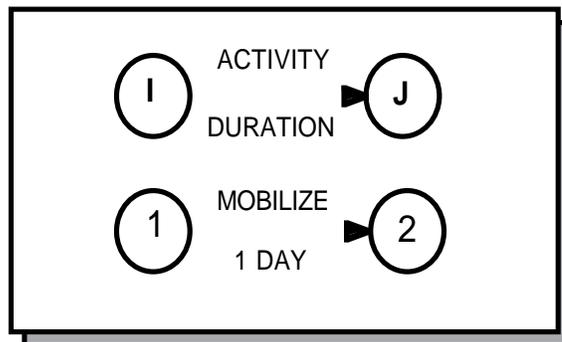
*How are you doing so far?*

If you understand both Principles One and Two, you may now proceed to Principle Number Three.

## MONITORING METHODS

### Principle Three:

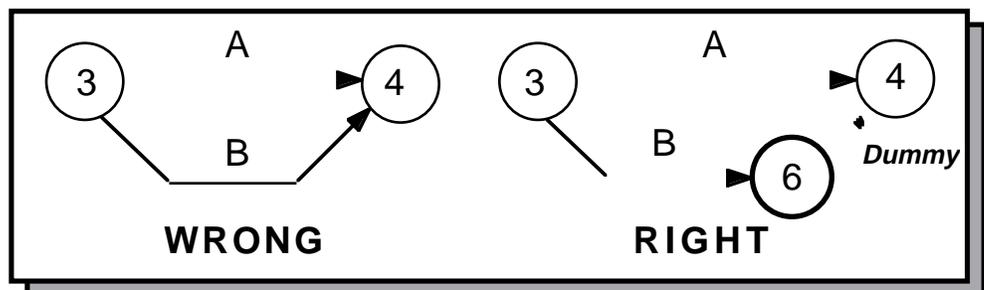
- (a) An activity is identified by using an event number at its tail (end) (called the activity's "I") and an event number at its head (beginning) (called the activity's "J").
- (b) Not more than one activity may have the same I and the same J.
- (c) The I - J is a numerical way to identify activities.
- (d) To avoid confusion it is best to attempt to keep the "J" number higher than the "I" number, and to allow for subsequent numbers to be added (due to changes that may be made in the work). Refer to the example depicted in Exhibit A-8, entitled "Principle Three, Identification by Number".



*Exhibit A-8.*

### Numbering Dummy

A dummy activity is used to ensure that all activities have a unique identification and to ensure the logic in a schedule is maintained. These principles are illustrated in Exhibit A-9, entitled "Numbering Dummy".

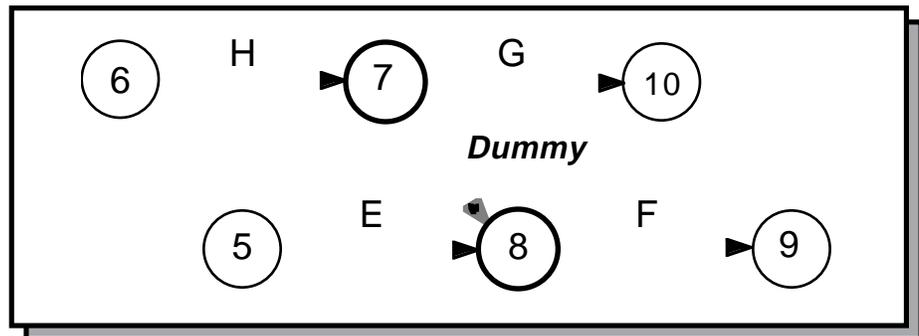


*Exhibit A-9.*

Note that Activities A and B can start and finish at the same event. However, they must have a unique I-J identification code as explained at the beginning of Principle Three and illustrated in Exhibit A-8.

### Logic Dummy

Note that Activity F depends upon activities E and H, and Activity G only depends upon activity H. Exhibit A-10 is entitled “Logic Dummy”.



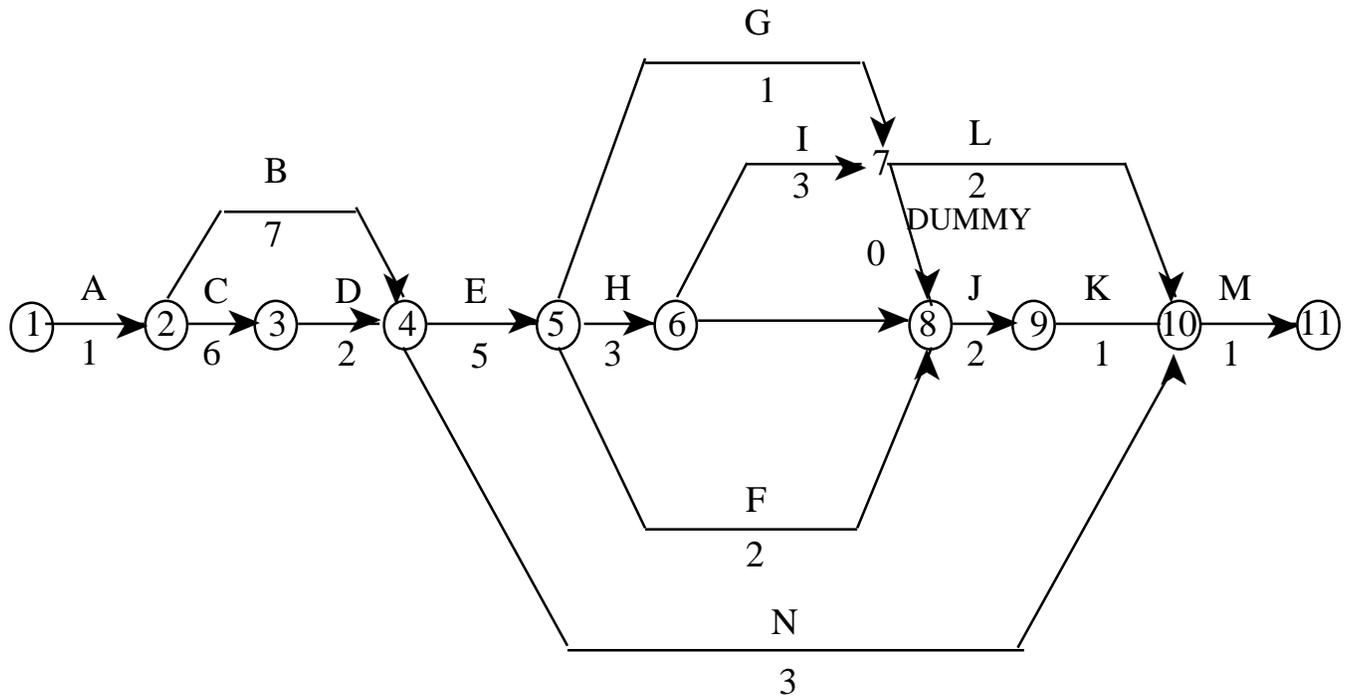
*Exhibit A-10.*

Performing the Analysis Remember! The DUMMY activity has no duration. It merely ensures the uniqueness of each activity or continues the logic.

Using the preceding principles, a network schedule of the example project “Construction of a Garage” would look like the CPM Network illustrated in Exhibit A-11. Notice that each activity is placed on the schedule according to the sequence established by the person who initially performed this task for you. (Refer back to Exhibit A-5 Project Activity List again.) Now that you have observed what the final product will look like (Exhibit A-11), a step-by-step analysis will provide you with a better understanding.

MONITORING METHODS

CPM NETWORK



Project Activity List		
ACTIVITY	DURATION	PRECEDES
A	1	B, C
B	7	E, N
C	6	D
D	2	E, N
E	5	G, H, F
F	2	J
G	1	L, J
H	3	I
I	3	L, J
J	2	K
K	1	M
L	2	M
M	1	
N	3	M
DUMMY	0	J

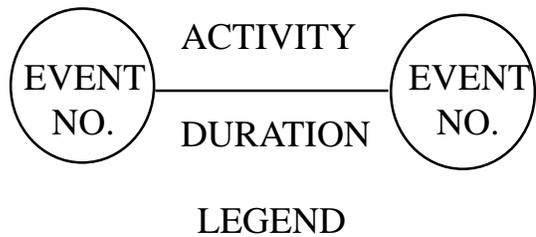


Exhibit A-11.

To test what you have learned thus far, examine the relationship between activities E, F, G, H, I, J, and L shown in Exhibit A-11. Try and construct this portion of the network without looking at the diagram. Remember to select an activity and ask yourself the two basic questions covered in Principle Two.

- Which activities must be completed before this one can start?
- **Which activities cannot start until this one is completed?**

Begin by asking yourself which activities depend upon activity E? Look at the PROJECT ACTIVITY LIST. It shows that activities G, H, and F cannot start until activity E is complete.

Or, which activities must be completed before G can start? On the Project Activity List (Exhibit A-6) look at the column titled “Acty/Name” and locate the place where G appears. The answer is E. What about H and F? Again, if you look at the column “Acty/Name” you will see that activities H and F depend upon E. Therefore, the illustration in Exhibit A-12 supports that logic. Study it carefully.

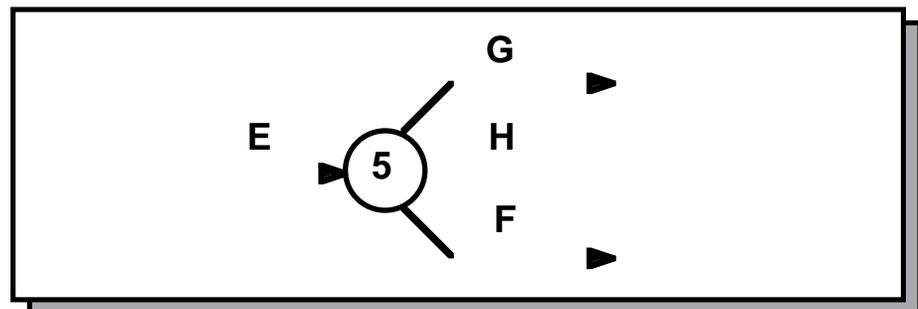


Exhibit A-12.

Now identify which activities cannot start until H is complete. Which activities depend upon activity H? (*The answer is “I”*). Or, which activities must be completed before “I” can start? (*The answer is H.*) You can now place activity “I” on the diagram as shown in Exhibit A-13.

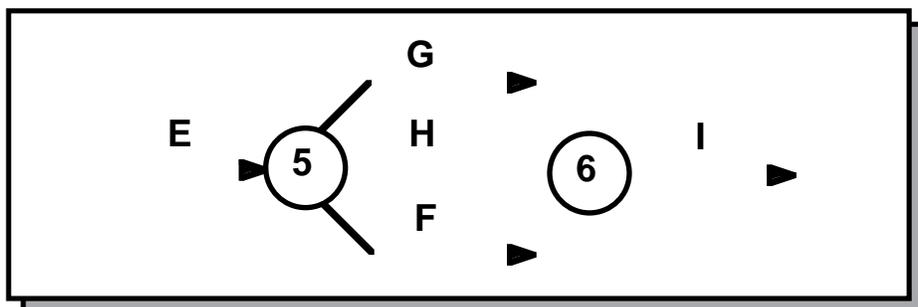
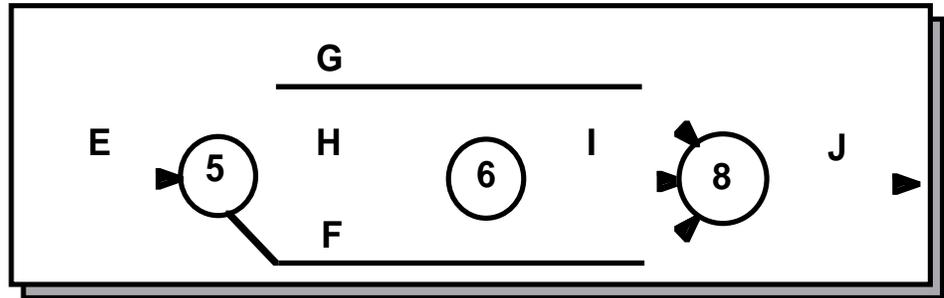


Exhibit A-13.

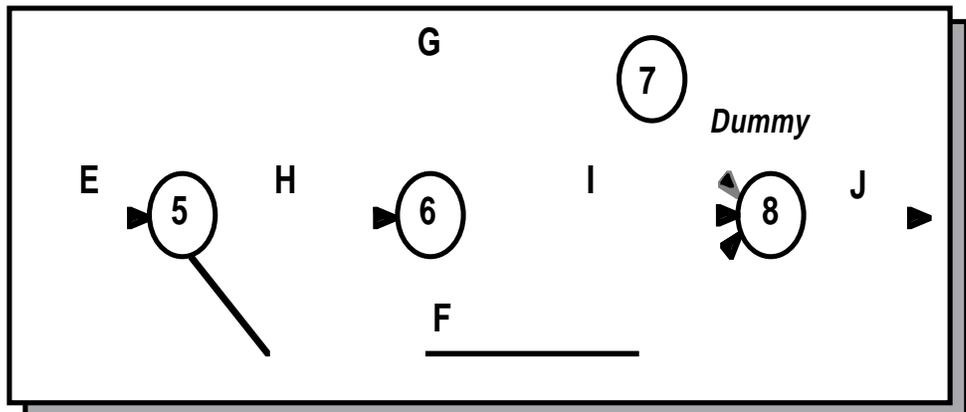
## MONITORING METHODS

Now look at activity F. Which activities cannot start until F is complete? (*The answer is J.*) Also, which activities must be completed before J can start? (*The answer is F, G, and I.*) Therefore, the network would look like that illustrated in Exhibit A-14. **A problem exists with this illustration.** Can you find the problem? If you identified the problem as a duplication of the “I-J” codes for activities G and F, your perception of the numbering dummy is excellent.



*Exhibit A-14.*

Try to reconstruct the diagram. If your diagram is identical to the one shown in Exhibit A-15, you have understood the principle. If your diagram is not correct, return to principle 3 and review the numbering and logic dummies again. You can now determine how activity L fits into the schedule.



*Exhibit A-15.*

Which activities must be completed before L can start? (*The answer is G and I.*) However, if you should try to illustrate this in your current logic, you will have a problem because L depends upon G and "I" but not F. Notice that Exhibit A-16 below shows that L is dependent on F as well as G and "I". You can solve this problem by logic. Activity L follows G and I. Activity J follows G, I and E. Study Exhibit A-16. It illustrates both the correct and incorrect logic. Exhibit A-17 provides a summary of Network Development.

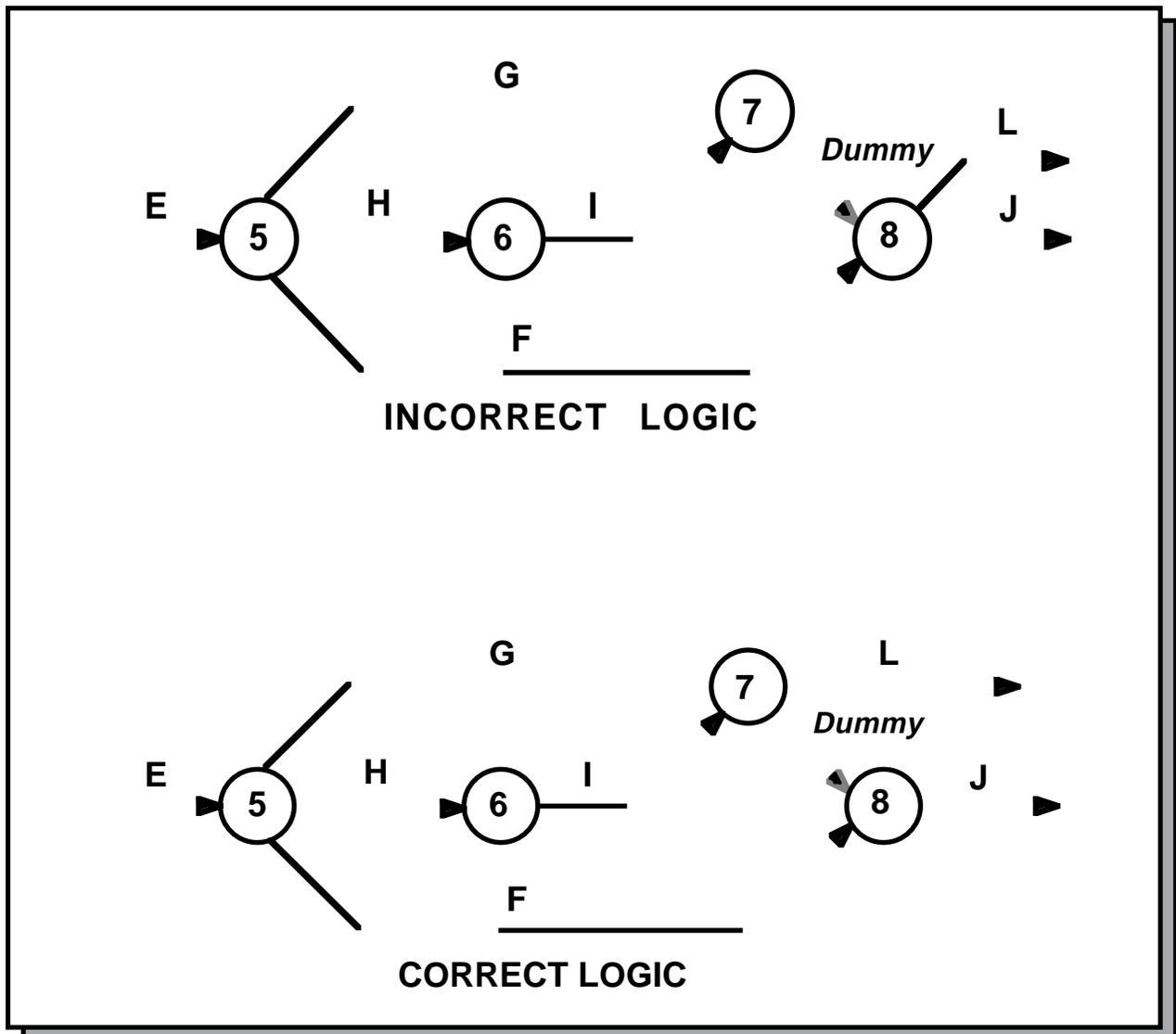


Exhibit A-16.

### NETWORK DEVELOPMENT SUMMARY

Before proceeding further, review the summary of information presented thus far:

- Activities are specific tasks in the project which have a duration.
- The order in which activities are completed is called the precedence.
- Activities are illustrated on a project diagram as arrows. They begin at an event and end at another event.
- When adding an activity to the project diagram you must ask yourself two questions:
  - ① Which activities must be completed before this activity can be started?
  - ② Which activities cannot start if this activity is not completed?
- These two questions can be answered by looking at the order of precedence on the Project Activity List.
- Numbering dummies are used to ensure that the activities follow one another according to the order established in the Project Activity List.

*Exhibit A-17.*

CPM Network Calculations - How to apply them

CPM is useful in many ways, such as determining:

- \* The impact to the project completion date caused by delaying a specific activity.
- \* The earliest date the project can be completed.
- \* The latest date the project should be completed if no changes occur.
- \* The activities in the project which are critical to completing the project on or before the completion date.

Basic Computations on Time

The basic computations in CPM to determine a time schedule consists of simple addition and subtraction. The computations are known as the “forward pass” and the “backward pass”. These two computations will develop the time boundaries for each activity.

By making a forward pass and a backward pass through the network, early start and late start times, and early finish and late finish times, and the critical path are established.

Early Start and Early Finish

You may begin by determining the earliest an activity can start. The Early Start Time (EST) for the first activity will be day 0. By adding the duration of each activity to the earliest time it can start, you can determine the earliest time the activity can finish. Remember, this is called the Early Finish Time (EFT). The information obtained will reveal the earliest time the next activity can start.

$$\text{Early Finish Time} = \text{Early Start Time} + \text{Duration}$$

$$\mathbf{EFT = EST + DUR}$$

The EST for activity A (in your example project) is 0 because it is the first activity. Notice that the EFT for activity A is 1 and the EST for activity C is also 1. The EST for an activity is the latest of any EFT leading into the activity. To help clarify this point, examine event number 4 on the Project Activity List in Exhibit A-5. Activity E depends upon activities B and D.

To determine the EST for activity E, you must choose between the EFT for activity B and the EFT for activity D. Activity B has an EFT equal to 8, D has an EFT equal to 9. **Choose the latest finish.** Therefore, the EST for activity E is 9. This will also be the EST for activity N since it begins at the same event. Before proceeding calculate the EFT for activities K, L and N.

**Example:**

**EFT for L will be the EST at any event plus the duration of L**

$$\mathbf{(EFT(L) = 20 + 2 = 22)}$$

$$\mathbf{EFT(K) = (EST \text{ at event } 9) + (\text{Duration of } K)}$$

$$\mathbf{(EFT (K) = 22 + 1 = 23)}$$

$$\mathbf{EFT (N) = (EST \text{ at event } 4) + (\text{Duration of } N)}$$

$$\mathbf{(EFT (N) = 9 + 3 = 12)}$$

Now, calculate the EST for activity M. The EST for M is the largest EFT of all activities that it depends upon. The largest EFT is for activity K. Therefore, the EST for M is 23.

## MONITORING METHODS

Repeat this exercise until you understand it thoroughly. Now proceed to the next part of the analysis.

Late Start and Late Finish

By starting with the last EST (activity M) you can now calculate the late start time (LST) and late finish time (LFT) for each activity. *Remember, this is the latest an activity can start or finish without changing the project completion date.* Refer to Exhibit A-17, entitled “Backward Pass”. Remove it from your text. You will need to refer to it often during this part of the instruction.

The LFT at the end of a project is equal to the last EST at the end. The last EST at the end of activity M is 24. Think of it this way: The earliest date that any activity after M could start would be day 24. This is the latest activity that M can end without changing the project duration.

To calculate the LST, simply subtract the duration.

Latest Start Time equal Latest Finish Time minus the duration  
**(LST = LFT - DUR)**

The LST for activity M is the late finish time, (day 24), minus the duration (1 day).

Latest Start Time (M) equal Latest Finish Time (M) minus the duration

$$\mathbf{LST (M) = LFT (M) - Duration (M)}$$
$$\mathbf{(LST (M) = 24 - 1 = 23)}$$

The LFT for K is equal to the LST for M (23). To calculate the LST for K, subtract the duration of K from the LFT for K.

Latest Start Time (K) = Latest Finish Time (K) minus the Duration (K)

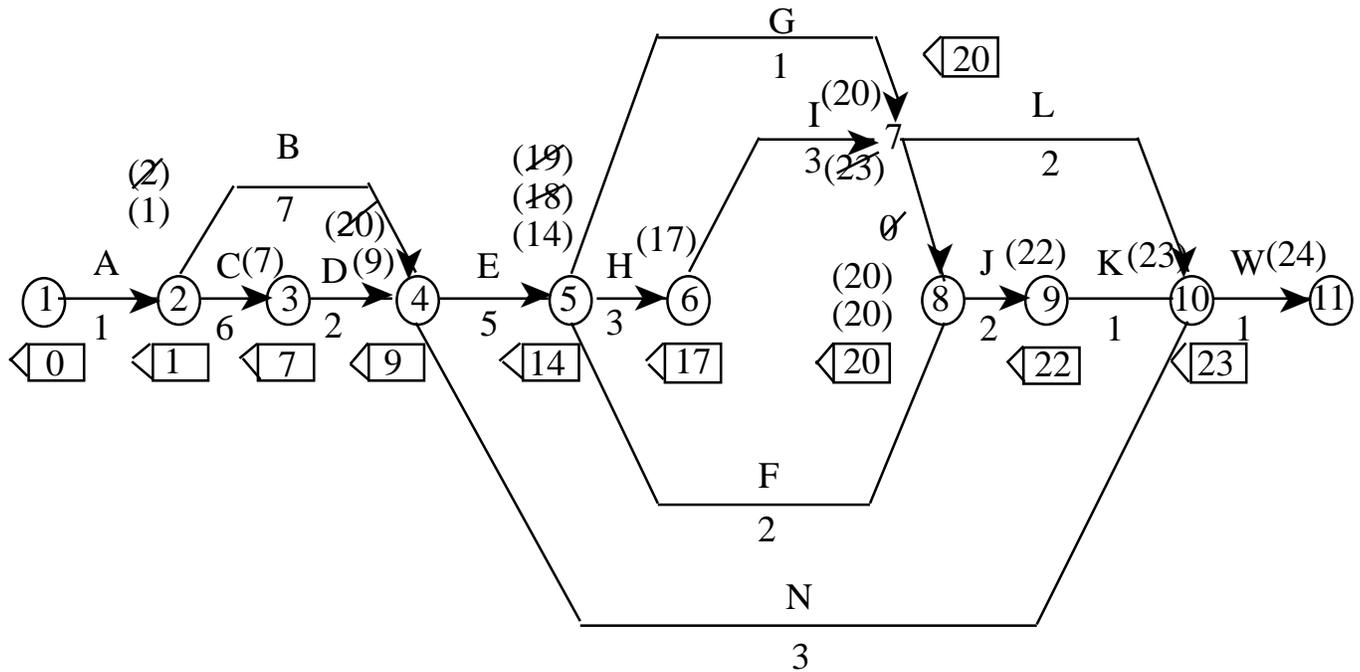
$$\mathbf{(LST (K) = LFT (K) - Duration (K))}$$

Latest Start Time (K) = 23 minus 1 = 22

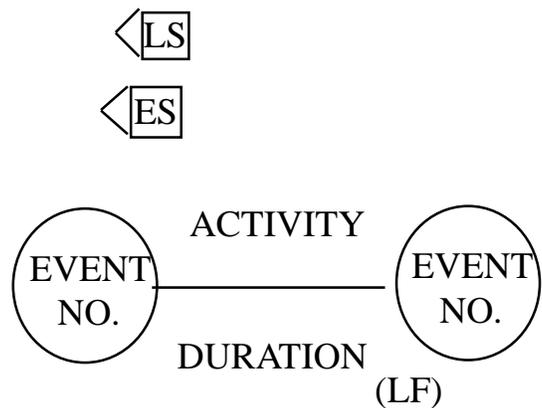
$$\mathbf{(LST (K) = 23 - 1 = 22)}$$

Continue this process backwards through the network to calculate the LFT and LST for each activity. Notice that when two or more activities begin from the same event, a decision must be made as to which LFT is correct. You can have only one LST at each event. Therefore, choose the smallest possible LFT. As an example, look at event 5. As you work backwards along the network through activity G, calculate a LFT for activity E of 19. Along the pathway through H the LFT for E would be 14. Through activity F the LFT for E is 18. You now have three late finish times (LFT) to choose from. The correct LST for these three activities is equal to the earliest (smallest) LFT, or 14.

# BACKWARD PASS



ACTIVITY	DURATION	ES	EF	LS	LF
A				0	1
B				1	9
C				1	7
D				7	9
E				9	14
F				14	20
G				14	20
H				14	17
I				17	20
J				20	22
K				22	23
L				20	23
M				23	24
N				9	23
DUMMY				20	20



LEGEND

Exhibit A-17.

## MONITORING METHODS

Before proceeding, calculate the LST at event 2 for B and C.

$$\text{LFT for path B} = \text{LST(B)} - \text{Dur B}$$

$$\text{LFT (B)} = 9-7$$

$$\text{LFT (B)} = 2$$

$$\text{LFT for path (C)} = 7-6$$

$$\text{LFT (C)} = 1$$

**Choose the smallest LFT. The latest event 1 can finish is day 1.**

Take time to notice what the Early Finish time is for activity M. This is the last activity in the project. It has an EFT of 24 days. *Therefore, you now know the earliest possible project completion date is 34 days. Remember that this completion date is based upon the planner's original estimate of durations for each activity.* The very nature of a construction project necessitates change from the unexpected as well as the expected. Some of the primary factors which influence changes in the schedule are:

- Added or deleted work.
- Delays.
- Strikes.
- Weather problems.
- Sequence changes.
- Unanticipated sub-surface conditions.
- Acceleration.

In a typical construction project the number of activities which fall on the critical path is generally between 2% and 10% of the total number of activities. On large projects the number could be as many as 20%.

What is meant by the term Critical Path (CP)?

In the final network, there must be at least one path of activities and events wherein the EST is equal to the LST. This is called the "Critical Path" (CP). It is nothing more than the longest path through the network. It is the path that determines the project duration. Any change in a duration on the CP will impact the project completion date. An activity must meet three conditions to be on the CP:

1. The LST must equal the EST time at the head of the activity arrow.
2. The LST must equal the EST time at the tail of the activity arrow.
3.  $\text{LST at head of activity} - \text{LST at tail} = \text{duration}$   
**(LST (H) - LST (T) = Duration)**

Notice that activity B in Exhibit A-17 is not on the critical path because it does not meet condition Number 3.

## Float

There is one final step in the computation. This is referred to as computing “float” or “slack” time. Activities not on the critical path have some amount of flexibility in their completion. You may be able to complete the activity early or late without changing the project completion date. This amount of flexibility is called “Float”. A critical activity has zero float. All non-critical activities may have float ranging from zero to a high of only one less than the project duration.

Look at activity N in Exhibit A-17. Activity N starts at event 4 and ends at event 10. It will require only 3 days to complete.

The activities on the critical path between events 4 and 10 require a combined duration of 14 days to complete. The difference between these two durations ( $14 - 3 = 11$ ) is the float available to activity N. Activity N could be delayed 11 days without changing the project completion date. A simple way for you to calculate the float for an activity is to use the following formula:

$$\text{FLOAT} = (\text{LFT} - \text{DURATION}) - \text{EST}$$

The process of calculating these dates is time consuming and tedious if done manually. Fortunately, the development of personal computers has offered some relief in performing some of this task. The only information that you need to input into the computer is the activity name, duration, order of precedence, and the earliest start date for the project. On the basis of this information, the computer will calculate all of the start dates, finish dates, float, and the critical path.

## Conclusion

Remember, the network is only as good as the information used in developing the network. The true value of a network diagram is measured in the number of activities, how well activities are identified, their durations, and their order of precedence.

### Method 3

## PROGRAM EVALUATION REVIEW TECHNIQUE (PERT)

The **Program Evaluation Review Technique (PERT)** is an appropriate scheduling and control method when the project is composed primarily of activities whose actual duration times are subject to considerable chance variation. Because of the variability in these projects, the issue of project completion time is most critical to the project's performance.

**PERT** modifies the CPM schedule to address statistical variance involved with critical path activities and possibly, "near critical" activities. For example:

An activity which is expected to have a duration of 10 days, may actually be reasonably expected to vary from 8 days to 12 days when performed. Another activity in your CPM schedule might also be expected to have a duration of 10 days, but could be expected to vary from 3 days to 20 days.

The CPM method would use the 10 day duration for both of these activities and the calculated schedule and critical path would ignore the potential variances just described. The advantage of the **PERT** statistical approach is that it offers a method of dealing with this chance variation in the schedule calculations and possibly calculating the probability that the project will be completed on or before the scheduled completion date.

The **PERT** scheduling method is identical to the **CPM** method in that :

- \* A network of activities and logic ties is prepared for the project ; and
- \* A forward and backward pass mathematical calculation will determine the critical path.

The difference between the two methods lies in the activity duration used in the calculation.

Using the schedule developed for the garage project once more, the **CPM** exercise used activity durations of specific or deterministic lengths. These specific durations provided by a competent planner or manager of such projects makes sense; Certainly the garage project is simple.

Most likely the contractor, or the manager of this project has managed many like projects in the past. The person planning this schedule has great confidence in the activity duration forecasts.

For the sake of this exercise in **PERT**, let us pretend this garage project has the great risks of a much larger and more sophisticated project. Although our scheduler may have great expertise, this project may have activities which are much more difficult to forecast for many reasons. A more sound scheduling approach would be to forecast an expected duration for each activity and somehow have a schedule developed which acknowledges potential variance of the activities, especially those which make up the critical path.

In order to achieve this, our scheduler must focus on each work activity independently and come up with three potential durations:

**a: The optimistic performance time;** The time which is the shortest possible duration for the activity. A duration which could only be bettered possibly one in twenty occurrences.

**m: The most likely performance time;** The duration which is most likely to occur more often than any other.

**b: The pessimistic performance time;** The time which is the longest possible duration for the activity. A duration which could be exceeded only one in twenty occurrences.

The three listed duration predictions are utilized to arrive at an average or mean value for the duration of the activity, the expected duration;

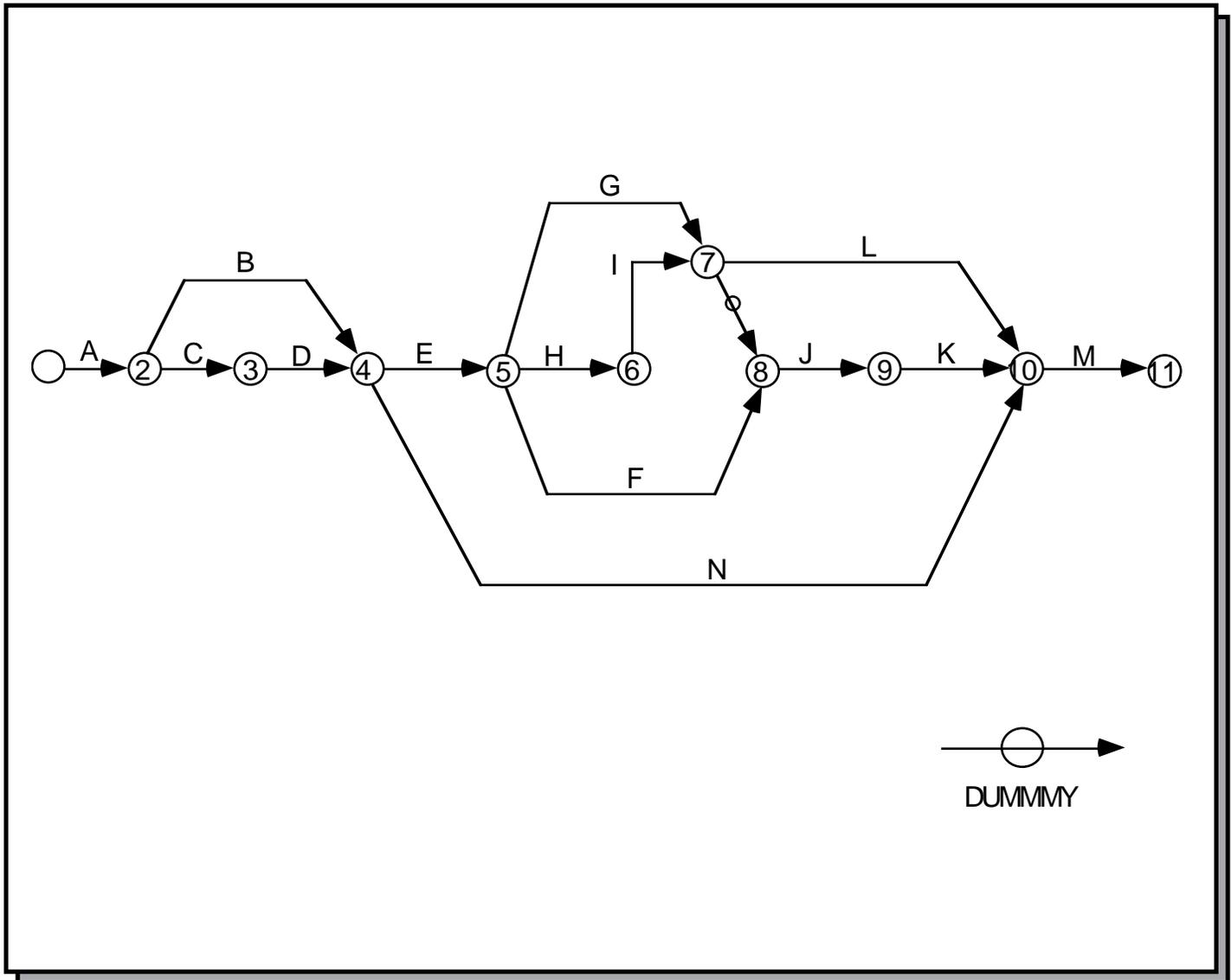
$$t_e \quad t_e = (a+4m+b) / 6.$$

Likewise the variability of the activity's duration is known as a standard deviation from the mean;

$$v_t \quad v_t = (b-a) / 3.2 .$$

## MONITORING METHODS

Now let us use the garage construction project network and apply the **PERT** method for calculating the activity durations and their variability. Below is the network logic diagram. It is identical to the network presented earlier for the **CPM** overview. The network's logic will be used in a **CPM** method of calculating a forward and a backward pass calculation to determine the critical path.



*Exhibit A-18.*

Below is a table of the estimator's three duration predictions ( **a**: the optimistic, **b**: the pessimistic, and **m**: the most likely activity duration). To the right of these predictions or estimations is the calculated "expected" duration:  $t_e$  and the standard deviation ,  $v_t$ , or variability factor associated with the activity's estimated duration.

PERT ACTIVITY LIST					
ACTIVITY	DURATIONS			EXPECTED	STANDARD
	A- OPTIMISTIC	M - MOST LIKELY	B - PESSIMISTIC	DURATION $T_e$ *	DEVIATION $v_t$ **
A MOBILIZE	1	2	3	2	0.625
B DELIVER MATL	3	6	10	6	2.1875
C EXCAVATE & FORM FOOTINGS	2	5	11	6	2.8125
D POUR FOOTING	1	2	3	2	0.625
E ROUGH FRAMING	2	5	9	5	2.1875
F ROUGH ELECTRICAL	1	2	4	2	0.9375
G INSTALL DOOR & WINDOW	1	2	3	2	0.625
H INSTALL ROOF	2	3	5	3	0.9375
I INSTALL SIDING	2	3	4	3	0.625
J PAINT INTERIOR	1	2	5	2	1.25
K FINISHED ELECTRICAL	1	3	4	3	0.9375
L PAINT EXTERIOR	2	3	5	3	0.9375
M CLEAN UP	1	2	3	2	0.625
N CONSTRUCT DRIVEWAY	2	3	4	3	0.625

\*  $T_e$  DURATIONS HAVE BEEN ROUNDED TO THE NEAREST FULL DAY  
 \*\* STANDARD DEVIATION IS EQUAL TO THE SQUARE ROOT OF  $V_t$  (VARIANCE)

Exhibit A-19.

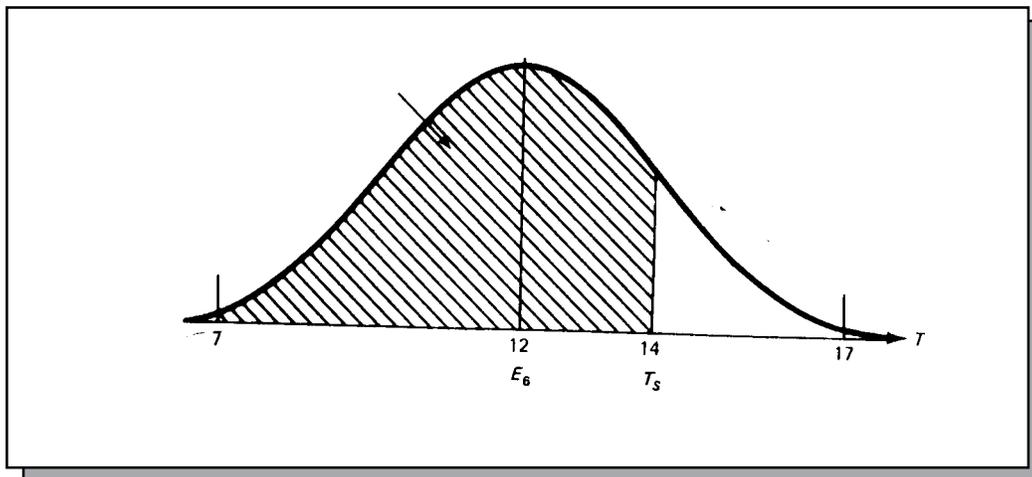
## MONITORING METHODS

With these expected durations, we can now conduct our mathematical passes through the schedule network and calculate or determine the activities which make up the project's critical path. You are encouraged to practice these calculations yourself to further reinforce your familiarity with **CPM** calculations. The resultant critical activities, their durations and standard deviations are shown below.

CRITICAL PATH ACTIVITIES	EXPECTED DURATION	STANDARD DEVIATION
A MOBILIZE	2	0.63
C EXCAVATE & FORM	6	2.81
D POUR FOOTING	2	0.63
E ROUGH FRAMING	5	2.19
H INSTALL ROOF	3	0.94
I INSTALL SIDING	3	0.63
J PAINT INTERIOR	2	1.25
K FINISH ELECTRICAL	3	0.94
M CLEAN UP	<u>2</u>	<u>0.63</u>
TOTAL VALUES	28	10.625

*Exhibit A-20.*

The project as calculated has an **estimated completion of 28 days**. The standard deviations related to these critical activities are added together to arrive at a **project schedule standard deviation of 10.625**, statistically speaking. You can use these two values to evaluate how much you can rely on the predicted completion date. This is achieved by probability analysis using a normal distribution bell curve and the related probabilities associated to the curve.



*Exhibit A-21.*

Furthermore, let us suppose that you do not like the variability of the completion date, (i.e., the date cannot be “depended upon” statistically speaking) The project management staff can review each of the critical path activities and see which of them contributes the most to the variability or risk level. This will allow decisions to be made on different methods to accomplish the high risk activities, reducing the risk of completing the project late.

**You are cautioned** that the **PERT method** has underlying, complicated statistical theories and requirements which must be met in order to insure that the data produced from it is reliable. If inexperienced you must seek out adequate statistical support in order to properly create and use a **PERT** schedule.

### Method 4

## THE LINE OF BALANCE (LOB) TECHNIQUE

The Line of Balance Technique display consists of four (4) separate elements:

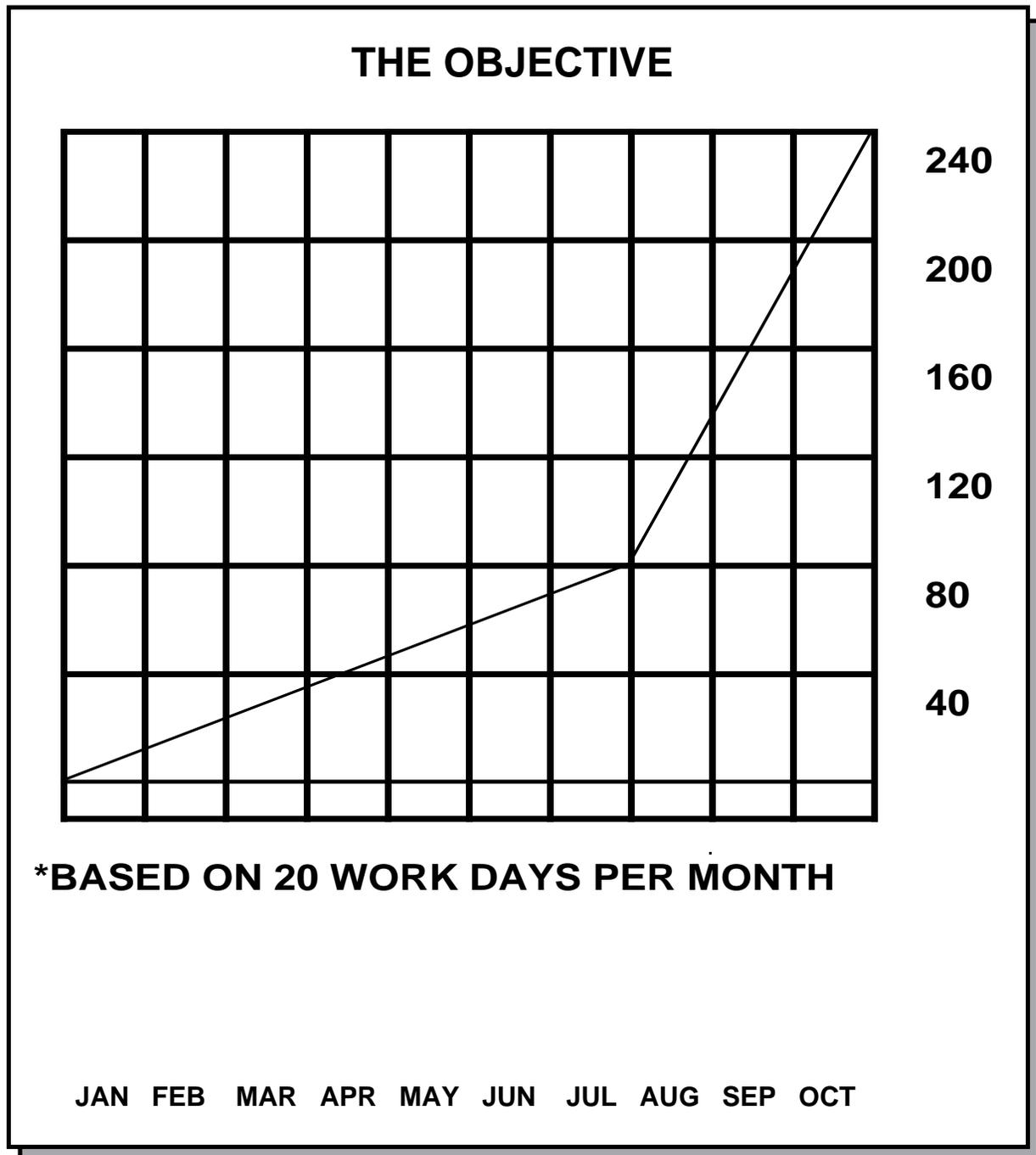
1. A flow process chart (Not a network).
2. A vertical bar chart (Not a scheduling type)
3. A time based, cumulative, line diagram; and
4. Single date, projected comparison line, which is The Line of Balance.

The Objective "Curve" is a straight line curve, with a calendar time base and a quantitative vertical scale.

The line diagram affords a simple, clear illustration of cumulative "end products" (units) to be constructed over the total contract period. Exhibit A-22 provides a diagram to illustrate, called The Objective.

The example shown in Exhibit A-22 indicates that the process by which each of the 240 units is to be produced consists of six activities/work items (A through F) and their individual lead times (latest starting times), which is indicated by the time position of their individual starting event symbols (square). Note that the dependency/interrelationships are indicated by the numbered ending event coordination symbol (arrow). Only the coordination symbols are numbered vertically, from top to bottom, and horizontally from left to right. These are called progress monitoring points.

The Program Plan, which is a performance production flow diagram of all of the major work items/activities in vector form, illustrates the planned sequenced interrelationships on a lead time base scale.



*Exhibit A-22.*

## MONITORING METHODS

Flow chart symbols especially adapted for construction project applications are usually projected by color, i.e.:

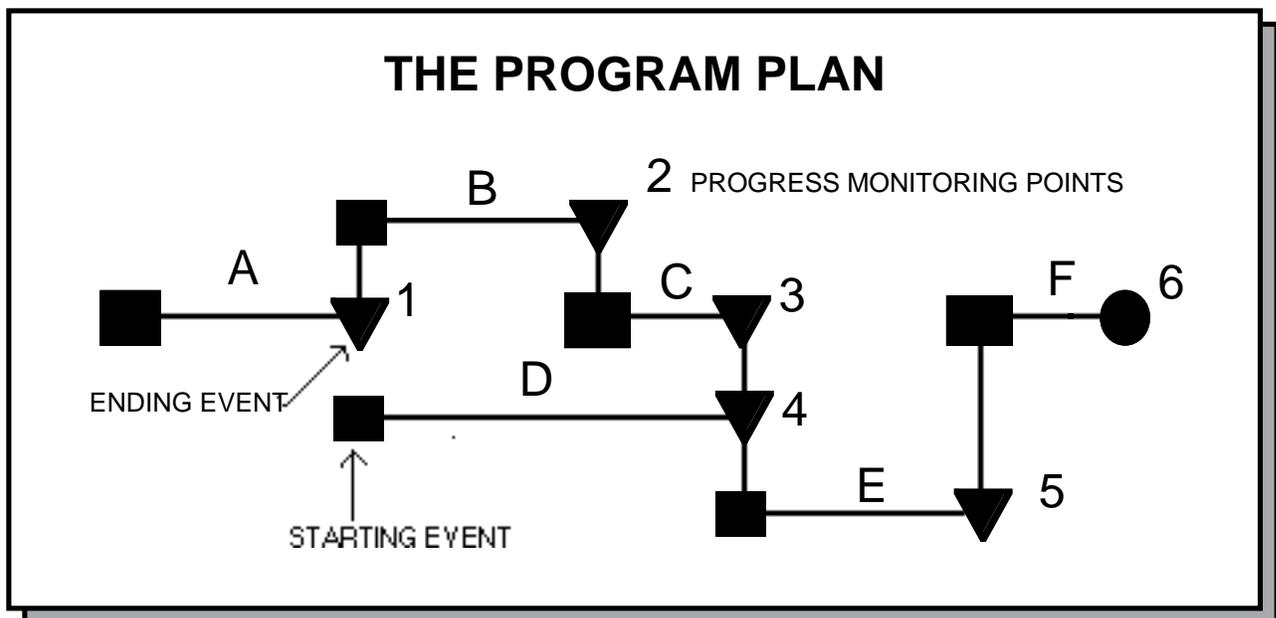
Procurement (Blue)

Prime Contract Activity (Green)

Subcontract Activity (Orange)

Completion (Yellow)

Ending Event/Coordination Point (Red)



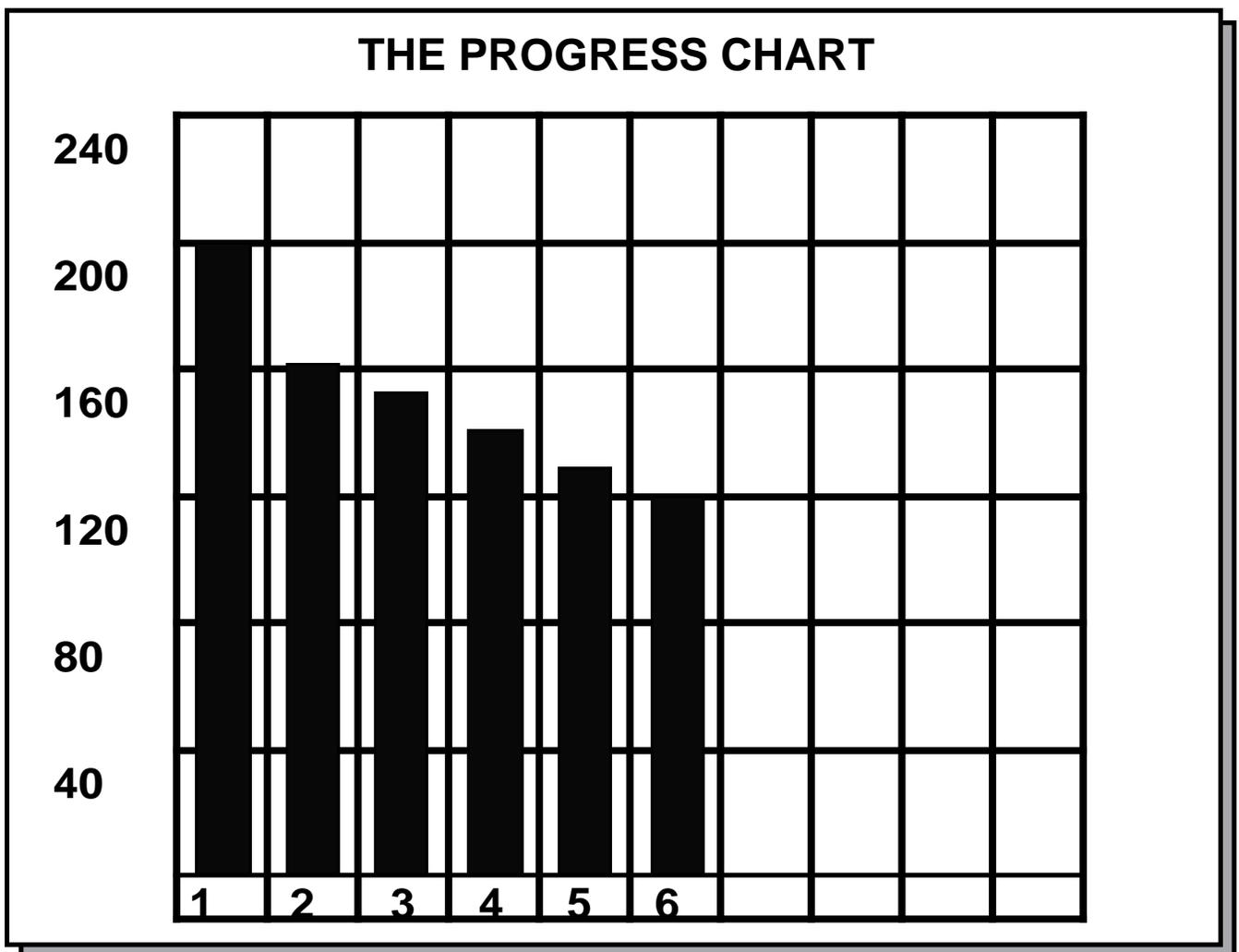
*Exhibit A-23*

The example provided in the Exhibit indicates a contract award date of 1 January; a requirement for 40 items to be completed by 1 April; a total of 80 items to be completed by 1 July; and the completion of all 240 units by 31 October.

Element III, The Progress Chart:

The progress chart is a family of vertical columns scaled, in conjunction with the objective curve element, to the quantity of units required. The columns are numbered, from left to right to correspond to numbering of events/coordination points in the Program flow plan. Cumulative progress is then indicated by the construction of vertical bars within the numbered columns, following a site inventory. Exhibit A-24 illustrates the Progress Chart produced.

- \* 120 units had been completed which is the vertical height of bar #6. Go to the Program flow chart and you will see that this is Activity F.
- \* Activity E had been completed on 130 units, which is bar/ event #5.
- \* Activity C was completed for 140 units, which is bar/ event #4;



*Exhibit A-24.*

## MONITORING METHODS

- \* Activity B had been completed on 160 units, which is bar/event#2; and,
- \* Activity A had been completed on 200 units, which is bar/event #1.

Element IV, The Comparison:

Now the Line of Balance can be determined. The Line of Balance is a stepped down line graph projected from the Objective curve area into the Progress Chart area. One step of the Line of Balance is projected for each activity on the status/given date. As an example Exhibit A-25 projects progress and comparison as of 1 August. The example included in Exhibit A-25 indicates all of the data needed for projecting the Line of Balance and how it is projected.

To further explain the process diagram, remember that the Objective curve which is Element # 1 in the process, represents the Total Units Planned/Expected to be completed cumulatively over the contract period. Projecting the 1 August requirements:

- (a) Total units (Activity F) which should be completed are found by reading the objective curve vertically on the 1 August line. The intersection (120 units), is projected horizontally to Column #6 for its L O B step.
- (b) The required number of completions for Activity E (event/bar #5) is determined by its "Lead Time" which is 1 week. That is, they should be completed units one week later. Moving 1 week into the month of August and upward to the objective curve, the intersection, which is approximately 130, is projected horizontally to column # 5.
- (c) The Lead Time for C & D is 3 weeks, moving from 1 August, 3 weeks and vertically, the intersection there is approximately 150, projected to both columns # 3 and # 4.
- (d) The 4 weeks/1 month Lead Time for activity B projects to 1 September where the intersection 160 is projected to column #2.

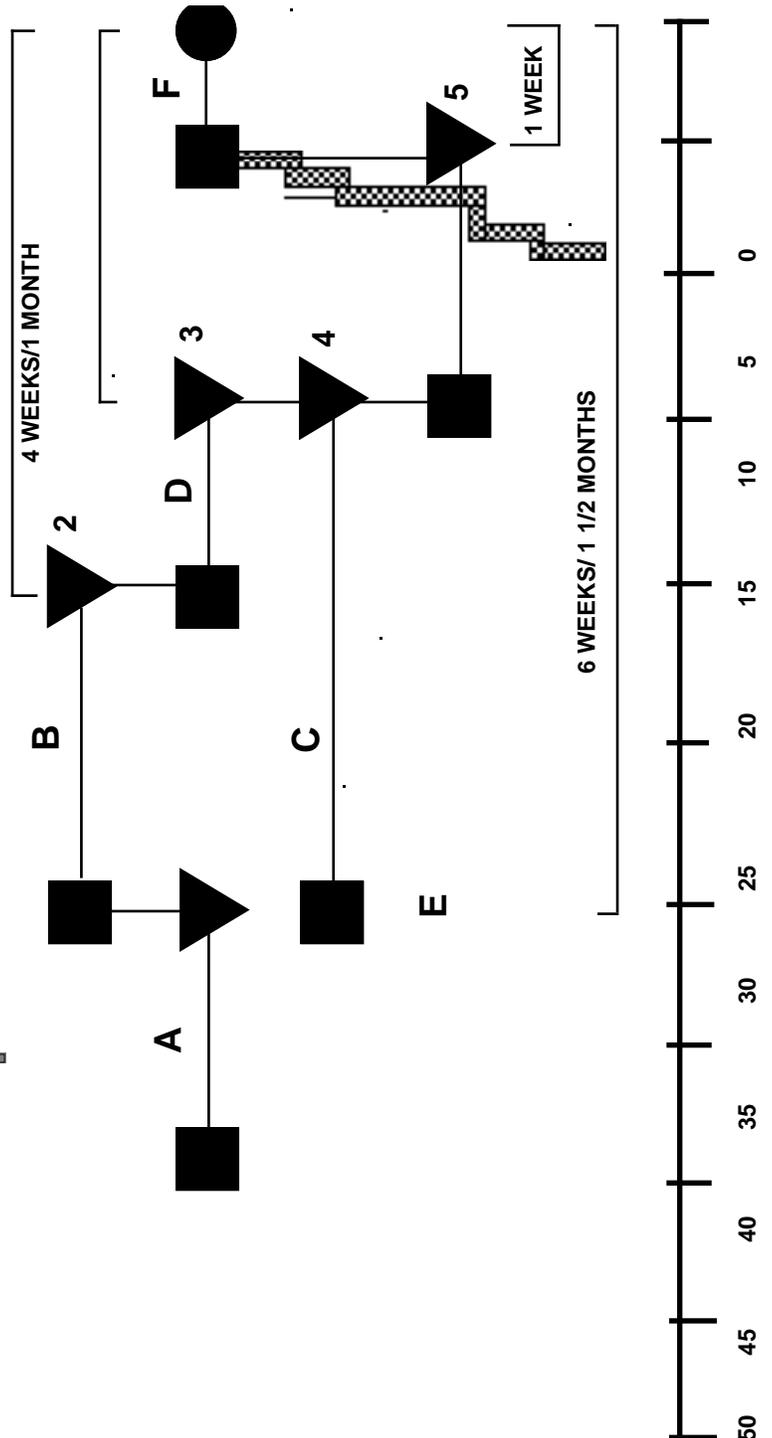
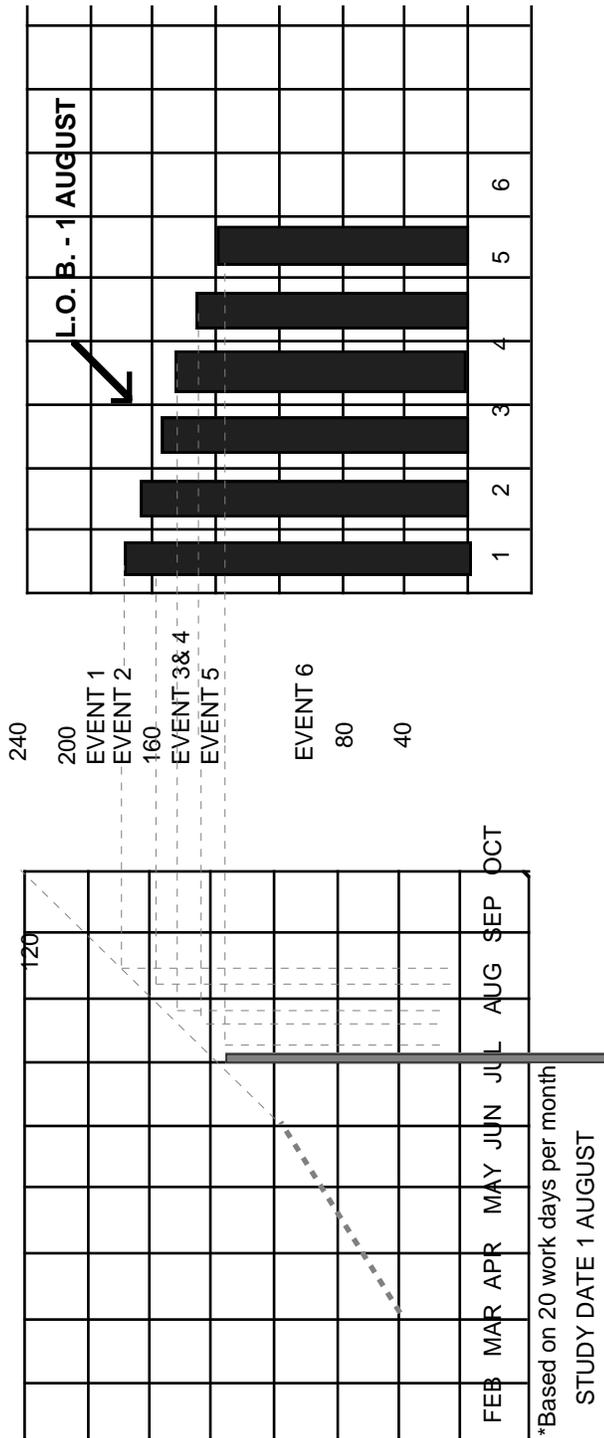


Exhibit A-25.

## MONITORING METHODS

- (e) The 6 week, 30 workdays Lead Time for completion of Activity A projects to the middle of September where the intersection is approximately 180, which is projected to column #1.
- (f) These projections in the Bar Chart area are connected in stepped down fashion to form the 1 August Line of Balance.

You can quickly see that Activity A/Event 1 is ahead of schedule for about 10 units; Activity C/event 4 is behind schedule for about 10 of the units; and all of the others appear to be on schedule.

Based on the exercise, and in determining the causes for delay, you should immediately check/correct if completion of the remaining units to be built are not to be slowed down by the progress rate of this one activity.

# LIST OF ACRONYMS

ACRONYM	DEFINITION
ACOs	Administrative Contracting Officers
B/L	Bill of Lading
BOA	Basic Ordering Agreement
CICA	Competition in Contracting Act
CG	Comptroller General
CAO	Contract Administrative Offices
CDA	Contract Disputes Act
CO	Contracting Officer
C.O.D.	Cash on Delivery
COR	Contracting Officers' Representative
COTR	Contracting Officers' Technical Representative
CBL	Contractor Bill of Lading
CEC	Contractor Establishment Code
CPSR	Contractor Purchasing System Review
CPM	Critical Path Method
EEO	Equal Opportunity Employment
F.O.B.	Free on Board
FOIA	Freedom of Information Act
GBL	Government Bill of Lading
GFE	Government-furnished Equipment
GFM	Government-furnished Material
GFP	Government-furnished Property
IG	Inspector General
MOL	Maximum Order Limitation
MAS	Multiple-award schedules
N/A	Not Applicable
OF	Optional Form
PCO	Procuring Contracting Officer
PERT	Program Evaluation Review Technique

ACRONYM

DEFINITION

---

R&D	Research and Development
SBA	Small Business Administration
SF	Standard Form
SINs	Special Item Numbers
TCOs	Terminating Contracting Officers