



***USER'S GUIDE
TO THE
CONTRACTING
OFFICER'S
REPRESENTATIVE'S
(COR) WORKBOOK***

CONTRACTING OFFICER TECHNICAL REPRESENTATIVE'S GUIDE

1.1 PURPOSE

This guide is issued by the Office of the Procurement Executive to provide the Department or Agency personnel who are designated as Contracting Officer's Technical Representatives (COTRs) with a source of basic guidance for monitoring contractor performance and for performing other contract administration duties. It is a convenient source of basic information about their role in administering and monitoring contracts of all types. It delineates the duties that the Contracting Officer may require of the COTR and explains what are the responsibilities of the COTR and which are those of the Contracting Officer. Frequent communications and collaboration between the COTR and the Contracting Officer is extremely important.

The direction provided in this guide is based on the authorities implemented by the Federal Acquisition Regulation (FAR) and supplemented by Departmental Acquisition Regulations. If any inconsistencies are found, the FAR and Departmental agency regulations take precedence over this guide.

1.2 SCOPE

The requirements and procedures contained in this guide apply to all Department acquisitions for personal property and non-personal services that are subject to the FAR and the Departmental Regulations.

1.3 DEFINITIONS

Acceptance The act of an authorized representative of the Government acknowledging that the supplies or services are in conformity with the contract requirements.

Cardinal Changes. Modifications to an existing contract which are beyond the general scope of that contract and are so extensive that a new procurement should be used.

Change Order. Unilateral action taken by the Contracting Officer in order to modify the drawings, designs, specifications, method of shipping or packing, place of inspection, delivery, or acceptance of an existing contract.

Contract A legal instrument providing for the purchase, lease or barter of property or services for the direct benefit of the Government.

Contract Administration The monitoring of the contractor's performance in order to assure compliance with performance requirements and contract provisions.

Contract Modification Any written alterations in the specifications, delivery point, date of delivery, contract period, price, quantity, or other provision of an existing contract.

Contracting Officer An official authorized to enter into or administer procurement contracts and make related determinations and findings.

Contracting Officer's Technical Representative (COTR) The individual in the requirements office who is responsible for the technical direction and evaluation of the contractor's performance.

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Constructive Change Order-Informal requests for additional work or services caused by some act or omission to act on the part of the Government that causes a contractor extra work, delays, or money.

Cost Estimate. A written calculation of all items included in the scope of the work, tabulated under appropriate cost headings (direct costs, labor, overhead, and profit).

Cost-Reimbursement Contract - Contract in which the buyer and seller agree on an estimate of contract costs. The buyer agrees to reimburse the seller for reasonable, allowable, and allocable costs necessary to complete the work.

Cure Notice. A document the Contracting Officer sends to a contractor to notify the contractor that the contract may be terminated by reason of default if the condition endangering performance of the contract is not corrected in 10 days.

Excusable Time Delay - Failure to perform which is beyond the control and without fault or negligence of the contractor.

Firm Fixed-Price Contract - A contract that provides for a price which is not subject to any adjustment by reason of cost experience of the contractor in the performance of the contract.

Indefinite-Quantity Contract - A contract used for procurements in which the exact number of deliverable items is not known at the time of contracting. The contract provides for a minimum and maximum amount of goods/services that may be ordered under the contract.

Inspection - Examination and testing of supplies and services to determine whether they conform to contract requirements

Labor-Hour Contract A contract that provides for the procurement of property or services on the basis of direct labor-hours at specified fixed hourly rates (that include direct and indirect labor, overhead, and profit).

Level-of-Effort Contract A contract that specifies the number and type of person-hours which the contractor will apply in pursuing the project.

Show Cause Letter. A document the Contracting Officer sends to a defaulting contractor to notify the contractor that the contract may be terminated by reason of default unless the contractor can prove in 10 days that the condition was not his or her fault.

Specifications Clear and accurate description of the technical requirements of a service or supply contract.

Statement of Work. Written definition of work to be performed which establishes standards sought for the goods or services to be supplied.

Termination for Convenience A contract clause designed to give the Government a unilateral right to terminate the contract when it no longer needs or requires the products or services.

Termination for Default A contract clause which allows the Government to terminate a contract when the contractor fails to perform or fails to make progress so as to endanger performance.

Time-and-Materials Contract A contract that provides for payment of supplies and services on the basis of incurred direct labor hours (at fixed rates) and materials (at cost).

Time Delay An interruption during which services, supplies, or work are not delivered in accordance with the performance time schedule stated in the contract.

1.4 COTR CERTIFICATION PROGRAM

To be certified as a COTR, a potential appointee must complete **40** hours of basic COTR training, to include courses in pre-award and post-award contracting, as well as procurement ethics. In addition, a COTR is required to complete at minimum an 20-hours of refresher training every year thereafter by FAI standards to continue to be FAC-COTR certified.

1.5 CERTIFICATION, NOMINATION AND DESIGNATION OF THE COTR

The COTR candidate is nominated in writing by the requirements office. The nomination memorandum must be sent to the Contracting Officer and it must include:

- Project Name
- Procurement Request Number/Solicitation Number/Contract Number
- Name of the COTR Candidate
- Phone Number of COTR Candidate
- Training Qualifications Including Course Title, Dates Attended, and Number of. Course Hours Successfully Completed.
- Technical Qualifications/Experience (List technical qualifications, agency/division where obtained, dates of this experience, and types of contracts administered (indicate supply or service, contract type, e.g., cost-reimbursement, fixed price).

The Contracting Officer must issue a written COTR designation memorandum that delineates the responsibilities of the COTR either in a separate letter of appointment or in the contract itself. The CO should tailor this letter to the needs of each specific contract. A copy of the letter should be sent to the contractor identifying the standard duties and any special duties that will be required. To acknowledge this memorandum, the COTR must sign the memorandum and return it to the Contracting Officer. The Contracting Officer must also ensure that designation of the COTR is listed in the actual contract document signed by the Government and the contractor. Below is a sample COTR Delegation Memorandum:

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SAMPLE COTR DELEGATION MEMORANDUM

Pursuant to the Federal Acquisition Regulation (FAR) and the Department of the Treasury Acquisition Regulation (DEPARTMENTAL REGULATIONS), you are hereby appointed the Contracting Officer Technical Representative (COTR) for Contractual Action _____. The COTR function is to serve as technical liaison between the Contractor and the Contracting Officer. The COTR is responsible for monitoring the Contractor's performance and delivery of the final product and/or services under the contract. Specific duties and responsibilities are listed in the paragraphs below.

The duties delegated in this letter are not re-delegable. The COTR is cautioned that he/she may be personally liable for actions taken or direction given beyond the authorities delegated in this letter.

The following authority and responsibilities are hereby delegated to the individual appointed:

- Monitor contractor performance and immediately report all problems related to it to the Contracting Officer. Keep the Contracting Officer informed, both orally and in writing, of the status of the contract and performance of its requirements. No periodic reports, as such, are required, but care should be taken to promptly report any potential disagreement or controversy that may arise.
- Ensure that the Contractor complies with the defined Statement of Work or specifications included in the contract. Assist the Contractor and the Contracting Officer in interpreting technical requirements of the contract scope of work or specifications. Differences of opinion shall be referred to the Contracting Officer for resolution.
- Assure that the Contractor uses the levels of personnel contracted for and necessary for performance of contractual requirements and that the level of personnel contracted for is not diluted by the excessive use of lower caliber personnel.
- Review and evaluate the Contractor's progress in relation to expenditures and advise the Contracting Officer of any disparity indicating excessive or deficient funding.
- Review Contractor invoices and recommend approval/disapproval for payment as appropriate. Such review shall be completed in a manner so as to allow timely payment under the Prompt Payment Act and avoidance of payment of interest penalties.
- Recommend in writing to the Contracting Officer any changes desired in scope and/or technical provisions of the contract with justification for the proposed action. If the Contractor proposes a change, obtain the Contractor's written statement to that effect and forward it to the Contracting Officer together with your analysis and recommendation. **YOU ARE NOT DELEGATED TO AUTHORIZE ANY CHANGES IN THE STATEMENT OF WORK OR SPECIFICATIONS OR DUTIES OF THE PARTIES AS STATED IN THE CONTRACT.**
- Ensure that proper action has been taken to formally modify the contract before the Contractor proceeds with any changes in the work or services to be performed.
- As requested, prepare and forward to the Contracting Officer cost estimates for any proposed increase or decrease in the work and/or services to be performed. Obtain certified funds when necessary for proposed increases.
- Perform inspections of completed work and/or services and certify or have certified (by authorized Government officials) acceptance or nonacceptance of work.

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- After completion of work, notify the Contracting Officer when the Contractor has met all terms of the contract and make any appropriate recommendations.

The following authority and responsibilities, when checked below, are hereby delegated to the individual appointed COTR for this contractual action:

- 1. Establish, and provide to the Contracting Officer, a surveillance plan that will ensure receipt of the quantity and kinds of supplies or services required by the contract.
- 2. Perform on-site surveillance in accordance with the surveillance plan. Document surveillance activities and provide a copy of documentation to the Contracting Officer. Assure technical proficiency and compliance with the technical provisions of the contract by review and verification of the performance of the work accomplished by the Contractor.
- 3. For contracts containing the "New Technology" clause, assure that the Contractor is reporting all reportable items of New Technology (any invention, discovery, improvement or innovation).
- 4. For contracts containing the "Patent Rights" clause, assure that the Contractor is reporting all reportable items that are or may be patentable.
- 5. Request the Contracting Officer to authorize Government-furnished property and, when requested by the Contracting Officer, furnishing disposition advice on the Government-furnished property or contractor-acquired property.
- 6. Assure that the contractor has a current facility clearance, as well as other appropriate clearances for contractor personnel to have access to classified material, as soon as it is determined that access to classified material will be required.
- 7. ETC
- 8. ETC

In order to record your actions as COTR, you should set up and maintain a file of letters you may send to and receive from the Contractor and Contracting Officer and memoranda for record of any such non-written actions and/or decisions. This file is considered a segment of the official contract file and should be forwarded to the Contracting Officer at the conclusion of this contract.

This delegation as COTR does not in any way alter or supersede your existing relationship with your supervisor.

This appointment is effective upon its receipt by you and shall remain in effect until closeout and final payment of the assigned contract or until terminated in writing by the appropriate Contracting Officer.

Contracting Officer Signature/Date

ACKNOWLEDGEMENT OF COTR

The COTR must sign and return the original of this document to the Contracting Officer and retain one copy for his/her file.

COTR Signature/Date

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Additionally, every COTR will receive a *Certification of Appointment* similar to the following:

CERTIFICATE OF APPOINTMENT	
Under authority vested in the undersigned and in conformance with Part 1001 of the Department of Treasury Acquisition Regulation	

is appointed	
<i>Contracting Officer's Technical Representative for Department of State</i>	
Based on successful completion of this COTR training _____.	
Appointment effective this ___ day of _____, and shall expire ___ year(s) from this date unless terminated.	
Bureau Chief Procurement Officer/Bureau Head or Designee	No. _____

Large dollar or complex contracts require increased monitoring by the government's quality assurance workforce. Factors such as the contract type, the supply or service being procured, and the COTR's level of experience influence the degree of team involvement needed for effective contract administration. The notification/designation memorandum should reflect this. The designation of a COTR does not change or supersede the established line of authority and/or responsibility of an organization. If the COTR changes, the requirements office must complete a new designation memorandum and the contract modified by the Contracting Officer. The memorandum should indicate that the need for a change in COTR responsibilities. It should delineate the contract number, name of the current COTR and the name of the COTR candidate. This memorandum should also contain the same information required above for the nomination of a COTR.

A substitute COTR may be designated to fill in for the primary COTR. Due to the scope or technical complexity of some contracts, "sub-COTRs" may also be designated for specific aspects of the contract. If sub-COTRs are necessary, they will be appointed by the Contracting Officer, with their authorities and duties included in their designation letter of appointment. Both the COTR and the sub-COTR will acknowledge this letter. Sub-COTRs will be required to meet all of the same requirements for nomination and designation as a COTR. Sub-COTRs will be the responsibility of, and responsive to the COTR.

1.6 STANDARDS OF CONDUCT

In accordance with the "Standard of Conduct", the COTR is prohibited from soliciting or accepting, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other item of monetary value from a person who has, or is seeking to obtain, a contract with the Department or agency. FAR 3.104 provides details regarding violations such as offers or acceptance of bribes, activities related to post-employment by former Government employees, and the release of information related to procurements and other contractor information.

Procurement integrity information is found in FAR Subpart 3.104 and your departmental or agency rules. The COTR should carefully review these provisions and direct any questions in this matter to the Contracting Officer or the appropriate Ethics Officer.

2.1 ACQUISITIONS: AN OVERVIEW

Acquisition is defined in the Federal Acquisition Regulation (FAR) 2.101(b) as “the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated.” The acquisition process results in the issuance of a contractual document. A contract, as defined in FAR 2.101(b), is “a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them.”

In Government contracting, contractors seeking to do business with the Government, submit bids or proposals in response to Government invitations for bid (IFB) or requests for proposals (RFP). When the Government, after bid opening or proposal review and negotiation, chooses a contractor and awards the contract. Government contracts are written documents.

In the Government, the authority to contract is delegated to Contracting Officers. They are the only persons authorized to enter into or modify contracts on behalf of a department or agency, and are responsible for ensuring that contractors live up to their contracted obligations. Contracting Officers may re-delegate in writing only certain limited authority to Contracting Officer Technical Representatives (COTR) to act on their behalf, particularly in providing technical direction to the contractor. COTRs must ensure that they do nothing to infringe upon unique Contracting Officer responsibilities.

2.2 DIMENSIONS OF ACQUISITION

Acquisition can be viewed in four dimensions: the preferred use of commercial requirements, the degree of competition, the method of procurement, and the type of contract ultimately awarded. These four dimensions are interrelated and interactive.

2.2.1 Commercial Item Acquisitions

The preference for the acquisition of commercial items is stated in FAR Part 12. Contracting Officers use commercial item procedures for simplified acquisitions, sealed bidding, and negotiated contracts. Market research is required to plan and prepare for an acquisition. The program office, working closely with the Contracting Officer, has an integral role in gathering this information. Combined synopsis/solicitation can be used when acquiring commercial items, which simplifies the acquisition process and saves considerable time and resources.

2.2.2 Competition in Contracting

It is in the Government's best interests to maximize the use of competition in its acquisitions. Competition is a marketplace condition under which both the buyer and the seller expect that the buyer will have alternate sources of supply. Full and open competition is the most desirable and favored form of contracting. When circumstances make it impossible to obtain full and open competition, or when competition is limited, the program or procurement customer office shall provide the Contracting Officer sufficient information to justify the award of a contract on a sole source basis or with limited competition. Use of an exceptions to full and open competition normally requires an approved "**Justification for Other Than Full and Open Competition**" (JOFOC) for all exceptions except the exception authorized or required by statute. The exceptions are: only one responsible source, and no other supplies or services will satisfy agency requirements; unusual and compelling urgency; industrial mobilization, engineering, developmental, or research capability, or expert services; international agreement; national security; or public interest.

When a program office desires to obtain certain supplies or services by contract without full and open competition, it shall, at the time of forwarding the purchase request, furnish the Contracting Officer with a justification (JOFOC) explaining why full and open competition is not feasible.

2.2.3 Methods of Procurement

The methods of procurement include sealed bidding and negotiations (including simplified acquisitions).

Sealed bidding is an objective, formal method of solicitation based entirely on competition. **An Invitation for Bid (IFB)** is prepared and publicized through FedBizOpps at www.fbo.gov. Prospective bidders prepare and submit bids. The bids are publicly opened at a predetermined time and place, and the amount of each bid is publicly announced. An award is made to the responsible and responsive bidder whose bid is most advantageous to the Government, considering only price and price-related factors.

Most acquisitions in which COTRs will be involved are made through the process of contracting by negotiation. Contracting by negotiation involves the publishing of a synopsis in FedBizOpps. **Solicitations (Request for Proposals)** for negotiated contracts should be structured to provide for the selection of the source whose proposal offers the greatest value to the Government. Offerors then prepare and submit proposals in response to the RFP. These proposals normally consist of a technical proposal and a business or cost proposal. Quality shall be addressed in every source selection with the use of non-cost evaluation factors such as past performance, compliance with solicitation requirements, technical excellence, management capability, personnel qualifications, and prior experience. Once evaluated, the Contracting Officer determines which proposals are in the competitive range.

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After establishing the competitive range, negotiations between the Government and offerors are undertaken with the intent of allowing the offeror to revise its proposal. The Contracting Officer, often with the assistance of a technical team, will evaluate the final proposal revisions.

Offerors that were excluded from the competitive range or from competition may request a debriefing. A written request for a pre-award debriefing must be submitted to the Contracting Officer within three calendar days after receipt of notice of exclusion from consideration. A pre-award debriefing shall not disclose the number or identity of offerors, the content of other offerors' proposals or their rankings, the evaluation of other offerors, and information prohibited under FAR Part 15.

The Contracting Officer is responsible for preparing the final contract document. Before release of this document to the contractor for signature, the Contracting Officer coordinates with all parties to the negotiation to assure that the final document fully delineates the agreement reached at negotiations and is representative of the needs of the program office. An important element of this final phase is to ensure that the schedule anticipated for receipt of supplies and/or services remains accurate.

The Contracting Officer will select or, in complex acquisitions requiring more formal procedures, identify and recommend to the designated **Source Selection Authority (SSA)**, the source whose proposal is most advantageous to the Government, considering only price and the other factors included in the solicitation, and proceed with award. . The source selection decision shall be documented, and the documentation shall include the rationale for any business judgments and tradeoffs made, including benefits associated with additional costs.

Offerors are entitled to a post award debriefing if a request is received by the agency within three calendar days after receipt of notice of award. To the maximum extent practicable, the debriefing must be given within five calendar days of receipt of an offeror's request. The Contracting Officer may determine the best method for debriefing an offeror, whether orally, in writing, or by other method. A summary of the debriefing must be included in the contract file.

It should also be noted that OMB policies emphasize performance based contracting for services, to ensure that the appropriate performance quality level is achieved, and that payment is made only for services which meet contract standards.

2.2.4 Types of Contracts

There are two main types of contracts with many variations. The two families of contracts **are fixed-price and cost-reimbursement**. COTRs need to

understand the characteristics of each major contract type because these can significantly affect contract administration duties. The contract types differ in the amount of risk placed on the Government and the contractor and in the degree of contract administration required.

Firm-fixed-price contracts place maximum risk on contractors, and little or no risk on the Government. The contractor has made a commitment in the contract to deliver all it promised in return for the specified consideration. The Government has the right to receive what it contracted for, at the price it promised to pay. If the contractor fails to perform at the contract price, it is liable for default, which can bring severe additional costs on the contractor. Therefore, the Contractor's incentive to perform according to the terms and conditions of the contract is quite high while the Government's contract monitoring requirements are usually minimized.

In cost-reimbursement type contracts, the contractor's risk is minimal. The Government's risk is commensurately high. It has no guarantee that it will get the specified work. If the work is not completed and the maximum costs have been reimbursed to the contractor, the Government has two choices, sometimes equally unsatisfactory. It can elect to not add funds to the contract and therefore not get any further work, or it can elect to add money to the contract to fund the remaining work.

Given the nature of the work acquired by cost-reimbursement contracts, contractor performance often evolves in ways neither the contractor nor the Government foresaw at the time of award. Because of the high Government risk and the lack of guaranteed performance, cost reimbursement contracts must be monitored far more closely than fixed-price types. The COTR must insure that the contractor is indeed providing its best efforts, and that it is judiciously expending funds and controlling costs.

2.3 FUNDING

Contracting Officers are responsible, before entering into a contract, for ensuring that sufficient funds are available for obligation. In a **fully funded contract**, funds are obligated to cover the price or target price of a fixed-price contract or the estimated cost and any fee of a cost-reimbursement contract.

An **incrementally funded contract** can be provided for progress payments based on costs and payments under cost reimbursement contracts. An incrementally funded contract can also be used for construction, shipbuilding, or ship conversion, alteration or repair, if there are provisions for progress payments based on a percentage or stage of completion. If incremental funding is considered for a requirement, the Contracting Officer will provide additional guidance.

A contract funded by annual appropriations may not cross fiscal years with the exceptions of:

- Contracts calling for end products that cannot feasibly be subdivided for separate performance in each fiscal year (e.g., contracts for expert or consultant services), or
- Basic contracts, options, or orders under that contract for severable services for a period that begins in one fiscal year and ends in the next, for a period of performance not exceeding one year.

As this can have considerable effect on budget management, consult the Contracting Officer for further guidance.

3.1 CONTRACT ADMINISTRATION

To assure performance of a contract in the manner most beneficial to the Government, each department or agency's COTR has the responsibility to actively watch and follow the contractor's performance and take prompt, affirmative action to correct problems. This is one of the most vital elements of what is called "contract administration," i.e., making sure that the terms and conditions agreed upon when the contract was awarded are actually carried out.

The goal of contract administration through the COTR is to ensure that the contract is performed, as written, by both the contractor and the Government. Here the emphasis is on "as written." All government personnel dealing with a contractor must understand that when the Government acts as a party to a contract, its authority to direct the actions of a contractor rest solely in the written words of the contract.

Contract administration begins when the contract has been signed (awarded) and ends with the administrative actions taken at contract closeout, after performance has been completed and the contractor has received final payment. Contract administration covers all the functions and duties listed at FAR Subpart 42.3.

Some of these duties at FAR PART 42.3 include:

monitoring the contractor's technical progress; approving invoices for payment in accordance with contractual terms; reviewing and consenting to subcontracts; monitoring subcontractor performance; controlling Government property; overseeing contract modifications and terminations reviewing purchase, delivery, and task orders; tracking and reporting system and equipment downtime; reviewing value engineering change proposals and recommending appropriate action to the Contracting Officer; evaluating cost and technical proposals submitted as a result of changes or as requested by the Contracting Officer; ensuring contractor compliance with contractual safety requirements; reviewing the contractor's compensation structure; reviewing the contractor's insurance

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plans; reporting to the contracting office any inadequacies noted in specifications; evaluating and monitoring the contractor's procedures for complying with requirements regarding restrictive markings on data; evaluating contractor's request for facilities and for changes to existing facilities and provide appropriate recommendations to the Contracting Officer; monitoring contractor industrial labor relations matters under the contract; performing traffic management services, including issuance and control of Government bills of lading and other transportation documents; ensuring contractor's compliance with quality assurance requirements; ensuring timely submission of required reports; and performing any and all other administrative tasks required by the contract.

Ultimately, the administration of a contract is the responsibility of the Contracting Officer, who is the only person who may modify the contract, or take action to enter into or change a contractual commitment on behalf of the Government. However, the COTR, as a member of the contract administration team, plays an important pivotal role in contract administration as described below.

The COTR must monitor a contractor's progress closely and make known to the Contracting Officer potential problems that threaten performance so that remedial measures may be taken. Contract administration can be simple, or complex and time consuming, depending on the type of contract, contractor performance, and the nature of the work.

3.2 CONTRACT INTERPRETATION **

The prime reference for matters concerning performance is the plain language of the contract document. Government regulations and procedures provide direction and guidance, but they do not alter the written contract terms.

Contracts list the contract clauses applicable to the acquisition (section I). The COTR should have a general knowledge of the requirements of these clauses. Questions regarding contract language should be referred to the Contracting Officer.

Once the contract has been awarded, the COTR's first responsibility is to read and understand the contract, keeping in mind the rules of contract interpretation. Government contracts are subject to essentially the same common law rules of interpretation applied to other contracts. Some of these rules affecting contract administration are:

- The intent of the parties must be gathered from the whole contract.
- The standard for the interpretation of the written contract is the meaning that would be attached to the writing by a knowledgeable, objective third party.
- Specific provisions prevail over general provisions when in conflict.
- A standard clause entitled "Order of Precedence" resolves inconsistencies within the contract provisions by assigning precedence in a specified order within the contract parts.

- An ambiguous provision subject to more than one interpretation will be interpreted against the party responsible for creating it -- in Government contracts this is almost always the Government, as the contract provisions are normally prepared by the Government.

3.3 CONTROLLING TECHNICAL DOCUMENT

Many contract administration problems result from the failure of the controlling technical document (Statement of Work, performance work statement, statement of objectives, specification, or purchase description) to precisely set forth what is required. Where specifications are shown to be defective or make performance impossible, the contractor may be excused for lack of performance or may be entitled to additional compensation if the cost of performance is increased.

Perhaps one of the most important aspects of contract interpretation is the determination of the basic nature of the document. There are two principal types of controlling documents:

- The **performance document** which expresses its criteria in terms of functions to be performed such as degrees of precision or capability levels which are imposed upon the end item (speed of a vehicle, maintenance standards, accuracy of measuring device, ability to withstand environmental conditions).
- The **design document**, which describes what is to be prepared in terms of its physical characteristics (size, shape, and delineation of component parts, wiring diagrams, materials to be used). A design is often specified by inclusion of drawings and parts lists or a sample item which serves as a standard of performance for the item to be delivered

The obligations and responsibilities imposed upon the contractor differ depending upon whether the controlling document is of performance or design nature.

When a design document is used, the contractor is obligated to produce an end item that is physically identical to the items described by the Government design document. Further, the Government design document will include a description of the quality features which are characteristic of the physical item which it wishes to obtain, and the contractor is responsible for achieving that level of quality in the production of the end item. However, when a design document is used, the contractor is not normally held responsible for the design adequacy of the end item the Government has specified. The Government bears the risk of whether the design will fulfill the requirement. For this reason, performance specifications are preferred for most applications.

When a performance document is used (a PWS or SOO), the contractor is responsible for achieving the performance outcome that the Government has specified in its document. This responsibility is different from that if the controlling document were a design document. If the performance document was

properly prepared and did, in fact, express the intended use and degree of performance desired by the Government, the contractor is responsible for the ability of the Government to achieve the performance objectives. In most cases, it is appropriate to transfer this risk to the contractor, since the contractor presumably possesses more expertise in the desired technology than does the Government.

3.4. THE COTR'S ROLE IN CONTRACT ADMINISTRATION

The legal responsibility for administration of the contract rests and remains with the Contracting Officer. The COTR functions as the technical representative of the Contracting Officer and stays in close communication, relaying any information affecting contractual commitments and requirements.

Generally, the Contracting Officer authorizes the COTR to independently perform the following functions:

- Correspond directly with the contractor. (Copies of all correspondence are sent to the Contracting Officer.)
- Conduct on-site visits.
- Hold conferences with the contractor.
- Approve all technical data submitted by the contractor.
- Provide direction to the contractor in technical matters such as:
 1. within the scope of the contract as written, or
 2. will not affect cost, period of performance, or
 3. other terms and conditions of the contract.
- Approve invoices for payment.

In addition to exercising delegated authorities, the COTR is expected to:

- Advise and assist the Contracting Officer in administering the business aspects of the contract -- reviewing vouchers, invoices, reports, and deliverables.
- Maintain a file documenting significant actions and containing copies of trip reports, correspondence, and reports and deliverables received under the contract.
- Coordinate requirements office decisions relating to the contract.
- Prepare final summary statements for contract closeout.

3.5 LIMITATIONS ON COTR AUTHORITY

The COTR shall not direct the contractor to undertake any activity which will change the:

- Total price or estimated cost
- Product deliverables
- Statement of work
- Delivery dates
- Total period of performance

- Administrative provisions of the contract.

All of the above are the sole responsibility of a warranted contracting officer.

3.6 SUPERVISOR'S PARTICIPATION IN CONTRACT ADMINISTRATION

Being designated as COTR places unique demands on an individual and establishes a direct channel of communication between the Contracting Officer and the COTR. The supervisor of an individual who has been appointed a COTR has an inherent responsibility to provide guidance to that individual; however, such guidance should not conflict with the Contracting Officer's letter of designation to the COTR. The supervisor should ensure that the COTR has the personal support, resources, and time needed to perform his/her functions. The COTR's supervisor should also ensure the COTR has had the appropriate training.

3.7 COMMUNICATING WITH THE CONTRACTING OFFICER

The COTR functions as the "eyes and ears" of the Contracting Officer, monitoring technical performance, and reporting any potential or actual problems to the Contracting Officer. It is imperative that the COTR stays in close communication with the contractor and the Contracting Officer, relaying any information that may affect contractual commitments and requirements.

In administering a contract with a small business concern, the COTR must keep the Contracting Officer apprised of any administration concerns the contractor may have. This will enable the Contracting Officer to make every reasonable effort in responding to a small business's request regarding an administration matter within 30 days, as required by FAR.

3.8 POST-AWARD ORIENTATION AND CONFERENCES

Post-award orientation is useful for ensuring that the contractor understands contract requirements and for delineating the roles of Government personnel and the procedures that will be followed in administering the contract. Orientation brings together key individuals (both Government and contractor) who participated in the pre-award phase with those responsible for the post-award administration of the contract. It also affords an opportunity for the orderly transition of contractual duties and obligations if different personnel are to assume post-award responsibility.

In relatively simple acquisitions, a letter from the Contracting Officer that identifies the Government's contract administration officials and any special or unusual requirements may accomplish post-award orientation.

The Contracting Officer may decide that a post-award conference is needed if there are indications that the contractor lacks a clear understanding of the contract requirements, or if the contract work is complex. Face-to-face post-award conferences are highly encouraged. At the Contracting Officer's

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discretion, a post-award conference may be held to explain the rights and obligations of both the contractor and the Government. Conferences may be prudent when awarding to a business that lacks experience in Government contracting; for construction or other complex contracts or for new requirements; or when existing or potential problems may adversely affect contract performance.

If a conference is held, the Contracting Officer will chair the conference. A meeting of the Government administrative team should precede the post-award conference in order to formulate an agenda. The agenda will cover all matters that need to be clarified or otherwise discussed with the contractor to avoid misunderstanding of the contract requirements. Matters the agenda might include are:

- Clarification of the specifications or the contents of the Statement of Work and/or identification of ambiguous clauses.
- Clarification of special contract terms/clauses.
- Reporting requirements and procedures for monitoring and measuring progress.
- Billing, voucher approval, and payment procedures.
- Quality control and testing requirements.
- Discussion of lines of authority, i.e., COTR responsibilities versus Contracting Officer responsibilities.
- Furnishing and control of Government property, if applicable.
- Anticipated problem areas.

A copy of the agenda should be sent to the contractor prior to the conference, to allow the contractor to provide feedback and to participate in the setting of the agenda. The conference should be conducted in a businesslike manner, with the recognition that both parties have an existing contractual relationship and that the purpose of the conference is to promote accurate understanding of the contract, not to alter it.

Post-award orientation of subcontractors is the responsibility of the prime contractor. If it appears desirable for Government personnel to attend a subcontractor orientation conference, Government representatives attending should recognize that the Government has no privity of contract with the subcontractor. All instructions, interpretations, or other contractual dealings with the subcontractor are the business of the prime contractor, unless problems arise that cannot be resolved by the prime contractor.

3.9 STANDARD COTR WORKING FILE

The COTR must set up and maintain a file for each contract under his/her administration. The file's purpose is twofold: to provide easy access to technical contract information and work progress; and, to ease the transition to a new

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COTR, if one is appointed during the life of a contract. Each file must be clearly indexed and must contain copies of the following materials:

- Complete Procurement Request Package;
- Solicitation and any amendments to it;
- Technical and cost proposals (with modifications) submitted by the winning contractor;
- Copy of the contractor's approved work plan, if required;
- Copy of the contract and all modifications to it;
- Copies of all progress reports submitted by the contractor;
- Copies of all correspondence and synopses of telephone calls to and from the contractor;
- Interim and final technical reports or other products;
- Documentation of acceptability/unacceptability of deliverables;
- Documentation of on-site visit results;
- Copies of any memoranda regarding periodic performance affecting payment;
- Copies of all invoices/vouchers and a payment register indicating the balance of funds remaining;
- COTR's final assessment of contract performance; and
- Any other pertinent materials/information.

The COTR shall provide to the Contracting Officer copies of all material that he/she authors. The requirements office is responsible for developing a procedure for the retention or retirement of technical files and products, including the COTR file.

3.10 MONITORING CONTRACTOR PERFORMANCE

3.10.1 Five Elements of Contract Administration

The contractor has primary responsibility for performance of the contract. However, both the Contracting Officer and the COTR have a vested interest in monitoring contractor performance because unsatisfactory performance may jeopardize a project or even an entire program.

It is the COTR's responsibility to ensure that the Government gets what it pays for through good contractor performance. Good performance can be achieved by adherence to the five basic elements of contract administration:

- Assuring that the contractor does the work called for in the contract;
- Assuring performance along the most beneficial lines of effort;
- Assuring satisfactory quality;
- Assuring timeliness of performance; and
- Assuring performance within available funds.

3.10.2 Monitoring Tools Available to the COTR

3.10.2.1 *Inspecting the Work*

The best method for monitoring the contractor's work is through actual inspection. The "Inspection" clause in our contracts gives the Government's authorized representative the right to inspect and test what is being generated under the contract at all stages of performance and wherever the work is being conducted (i.e., both contractor and subcontractor work sites). See Quality Assurance below for more information on inspection and acceptance.

3.10.2.2 *Earned Value Management*

Earned value is an objective measurement of how much work has been accomplished on a project. It is a management technique that relates resources planning to technical cost and schedule requirements. Earned value provides for a balance of management oversight for technical (performance), cost (resources), and schedule (time) program factors.

The major objectives of applying earned value to a contract are to encourage contractors to use effective internal technical, cost and schedule management control systems, and to permit the customer to rely on timely data produced by those systems for determining product-oriented contract status.

Using the earned value process, the management team can readily compare how much work has actually been completed against the amount of work planned to be accomplished. All work is planned, budgeted, and scheduled in time-phased "planned value" increments constituting a cost and schedule measurement baseline.

As work is performed, it is "earned" on the same basis as it was planned, in dollars or other quantifiable units such as labor hours. Planned value compared with earned value measures the dollar value of work planned versus the dollar value of work accomplished. Any difference is called a schedule variance. For additional information on earned value management Google EVM or refer to your own agency guidance.

3.10.2.3 *Reports*

Reports are generally required as a means of evaluating the contractor's work progress and utilization of resources. They are usually divided between a Technical Progress Report and a Financial Status Report. The COTR must ensure that the contractor complies with reporting provisions that are in the contract. The Government may require in the contract document that the contractor provide progress or administrative reports. It must be remembered, however, that the contractor will charge the Government for all reports.

The COTR must read and understand the progress reports to identify and initiate steps to deal with any threats to performance that they may disclose. Failure to read progress reports negates their value. Failure to read them promptly can

diminish or destroy their value. Failure to understand progress reports can also render them useless. If the wording is vague or unclear, The COTR should ask the contractor to clarify what he or she means. The contractor may be trying to gloss over a problem. If the technical content lies outside the COTR's expertise, he or she should seek help from Department personnel who have the necessary technical qualifications to understand what the report is saying.

It is also important to take steps from time to time to check and verify what the reports say especially if couched in general terms. The COTR can ask for copies of drafts, texts, or designs prepared to date, or for other data that should be in existence if work is proceeding according to plan. Cases have occurred in which lower level contractor personnel have intentionally or unintentionally misled their superiors, who signed out a progress report that indicated far more progress than had in fact been achieved.

3.10.2.3.A Technical Progress Reports

The technical progress reports should include all relevant details to provide the COTR with information on the progress of the work. Progress report compares actual to planned performance and indicates the progress made in accomplishing each contract task. The report should include relevant details for assessing the status of performance, i.e., a brief, factual summary description of the technical progress made. The report should not be unduly burdensome to prepare and may submit them in letterform. Technical progress reports may be submitted in letter form and may include the number and names of persons working on the project; the facilities devoted to the work; the number of workdays expended; the direction of the work; and the latest observations, problems encountered, predictions, plans for the next reporting period, and actions required by the Government, if any.

The necessity for writing and analyzing progress reports provides both the contractor and the COTR with an opportunity to periodically evaluate the work in relation to contractual requirements. As the contract progresses, unforeseen technical difficulties may threaten on-time completion of the contract. The progress report should indicate the specific task that is not progressing according to plan; the reasons for the difficulty; specific recommendations for remedial action, and the resources that will be required.

3.10.2.3.B Financial Status Reports

Financial status reports (often used in cost-reimbursement type contracts) provide a means of monitoring the contractor's expenditures and comparing costs incurred with technical progress. Significant differences between technical progress and the expenditure of resources often indicate problems in contract performance. The amount of detailed financial information needed depends on the type of contract, the nature of the work, and the method of payment. Financial reports are especially important on cost-reimbursement contracts for determining contractor progress.

The amount of detailed financial information required will vary, depending on the type of contract involved, the nature of the work or services being procured, and the method of payment. Under a cost reimbursement contract, the contractor is entitled to full and prompt payment for all incurred allowable costs, unless specified in the contract, pending completion of performance. Therefore, cost-reimbursement contracts require close monitoring by the COTR so that the Government does not pay excess costs for the end product either because of a contractor's inefficiency (e.g., missed schedules, unacceptable reports), or as a result of unforeseen problems which, if promptly addressed, could have prevented excess costs.

3.10.2.4 Site Visits

If a contract is large and complex, a site visit may be indispensable to check contractor performance. Site visits should be conducted jointly by the Contracting Officer and the COTR, however as a practical matter; site visits are often delegated to the COTR. A site visit may be necessary to check actual against reported performance; inspect facilities and working conditions; and verify that personnel charged to a cost reimbursable contract are actually performing work under that contract. A site visit is usually arranged in advance with the contractor. Discretion should be used in conducting site visits so that Government personnel will not be perceived as interfering in the contractor's operation.

3.10.2.5 Reviewing Vouchers

Contractors are required to periodically submit vouchers or invoices, i.e., requests for payment. Many contracts instruct the contractor to forward invoices to the COTR, with an information copy to the Contracting Officer. If the contract requires COTR review, the COTR should review the vouchers/invoices to determine the validity of the costs claimed and relating total expenditures to the physical progress of the contract. This is particularly important under cost-reimbursement contracts, where a COTR can sometimes gain evidence of performance problems through examining the contractor's vouchers. If the rate of expenditure during the billing period is unusually high, this may disclose effort to overcome significant obstacles to progress. Information submitted to substantiate or explain costs may throw further light on performance problems. Remember, however, that vouchers alone do not provide sufficient information for tracking financial progress. They should be reviewed in conjunction with the financial status reports.

3.10.2.5.A Questioning the Reasonableness of Costs

Under cost-reimbursement type contracts, the Government is entitled to ask the contractor for information that is necessary to understand whether the charges billed are "reasonable", "allocable", and "allowable" -- the basic tests that the contractor's costs must pass to be reimbursed. If it appears from charges billed that the contractor may be spending more than is reasonably necessary for

certain parts of the work, the COTR should call the contractor for additional explanation or substantiation for those costs. If the additional information fails to establish that the contractor is proceeding in a reasonably efficient way, the COTR should discuss the matter with the contractor to make sure that there is not an equally effective way to get the work done. If agreement cannot be reached, the COTR should consult with the Contracting Officer.

3.10.2.5.B The Right to Disallow Costs

While the contractor is entitled to latitude and exercise of judgment in managing the contract work, the Government has the right to "disallow" and not reimburse the contractor for costs that are unreasonable in nature or amount. This right constitutes a powerful lever for persuading a contractor to manage efficiently. The more the contractor realizes that the Government is keeping a close watch on costs and is ready to raise questions where warranted, the more effective the power to disallow costs will be as an incentive for economical management by the contractor. It should be stressed, however, that only the Contracting Officer could disallow costs. Any questions or problems with a contractor's vouchers should be brought to the Contracting Officer's attention.

3.10.2.6 Technical Direction

A means of directing contractor performance is through "technical direction", a concept used in cost-reimbursement contracts. Because work statements in cost-reimbursement contracts are typically not specific enough in terms of approach or methodology, the Government needs to have the ability to work closely with and guide the contractor along the most beneficial lines of effort. Technical direction constitutes direction by the Government to the contractor as to which areas or lines (within and without changing the description of work) the contractor is to emphasize or pursue.

- Technical direction must not require the contractor to perform work different from that which he or she has agreed to do, nor may it change other provisions of the contract such as: deliverable due dates, total price or estimated cost, total period of performance, or any administrative provisions.
- Whenever the COTR provides technical direction, it must be in writing, with a copy provided to the Contracting Officer. It is good practice to coordinate such direction in advance with the contractor. If the contractor considers the direction an imposition of work that is over and above what the contract requires, the matter should be discussed with the Contracting Officer.

Technical direction is not used in a fixed-price contract, where the contractor properly resists any interference with his/her freedom to perform the contract as he/she chooses, with the objective of minimizing costs of performance and maximizing profit.

3.11 QUALITY ASSURANCE

The FAR, Part 46, prescribes policies and procedures to ensure that supplies and services acquired under Government contracts conform to the contract's quality and quantity requirements. Included are inspection, acceptance, warranty, and other measures relating to quality assurance.

The requirements office is responsible for developing specifications for inspection, testing, and other quality measures to be included in solicitations and contracts. When administering the contract, the COTR is responsible for developing quality assurance procedures, verifying whether the supplies or services conform to contract quality requirements, and maintaining quality assurance records.

The contractor is responsible for fulfilling its obligations under the contract by:

- Monitoring product quality;
- Providing to the Government only supplies and services conforming to contract requirements;
- Performing all inspections and tests required by the contract; and
- Monitoring the quality of materials supplied by vendors.

Although contracts generally make the contractor responsible for performing inspection before tendering supplies to the Government, some specialized inspections are performed solely by Government personnel, e.g., tests that require use of specialized test equipment or facilities and Government testing for first article approval.

3.11.1 Warranties

A warranty is a promise given by the contractor to the Government regarding the nature, usefulness, or condition of the supplies or services furnished under the contract. The purpose of a warranty is to delineate the rights and obligations of the contractor and the Government for defective items and services and to foster quality performance.

The use of warranties is not mandatory. The Contracting Officer determines whether a warranty is appropriate based on the nature and use of the supplies and services, cost, administrative system for enforcement, and trade practice.

3.11.2 Inspection

"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.

It is the COTR's responsibility to determine that the work is complete and conforms to the technical requirements of the contract. Quality assurance inspections may be performed at such times and places as may be necessary to

determine conformance with contract requirements including inspections at the source or at destination.

The COTR must ensure that the work performed under the contract is measured against the Statement of Work. If performance does not meet contract requirements, the COTR must identify deficiencies and advise the Contracting Officer so that remedial action can be taken before final payment and contract closeout.

3.11.3 Acceptance

"Acceptance" means the act of an authorized Government representative by which the Government assumes ownership of supplies tendered or approves services rendered as partial or complete performance of the contract. Acceptance may take place before delivery, at the time of delivery, or after delivery depending on the contract provisions. However, supplies or services are not, ordinarily, accepted before quality assurance actions have been completed.

Acceptance is effected by execution of an acceptance certificate on an inspection or receiving report form or commercial shipping document. The COTR should bear in mind that once formal acceptance has been accomplished; the contractor is excused from further performance. After final acceptance, the contractor can no longer be held responsible for unsatisfactory effort, unless otherwise specified in the contract. Final acceptance of the work by the COTR concludes performance by the contractor, except for administrative details relating to contract closeout.

The COTR must ensure that the work performed under the contract is measured against the work statement. If performance does not meet contract requirements, it is incumbent upon the COTR to identify deficiencies and to recommend changes to the Contracting Officer so that remedial action can be taken before final payment and contract closeout.

3.12 CONTRACT MODIFICATIONS

3.12.1 General

During the life of a contract, it may become necessary to alter the terms of the contract to incorporate new requirements or resolve problems that develop after contract award. When that is the case, the Government must prepare and issue a formal contract modification.

Contract modifications are any written alteration in the specifications, delivery point, date of delivery, contract period, price, quantity, or other provisions of an existing contract.

The only person authorized to modify a contract on behalf of the Government is the Contracting Officer. The COTR has no authority to execute any contract

modifications. The COTR may not obligate in any way the payment of money by the Government or terminate for any cause the contractor's right to proceed.

Generally, there must be "consideration" whenever a contract is modified. "Consideration" is the benefit each party confers upon the other for the modification. The requirement for consideration, as set forth in decisions by the Comptroller General, is that no official of the Government may alter a contract to the prejudice of the Government unless the Government receives corresponding, tangible, contractual benefits. For instance, there is no such thing as a "no-cost" extension to the contract period of performance. If the Government allows additional time for delivery, the "cost" to the Government is its right to delivery by the date originally agreed upon. The law requires the contractor to provide consideration for the Government's giving up that right.

Modifications to a contract affect the interests, rights, and obligations of two independent parties, the Government and the contractor. The responsibility of the Contracting Officer is to preserve the integrity of the relationship between these two parties. The Contracting Officer reviews the action to determine whether it is consistent with the existing contract and to ensure that the equities of the existing relationship are preserved, and will be continued, when a modification is issued and negotiated.

3.12.2. Types Of Contract Modifications

There are two general categories of modifications:

- Unilateral Modifications. Those issued and signed by the Contracting Officer. Unilateral modifications are binding on the contractor.
- Bilateral Modifications. Those established by mutual agreement and signed by both the contractor and Contracting Officer.

3.12.2.1 Unilateral Modifications

3.12.2.1.A Administrative Change

An administrative change alters only administrative details that do not affect the substantive requirements and provisions of the contract - for example, the name of the COTR or the paying office, a telephone number or a funding code, a typographical mistake. It is Government policy that all changes to a contract, whether or not the rights and obligations of the parties are affected, be communicated in writing to the contractor through a modification issued by the Contracting Officer.

3.12.2.1.B Change Order

A change order is a written order that directs the contractor to make changes to the contract as authorized by the "Changes" clause of the contract. This clause allows the Government to alter the work to be performed without the consent of the contractor as long as the change is within the general scope of the contract. It also obligates the contractor to perform the work of the contract as changed.

When a change order is issued, the contractor is obligated to proceed with the work as changed. Such changes may result in an appropriate upward or downward adjustment in the contract price, delivery schedule, or time for performance. If there is an increase in the cost of the work or the time for performance, the contractor must submit a claim for an equitable adjustment within 30 days, and must do so prior to final payment. The contractor is neither to be disadvantaged nor given an unwarranted advantage as a result of the equitable adjustment. Equitable adjustments are reflected in a subsequent bilateral modification.

Disagreements in the content of the change order and the equitable adjustment are subject to settlement under the "Disputes" clause, and nothing in that clause excuses the contractor from proceeding with the contract as changed. This power, unique to Government procurement, allows the Contracting Officer to alter performance without unnecessary interruption and to subsequently determine the appropriate contract adjustments.

3.12.2.1.C Options

Some contracts contain a clause that enables the Government to exercise an option. A contract option can provide the Government a unilateral right to purchase additional supplies or services called for in the contract for a specified time. A contract option can also provide the Government with the right to extend the term of the contract for a specified time. Exercise of the option requires acceptance of the provisions of the option clause and necessary revisions in the contract schedule.

The decision to acquire the option quantity or to extend the term of the contract is primarily the responsibility of the COTR. Options may be exercised only when it is determined that:

- sufficient funds are available;
- the requirements covered by the option fulfill an existing need;
- the exercise of the option is most advantageous to the Government, price and other factors considered; and,
- the option was synopsisized in accordance with FAR Part 5, unless exempted by the FAR.

To exercise an option provided for by a contract's option clause, the COTR must initiate a procurement request in sufficient time to allow for processing of the action -- generally, within 60 days administrative lead time. The request should state the basis for determining that the requirement is still needed and any factors that justify exercise of the option (e.g., need for continuity of operation, cost of relocating Government-furnished property, etc.). The request must also include an approved funds cite to cover the estimated or actual cost of the option.

It is also necessary to revalidate the requirements, as well as to analyze the

current market to establish that exercising the option is in the Government's best interest. The COTR plays a significant role in these functions.

3.12.2.1.D Incremental Funding

An incrementally funded contract is a contract in which the total work effort is performed over multiple time periods and funds are allotted to cover discernible phases or increments of performance. This funding method allows for contracts to be awarded for periods in excess of one year, even though the total estimated amount of funds to be obligated for the contract is not available at the time of contract award.

3.12.2.2 *Bilateral Modifications*

All bilateral modifications are called supplemental agreements. They constitute revisions that add additional work or revise the existing terms of the contract.

Supplemental agreements are used to:

- Provide an equitable adjustment when a change order has been issued pursuant to the Changes clause, Government-Furnished Property clause, or other clauses or special provisions of the contract;
- Change the contract price, delivery schedule, quantity, or other contract terms.
- Modify a contract when the modification is for work that is an inseparable part of the original procurement.
- Finalize the settlement agreement when a contract has been terminated for convenience of the Government.
- Permit the contractor to complete a contract after a non-excusable delay when the contractor assumes liability for actual damages.

3.13 MODIFICATIONS INVOLVING NEW ACQUISITION ACTIONS

Before initiating a modification, it must be determined if the proposed effort is within the scope of the existing contract or is a "new procurement" outside of the scope. A new requirement outside of the scope of the existing contract must be processed as a new procurement.

When a new procurement is contemplated, it should be subject to competition. The Contracting Officer shall ensure that a proposed modification complies with the competition requirements of FAR Part 6 and DEPARTMENTAL REGULATIONS Part 1006. It cannot be awarded to a contractor simply because that contractor has a current contract. If the new procurement is to be awarded noncompetitively, it must be justified as a noncompetitive procurement.

3.14 PROCESSING CONTRACT MODIFICATIONS

Modifications can be initiated by a written request from either the Government or the contractor. When a modification is necessary, the COTR must prepare a procurement request/requisition to document the need for the modification.

Attach, as necessary, the following information:

- The contractor's name and address

- An explanation of the circumstances (who, what, when, where, why) that resulted in the need for the modification
- A full description of the work to be changed or modified
- An Independent Government Cost Estimate, if the modification involves a cost increase.
- The estimated total time necessary to accomplish the required services, if the time must be extended.

3.14.1 Independent Government Cost Estimate

The Contracting Officer, depending upon the circumstances of the particular acquisition will occasionally require detailed cost estimates. The following step-by-step procedures may be used in developing detailed cost estimates:

- Divide the effort into identifiable tasks or logical steps.
- List the categories of labor that will be required in each task or step (e.g., clerical, engineer, and laborer).
- Estimate the hourly cost of each category of labor.
- Estimate the total number of hours for each labor category, by task.
- Multiply the number of hours in each category by the estimate of time required. This will yield the estimated direct labor cost.
- Estimate the amount and type of materials and supplies that will be required and the cost of each.
- Identify any other elements of direct cost that the acquisition may require, such as consultant services, computer rentals, etc., and estimate the cost of these.
- Estimate the travel requirements, if any. Identify the destination, number of people, length of each trip, and total cost of this travel in terms of both transportation and per diem.
- If subcontracting is expected, identify the tasks to be subcontracted and estimate the cost.
- Estimate the amount of overhead that will be charged.

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When all of this information has been collected, a detailed cost estimate can be prepared. The following format may be helpful:

INDEPENDENT GOVERNMENT COST ESTIMATE			
Direct Labor by Category	No. of Hours	Rate	Total
_____	X	_____	_____
_____	X	_____	_____
_____	X	_____	_____
_____	X	_____	_____
_____	X	_____	_____
TOTAL DIRECT LABOR			_____
DIRECT LABOR OVERHEAD (____%)			_____
TOTAL LABOR COSTS			_____
Other Direct Costs			
Travel and Per Diem			_____
Consultants (____ days at \$_____/day)			_____
Materials and Subcontracts			_____
TOTAL OF OTHER DIRECT COSTS			_____
FIXED FEE (____%)			_____
TOTAL (COST PLUS FEE)			_____

13.15 CONSTRUCTIVE CHANGES

The term "constructive change" derives from the verb "to construe" and not from "to construct." A "constructive change" is a situation that can be construed as having the effect of a change order. A "constructive change" arises when, by informal action or inaction by the Government, the contractor's situation is so altered that the effect is as though a change order had been issued.

The following are the most common reasons for the occurrence of constructive changes:

- **Inadequate (latently defective) specifications.** If a specification is defective and a reasonable review prior to preparation of the bid or proposal would not disclose the defect (i.e., the defect is latent), the work is made more difficult for the contractor than would be expected. Adding a work requirement in this accidental manner is tantamount to making a change to the specifications and results in an obligation by the Government to make the same equitable adjustment that that would be made under the Changes clause. The same holds true when defective specifications make performance impossible.
- **Improperly interpreted specifications.** If, during the course of contract performance, questions arise concerning the meaning of the specifications or other contract terms, the contractor is required to inquire of the Government as to the meaning. The Government's interpretation may differ from that of the contractor. Under the Disputes clause, the contractor must comply with any "final decision" of the Contracting Officer. Later, this disagreement may be subject to review by the General Services Administration's Board of

Contract Appeals or a Claims Court. If it is determined that the Government has required more than a reasonable reading of the specifications would require, then the contractor is entitled to an adjustment.

- **Overly strict inspection.** Overly strict inspection presumes that a delivery has been made. The COTR, in the role of inspector, rejects the item and requires corrections that the contractor then makes. If the contractor later makes a claim for the additional work, and it is determined that the initial delivery was not defective, the adjustment will be under the principles of constructive change.
- **Improper technical direction.** Improper technical direction usually is the result of the COTR either not determining the limits of his/her authority or ignoring such limits. Contractors will often comply with improper orders for "free" services to maintain the goodwill of the COTR.

The amount of financial adjustment that should be negotiated under the equitable adjustment process is measured by cost; specifically, the contractor's increased or decreased cost resulting from the change action. The concept of the equitable adjustment includes, in addition to a cost adjustment, an equitable adjustment of profit or fee for the change. The total amount of adjustment should be based upon a measure of the cost impact upon the contractor resulting from the change.

Avoiding Constructive Changes. In order to avoid constructive changes, the COTR should:

- Prepare the SOW and resulting contract with care to remove all ambiguities from the specifications. Take care to be specific when drafting modifications.
- Know the requirements of the contract. Erroneous interpretation of specifications and overly strict inspections often result from a failure by the COTR to know and understand the contract requirements.
- Keep proper records. Be especially careful to document interim and final inspections, and identify specific problems in writing.

3.16 HANDLING UNSATISFACTORY PERFORMANCE

3.16.1 General

In a delinquency or default situation, contractor performance is delayed, inadequate, or both. COTRs must understand the rights and responsibilities of both the Government and the contractor and should not take any actions that might be considered prejudicial to either party.

Two principles govern conduct in these situations. First, when a delinquency appears imminent, prompt action must be taken to protect the Government's rights; and second, in administering a delinquent contract, Treasury personnel should do nothing that might waive the Government's rights.

The COTR should notify the Contracting Officer at the earliest moment when, as a result of monitoring the contractor's progress, it appears that the contractor may become, or is in fact, delinquent. The Contracting Officer will thus be prepared to take formal action dependent upon the facts.

Silence on the part of the Government could be interpreted by the contractor as revised Government expectation of performance, differing from that stated in the contract. This could adversely affect the Government's right to withhold payments, terminate for default, or otherwise exercise certain rights under the contract.

Unsatisfactory performance is often a matter of degree. The Government's actions can be directed towards correcting the unsatisfactory performance. The Government's actions can also be directed towards protecting the Government's interests in the event of the contractor's default.

3.16.2 Initiating Corrective Action

The COTR must take appropriate action to enforce any contract requirements that are not being met. The following are steps the COTR should take if the contractor is not complying with a specific requirement called for in the contract.

- Call the contractor's attention to the discrepancy and seek the contractor's voluntary commitment to remedy the failure. Then follow-up later to see if remedial action was taken.
- If the contractor disagrees that contract requirements are not being met, discuss the matter with the contractor to determine the basis for the contractor's position. Also, discuss the matter with the Contracting Officer to see what course of action should be taken to resolve whether or not the contractor is complying with the contract. If it is clear that the contractor's position has no reasonable basis, direct the contractor to take corrective or other action necessary to meet the requirements of the contract.
- Such directions, if oral, are confirmed in writing, with a copy provided to the Contracting Officer. The giving of such directions is representative of the COTR's primary responsibility of seeing that the contractor does what he/she promised to do in the contract. By the same token, the COTR must not direct the contractor to do anything more than or different from what the contractor agreed to do. Such a direction would violate the limitation placed on the COTR's authority.
- If, however, the contractor fails to comply with a contract requirement within a reasonable time after having been directed to do so, then the COTR may recommend that the Contracting Officer send a letter pointing out the failure of performance and its importance to Treasury, and directing that the deficiency be "cured" within a specified time period -- usually ten days. This letter is called a "cure notice". Such a letter can be beneficial in assuring that top management in the contractor's organization is aware of the problem and in enlisting their support for corrective action.

- If the departure from contract requirements continues, and if it appears that the contractor will not remedy his or her failure to do what the contract requires, then the COTR should consider recommending that the Contracting Officer terminate the contract for default.

3.16.3 Dealing with Delinquencies

A delinquency occurs when a contractor fails to deliver products or make progress in accordance with the schedule set forth in the contract. When an actual or threatened delinquency occurs, the COTR must:

- Promptly notify the Contracting Officer.
- Determine the reason for the delay, and discuss it with the Contracting Officer. Based on the facts, the Contracting Officer will decide if the delay is excusable, and will determine an appropriate course of action.
- If it is decided that the delay is excusable, the COTR should request that the Contracting Officer issue a modification to change the contract period of performance/delivery schedule.
- If the delay is not excusable is attributable to the contractor, and there is no other recourse, the COTR may request the Contracting Officer to terminate the contract for default.

3.16.4 Dealing with a Cost Overrun

A cost overrun occurs when a contractor exceeds the estimated costs or the fund limitation of a cost-reimbursement contract without proper authorization from the Contracting Officer. Cover overruns occur only in cost-reimbursement type contracts, since in fixed-price type contracts, the contractor is responsible for completion of the contract regardless of costs incurred.

When the COTR becomes aware of an overrun situation, he/she should not request or encourage the contractor to continue work. Boards of Contract Appeals have held that such action will legally obligate the Government to reimburse the contractor for keeping on with the work, notwithstanding the "Limitation of Cost" clause limiting the Government's obligation to the stated estimated amount. This constitutes an improper obligation of appropriated funds, i.e., and an unauthorized commitment. The COTR should promptly notify the Contracting Officer and the requirements office. The Government will then assess the situation. The Contracting Officer will terminate the contract for the convenience of the Government before the overrun occurs; modify the contract to decrease the technical effort in order to eliminate the need for additional funding; or, increase the contract funding to permit completion of the work. If it is determined to complete the work and if additional funding is available, the COTR must initiate the Procurement Request Package and submit it to the Contracting Officer for action.

3.16.5 Remedies Available to the Government

3.16.5.1 *Withholding Payments*

All Government contracts contain a clause allowing the Government to withhold payments. A contractor's failure to submit a report or to perform or deliver services or work when required by the contract is a deficiency in performance. The Contracting Officer will generally issue a formal cure notice, which includes a statement that contract payments will be withheld if the deficiency is not "cured" or is not determined to be excusable.

When determination is made to withhold contract payments, the Contracting Officer will notify the contractor in writing that payments have been suspended until the deficiency or failure is cured.

3.16.5.2 *Terminations*

Situations may arise when the work contracted for does not run to completion. Two standard contract clauses are designed to cover this eventuality: the "Termination for Convenience of the Government" clause and the "Default" clause. In commercial item acquisitions, the terms used are "Termination for Cause" and "Termination for Convenience." No matter which type of termination is issued, or the extent of the terminated portion of the work, the decision to terminate is a unilateral right of the Government. Both types of terminations can be either partial or complete; that is, all or any part of the work can be subject to the termination. The contractor must complete the portion that is not terminated. The contractor has no contractual right not to continue with the remaining work.

3.16.5.2.A Termination for Convenience

The "Termination for Convenience" clause gives the Government the right to cancel a contract when to do so is in the Government's best interest, without regard to the contractor's ability and readiness to perform. The contractor assumes this risk under the contract terms.

A termination for convenience requires that a financial settlement be made for the work that has been accomplished under the contract up to the effective date of the termination.

Settlements may be reached through negotiated agreement; determination of the Contracting Officer; and costing out under invoices or vouchers (in the case of costs under cost-reimbursement contracts). The contractor is paid for his or her work on the terminated part of the contract as well as a reasonable allowance for profit on work done and reasonable settlement expenses without profit or fee. The contractor is not paid any profit or fee on work that was not performed before the effective date of termination. Once it is determined that a contract is to be terminated, the Contracting Officer initiates the termination immediately to preclude the further incurrence of cost.

Following the termination, the Government and the Contractor may need to reach

an agreement on an equitable settlement. The Contracting Officer evaluates the contractor's settlement claim and establishes the Government's position with respect to the various elements of cost or price included. A cost or price analysis must be performed and, in some cases, the contractor's books and records must be audited. A memorandum documenting the negotiations must be placed in the contract file.

3.16.5.2.B Termination for Default

The "Termination for Default" clause allows the Government to terminate the contract when the contractor fails to make progress or to perform any other contract requirements within the period specified by the "cure notice."

Terminations for default usually occur in fixed-price contracts.

Fixed-price contracts may be terminated for default if the contractor fails to make delivery of the supplies, or to perform the services within the time specified in the contract; perform any other provision of the contract including public policy provisions (such as equal employment opportunity standards); or, make sufficient progress to ensure timely or successful performance of the contract. In the first instance, the notice of Termination for Default may be issued immediately. In the latter two cases, however, the Contracting Officer issues a "show cause" or "cure notice" to the contractor, citing the failure and allowing at least 10 days for the contractor to submit a plan to cure the problem. If the contractor's plan does not offer a reasonable solution to the problem, the contractor may then be defaulted for failure to perform. FAR Part 49 describes the procedures, factors, and contents of notices to be considered when such actions are taken.

With respect to excusable delays, the default clause in fixed-price contracts states the general reasons that may excuse a contractor's delay in performance. For example, a delay is excused when it is caused by a factor beyond the contractor's control and is not his/her negligence. Examples of possible excusable delays include acts of God (fire, flood, etc.), acts of the Government, and strikes. Delays arising from excusable causes are not excused beyond the time the excuse continues to prevent performance. A situation might arise, for example, when a month's delay in delivery or performance is excused, but the contractor's own action and negligence causes a second month's delay. In this case, the right to terminate for default would not be lost with respect to the second month's delay.

When a fixed-price contract is terminated for default, the contractor is not entitled to compensation for work performed prior to the termination and not yet accepted by the Government, and the Government is entitled to repayment of any advance or progress payment that applies to such work. The Government may, however, order the contractor to deliver any completed or partially completed work produced or acquired for the terminated part of the contract. The contractor must protect and preserve any property in which the Government has an interest (as

directed by the Contracting Officer) and is entitled to compensation for any expenses involved.

Right to buy against account of defaulted contractor. When a fixed-price contract is terminated for default, the Government may repurchase the same or substantially similar items/services to those the contractor was to furnish and hold the terminated contractor liable for the excess costs of the replacement procurement. However, procurement action must be initiated as soon as practicable after the default termination and at as reasonable a price as possible, considering the quality and time factors.

With respect to handling terminations on cost-reimbursement type contracts, the provisions for default termination contained in cost-reimbursement type contracts are part of the general "Termination" clause, which covers both convenience and default terminations. Excusable contractor delays are described in a separate clause entitled "Excusable Delays." The distinction between a default and a convenience termination is not so great under a cost-reimbursement contract as it is in the fixed-price situation. When a cost type contract is terminated for convenience or for default, the contractor receives all allowable costs incurred up to the time of termination, and he or she is not liable for procurement costs if the Government purchases replacement supplies or services.

3.16.5.2.C Termination for Cause

This clause used in commercial items contracts allows the Government to terminate a contract, or any part of a contract, for cause in case of default by the contractor. It also applies if the contractor fails to comply with any of the contract's terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. Upon termination for cause, the Government is not liable for any supplies or services not accepted. The contractor shall be liable to the Government for all rights and remedies provided by law. However, if it is decided that the Government improperly terminated this contract for default, the termination will be deemed a termination for convenience.

3.16.5.2.D Alternative Dispute Resolution

Alternative Dispute Resolution (ADR) is a means of resolving issues in dispute without resorting to litigation. The aim of this procedure is to expedite controversial issues as inexpensively as possible. In a situation calling for ADR, the Contracting Officer will direct the COTR as to what assistance is needed.

3.17 CONTRACT DISPUTES AND APPEALS

3.17.1 Contract Disputes

No matter how carefully a contract is negotiated and written, because of the complexities of the Government contracting process, disputes may arise. The

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Disputes clause included in all Government contracts is designed to prevent disagreements between the Government and the contractor from disrupting performance under the contract (See FAR Part 33 and your own DEPARTMENTAL REGULATIONS).

The Contracting Officer has decision-making powers for resolving many contractual matters. If agreement can be reached between the two parties (Government and contractor) with regard to equitable adjustments pursuant to contract clauses; additional reimbursement for extra work performed; or refunds required under the Inspection or other contract clause; a bilateral agreement may be negotiated.

If the parties cannot reach agreement, these issues and other disagreements are resolved under the procedures set forth in the Disputes clause. The Disputes clause provides that:

- The contract is subject to the **Contract Disputes Act** of 1978 (PL 95-563; 41 U.S.C. 601-613).
- The Contracting Officer's decision is final unless the contractor appeals or files a suit as provided in the Act.
- The authority of the Contracting Officer under the Act does not extend to claims or disputes which by statute or regulation other agencies are expressly authorized to decide.
- A claim by the contractor shall be made in writing and submitted to the Contracting Officer for a written decision.
- For contractor claims of \$100,000 or less, the Contracting Officer must render a decision within sixty days; for claims in excess of \$100,000, the Contracting Officer must decide the claim within sixty days or notify the contractor of the date when the decision will be made.
- A claim by the Government against the contractor shall be subject to a written decision by the Contracting Officer.
- Interest on the amount found due on contractor claims is paid by the Government from the date the claim is received by the Contracting Officer until the date of payment.
- Except, as the parties may otherwise agree, pending final resolution of a claim by the contractor arising under the contract, the contractor must proceed diligently with the performance of the contract in compliance with the Contracting Officer's decision.

3.17.2 Appeals

The contractor may appeal the Contracting Officer's final decision to the Board of Contract Appeals within ninety (90) days of receipt of the decision, or, within twelve (12) months of receipt of the decision, to the U.S. Claims Court. If he or she fails to do this, the decision concerning a question of fact becomes final. The COTR must provide any support, assistance, and documentation required for resolution of a dispute to the Contracting Officer upon request.

3.18 ADMINISTERING OBLIGATIONS OF THE GOVERNMENT UNDER THE CONTRACT

3.18.1 General

The Contracting Officer depends on the COTR to see that Government obligations to the contractor are fulfilled. A person appointed as COTR should take the time at the outset to go through the contract to identify actions the Government must take to discharge its obligations to the contractor.

3.18.2 Processing Vouchers/Invoices

Government contracts contain a Prompt Payment clause that requires that payment be made within 30 days of acceptance of goods or services or the date of the designated billing office's receipt of a proper voucher, whichever is later. The Government pays interest if the 30-day deadline is not met.

Many contracts instruct the contractor to send all vouchers/invoices to the COTR with an information copy to the Contracting Officer. In those cases, the COTR is responsible for reviewing the vouchers/invoices to determine the validity of the costs claimed and relating total expenditures to the physical progress of the contract.

Because of the Prompt Payment Act implications, the COTR must review vouchers/invoices promptly and either approve them or, if the invoice is to be disputed, return the invoice to the contractor within seven (7) days. If an interest penalty is owed to the contractor, the penalty is absorbed within the funds of the requirements office for which the penalty has occurred. The unavailability of funds to make a timely payment does not relieve the obligation to pay interest penalties.

3.19 GOVERNMENT PROPERTY

The COTR should examine the contract at the outset to see what, if any, data, equipment, or other property the Government has agreed to furnish the contractor. If property is to be furnished, the COTR should:

- Find out what date, if any is specified in the contract for delivering the property to the contractor; and, if no date is specified, find out when the contractor will need it in order not to impair his or her ability to meet the contract completion date.
- Find out where the property is and see that arrangements are made to get it to the contractor on time.
- Find out whether the property is in proper condition for use as intended. The sooner this is ascertained, the sooner repair, correction, or other action can be initiated on an informed basis rather than discovering the problem later when it is too late to avoid delaying contract completion.

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- Find out whether there are any special instructions or limitations regarding use of the property. If such instructions exist, see that they are furnished to the contractor along with the property.

The "Government Property" clause imposes a number of obligations on the contractor with respect to Government-owned property that has been placed in the contractor's possession for performing a contract. The COTR should become familiar with all of the provisions of the clause to assure that the contractor is meeting these custodial obligations, including the duty, upon completion of the contract, to return or otherwise dispose of the property in accordance with the Government's instructions.

When Government property is required for performance, the COTR must submit to the Contracting Officer a written request for delivery to the contractor. The request will be forwarded to the Contracting Officer regardless of the source of the property. The Contracting Officer will normally approve transportation costs as a reimbursable item under cost-reimbursement contracts on which the property is assigned. In these cases, shipment will be authorized on a commercial bill of lading.

Each request for Government-furnished property will identify the items to be furnished, serial number, date required, the name and address of the person to receive the property, the name of the contractor, contract number, and the contractor's need for the equipment in performance of the contract. Only the Contracting Officer shall make authorization for delivery of Government-furnished property.

The COTR will be responsible for furnishing recommendations to the Contracting Officer for the disposition of Government-furnished property in the hands of the contractor. Before recommending storage for potential future use, consideration will be given to packaging, packing, transportation, and storage.

There may be occasions under cost-reimbursement contracts wherein the contractor must acquire property for use in completing the contract. In such situations, the COTR is required to ensure that such property is used for the intended purpose and, if applicable, is returned to the Government in reasonable condition upon contract completion. In some cases, the contractor may purchase the equipment/property, and therefore title remains with the contractor unless the contract states otherwise.

The contractor may be authorized to use the property on other Government contracts and on commercial work. The contractor is usually charged rent when Government property is used on commercial work. The contract auditor should subject the rent payments received from the contractor to periodic audits.

The contractor is responsible and accountable for all Government property in

their possession. Therefore, the contractor must keep accurate records of that property. The COTR shall verify the contractor's inventory of Government property periodically as directed by the Contracting Officer.

Unless summary records are authorized, the contractor's records shall provide the following information, regardless of value:

- The name, description, and National Stock Number (if furnished by the Government);
- Quantity received (or fabricated), issued, and on hand;
- Unit price and unit of measure;
- Contract number or equivalent code designation;
- Location of the property;
- Disposition; and
- Posting reference and date of transaction.

Summary records are normally maintained for special tooling, special test equipment, and plant equipment costing less than \$5,000 per unit.

3.19.1 Government Promises to Furnish Information or Property

Once the Government identifies property in the contract that it must furnish to the contractor, the Government may become subject to a claim by the contractor for adjustment of the contract's terms if:

- The property is not furnished to the contractor by the date agreed to in the contract, or, if no such time was specified, by a sufficiently early date to permit the contractor to finish the contract work by the agreed completion date;
- The property is not furnished in a condition suitable for the intended use of the property (e.g., poor copies where data is only partly legible); or,
- If proper use of the property depends on knowledge or possession of related information concerning techniques or conditions of its use, and the Government fails to provide such related information as the contractor requests and it is reasonably required to enable the contractor to use the property effectively for its intended purpose.

The contractor's right to claim contractual adjustment in these circumstances is granted by standard contract clause language that is required to be included in contracts that involve the furnishing of Government property for the contractor's use. An example of such language is the "Government Property" clause. The contract adjustments that the contractor is entitled to claim include adjustments to extend the time for completion of the contract as well as adjustment to increase the estimated cost of and fixed-fee for the work.

3.19.2 Reports of Government Property

The contractor shall report annually the total acquisition cost of Government property. This also includes property being used by subcontractors. This information must be provided to the Contracting Officer with comments from the

COTR.

3.20 TRAVEL BY CONTRACTORS

The COTR will ensure that travel to be performed by a contractor is authorized in the contract in accordance with FAR Subpart 31.2 and the Federal Travel Regulations (FTR). The COTR will review for allowability; contractor submitted documentation substantiating actual costs for all travel expenses incurred under a contract that permits reimbursable travel.

In evaluating contractor documentation of actual travel costs, at a minimum, the COTR will ensure that:

- Travel proposed is essential to the effective performance of the contract;
- The contractor and any subcontractor(s) are limiting daily per diem rates to the rates prescribed by the General Services Administration (GSA) in the FTR;
- The contractor and any subcontractor(s) have screened reimbursable travel to void nonessential participation in conferences, meetings, or conventions; and,
- The contractor and any subcontractor(s) are not using airfares above the coach level.

3.21 THE GOVERNMENT'S OBLIGATION NOT TO INTERFERE WITH THE CONTRACTOR'S PERFORMANCE

It is a fundamental principle of contract law that the Government has an obligation not to interfere with or unreasonably delay the contractor in the performance of the contract. This principle will apply whether or not it is reflected in a contract clause. The COTR should always keep in mind the need to act so as to respect the contractor's rights to proceed without unreasonable hindrance by the Government. Violation of this basic duty constitutes a breach of contract for which the contractor is legally entitled to recover from the Government the amount of any damage he/she has suffered by reason of the breach.

The Government violates this basic duty by such actions as denying the contractor access to Government premises on which some or all of the contract work must be performed, or by directing the contractor to stop work, pending resolution of questions as to the best way to proceed, where the contractor has not agreed that the Government may suspend performance. The Government also violates its basic duty by unreasonably delaying approvals or consents that the contract requires the contractor to obtain before proceeding with actions necessary to perform the contract. Examples of such approvals or consents include approvals of work to date, or of plans for the next phase or work, that are required as a condition precedent to proceeding with the contract work; and, required Government consent to subcontracts.

To some extent, standard contract clauses recognize this basic principle. For example, the "Inspection" clause expressly states that all Government

inspections and tests shall be so conducted as not to "unduly" delay the work. The "Excusable Delays" clause for cost-reimbursement type contracts provides for revision of the delivery schedule if the Contracting Officer finds that any failure in performance was due to causes beyond the control and without the fault or negligence of the contractor. One of those causes is identified as "acts of the Government in either its sovereign or contractual capacity".

3.22 SECURITY

If contract performance involves access to classified information by contractor personnel, a security clause will be included in the contract. The COTR will be responsible for administering the security aspect of the contract in accordance with the Department of Treasury Security Manual, TD 71-10.

3.22.1 Access to Classified Information

The COTR determines that during pre-award whether access to classified information is necessary for the contractor to perform. The COTR ensures that the DD Form 254 is properly completed and distributed. In monitoring the contract, if the original Form 254 did not cover the full span of the contract, or, if the contract is modified in such a way that the security requirements are changed, the COTR shall ensure that the form is updated prior to its anniversary date.

3.22.2 Request for Classified Documents

The COTR will evaluate all requests for classified documents. Requests received by the Contracting Officer will be forwarded to the COTR for certification of the need-to-know and transmittal to the Treasury or bureau security office for approval.

3.22.3 Request for Classified Facility Access

The COTR shall review all requests for classified facility access by contractors who do not already have a facility security clearance, and when the situation requires access, provide the requests directly to the bureau security office. All requests must include the names of the personnel actually involved in the classified aspects of the contract and the required security classification level, the proposal or contract number, and title of project requiring the access, and reason(s) for the access.

COTRs shall also ensure that visit authorization requests are received from contractors in advance of contractor visits to bureau facilities.

3.22.4 Identification/Building Passes for On-Site Contractors

Every contractor employee working on-site must have an identification/building pass. The COTR is responsible for the issuance of security badges to contractor personnel. The contractor is required to submit an application to the COTR in the form prescribed by the COTR. A letter must also accompany the application on company letterhead that contains the following information:

- The purpose for which the pass is being requested;
- The type of access the applicant requires;
- Whether or not the applicant has a valid security clearance; and,
- The contract number and period of performance of the contract.

The COTR shall review the application and either approve or disapprove it. The COTR must maintain a list of building passes issued, by contract employee name, social security number, and building pass expiration date. The COTR must ensure that the contractor returns to him/her all building passes upon expiration of the contract, when employment of the contract employee is terminated, or when the employee no longer has a need for access to the Treasury facility. The list must also indicate the date on which the pass was returned. The COTR must notify the applicable security office of the contract's expiration. Notification shall be in writing, stating the date of contract completion, the company's name and contract number, and the employee no longer needing access. A copy of the memo shall be forwarded to the Contracting Officer.

3.23 ADMINISTERING SUBCONTRACTS

FAR Part 44 contains subcontracting policies and procedures for administering Government contracts, i.e., approval or consent to subcontracts; review and approval of a contractor's make or buy programs; and evaluation, review, and approval of contractor purchasing systems.

In the case of a prime contract, the Government is the buyer and the contractor is the seller. However, when the contractor awards subcontracts, the contractor becomes the buyer and the subcontractor becomes the seller. The prime contractor and the Government have a direct legal relationship. No such direct legal relationship exists between the Government and the subcontractor.

The prime contractor, not the Government, is responsible for administering subcontracts (except with regard to 8(a) contracts). Even in acquisitions where the contract specified that the Government has a right to review and approve subcontracts, no direct legal relationship between the Government and the subcontractor is established.

FAR 44.202 requires that the Contracting Officer and COTR consider the following when contemplating consent for a prime contractor to enter into subcontracts:

- Is the decision to subcontract consistent with the contractor's approved make-or-buy program, if any?
- Is the subcontract for special test equipment or facilities that are available from Government sources?
- Is the selection of the particular supplies, equipment, or services technically justified?
- Has the contractor complies with the prime contract requirements regarding small business subcontracting, including, if applicable, its plan for

subcontracting with small, small disadvantaged and women-owned small business concerns?

- Was adequate price competition obtained or its absence properly justified?
- Did the contractor adequately assess and dispose of subcontractors' alternate proposals, if offered?
- Does the contractor have a sound basis for selecting and determining the responsibility of the particular subcontractor?
- Has the contractor performed adequate cost or price analysis or price comparisons and obtained accurate, complete, and current cost or pricing data, including any required certifications?
- Is the proposed subcontract type appropriate for the risks involved and consistent with current policy?
- Has adequate consideration been obtained for any proposed subcontract that will involve the use of Government-furnished facilities?
- Has the contractor adequately and reasonably translated prime contract technical requirements into subcontract requirements?
- Does the prime contractor comply with applicable cost accounting standards for awarding the subcontract?
- Is the proposed subcontractor on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs?

When the Government buys the services of a contractor it is buying, along with other services, the contractor's management capabilities. It is the prime contractor's responsibility to ensure the performance of its subcontractors. However, the contractor's purchasing system and administrative procedures can be reviewed by the Contracting Officer or audit personnel to determine the effectiveness of the contractor's management of subcontracts.

3.24 FINAL EVALUATION AND CLOSEOUT

3.24.1 General

A contract has been completed when all services have been rendered, all articles, material, and reports have been delivered and accepted; administrative actions accomplished; and final payment made to the contractor.

Contract closeout actions are primarily the responsibility of the Contracting Officer. However, the assistance of the COTR is necessary to certify that all services have been rendered satisfactorily and all deliverables are acceptable. In the case of consulting contracts, the COTR must complete an "assessment report" regarding the contractor's performance.

Upon completion of the contract, the Contracting Officer must ensure or determine, as applicable, that:

- All services have been rendered;
- All supplies have been delivered and accepted;

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- Required evaluations of contractor performance have been completed and documented;
- All payments and collections have been made;
- Releases from liabilities, obligations, and claims have been obtained from the contractor;
- Assignments of refunds, credits, etc., have been executed by the contractor;
- All administrative actions have been accomplished, including the settlement of disputes, protests, and litigation; determination of final overhead rates; release of funds; and disposal of property, etc.; and.
- The file is properly documented.

3.24.2 Contractor Performance Evaluation

FAR 42.15, *Contractor Performance Information*, sets forth the policies and responsibilities for evaluating contractor performance for contracts exceeding \$100,000. This past performance information is required for future source selection purposes. The COTR should communicate with the Contracting Officer in establishing the past performance evaluation requirement. The COTR will provide the Contracting Office with performance evaluations for assigned contract.

Contracts awarded to Nonprofit Agencies Employing People Who Are Blind or Severely Disabled, and the Federal Prison Industries in accordance with FAR Subparts 8.6 and 8.7, are exempt from the mandatory past performance requirement.

The Department of the Treasury and many other agencies use the National Institutes of Health's (NIH) contractor performance system (CPS). Acquisition staff input pertinent contractor performance information to CPS for contracts exceeding \$100,000. Except for contracts with UNICOR (Federal Prison Industries) and the Javits-Wagner-O'Day (JWOD) Program, FAR Subpart 42.15 requires that any contract regardless of type and method of award have "an evaluation of contractor performance (prepared for each contract in excess of \$1,000,000 (regardless of the date of contract award) and for each contract in excess of \$100,000 beginning not later than January 1, 1998 (regardless of the date of contract award), at the time the work under the contract is completed. In addition, interim evaluations should be prepared as specified by the agencies to provide current information for source selection purposes, for contracts with a period of performance, including options, exceeding one year." Typically, contracts with multiple option years should have annual performance evaluations prior to exercising each option.

Training for new CPS users can be arranged through your procurement office. Information regarding CPS can be obtained at <http://cps.od.nih.gov>.

3.24.3 Final Evaluation

When the contract expires, the Contracting Officer will send the COTR a memorandum, requesting completion of closeout documentation. The documentation will consist of a completion certificate, a contractor evaluation, and a final payment and closeout certificate.

3.24.4 Contract Closeout

After the Contracting Officer receives the COTR's closeout documentation supporting the fact that all materials, supplies or services have been properly received and paid for, he/she will initiate administrative closeout actions, e.g., *requesting final audits, negotiating final settlements, etc.* The COTR must assist the Contracting Officer with respect to providing information and/or recommendations, as required by the CO.

Contract closeout is necessary for both firm fixed priced contracts and for all cost reimbursement contracts to ensure that Government funds were properly expended, excess funds are deobligated, Government property, if used, is properly returned, contractor releases from further claims are obtained and the contractor's performance is rated for future Government use. Failing to complete contract closeout in a timely manner increases the staff time needed to complete the closeouts because the passage of time makes it more difficult to obtain the necessary information. Your agency should have it's own prescribed forms and formats for closing out contracts.