CHAPTER 14

Administration of Contracts for Construction, Alteration, and Repair Work

This Chapter

- Discusses activities conducted after award but prior to the actual commencement of work (Section 14A)
- Discusses day-to-day contract administration and high-lights the source of the more critical contract administration functions (Section 14B)
- Identifies sources of problems in construction contract administration and discusses the actions which may be taken to solve them (Section 14C)
- Defines specific responsibilities of the Purchasing Agent with regard to administration and enforcement of labor standards provisions (Section 14D)

Cross-References:

- Chapter 10 discusses the acquisition of construction, alteration, and repair work.
- Chapter 13 discusses administration of non-construction contracts.

SECTION 14A

POST-AWARD ACTIVITIES

INTRODUCTION

Ideally, upon contract or purchase order award the parties to the agreement carry out their respective responsibilities for performance with little or no change to the agreement and in full compliance with all of its terms and conditions. The ideal seldom if ever takes place in the execution of construction work because of the many variable factors which influence performance of the work. This section deals with some of these variables through a discussion of day-to-day contract administration practices and procedures, extraordinary actions and remedies, and administrative procedures applicable to the enforcement of the Labor Standards.

With few exceptions, the contract administration function can be directly related to the functions typically performed by technical personnel and by Purchasing Agents. In this regard it should be remembered that on-site, day-to-day surveillance of the contractor's activities is the primary responsibility of technical personnel. Technical personnel who perform this function must therefore be fully familiar with the terms of the contract agreement and with the limits of their authority. Matters pertaining to extraordinary actions, on the other hand, are strictly within the realm of the Purchasing Agent's responsibilities. See Exhibit 14A (i) “Notice of Award” letter.

PRE-CONSTRUCTION CONFERENCE

To assure the contractor's understanding of the contract terms and work site conditions, the FAR requires a post-award conference (also referred to as a "pre-construction conference" in construction contracts) to be conducted when the appropriate factors listed in FAR Subpart 42.5 apply.

Government solicitations can be substantial documents. Presumably the government knows all along exactly what it is that needs to be done; presumably the contractor made itself aware of the government's requirements prior to submitting its offer. These presumptions are not always warranted. Even if bid, proposal, or quotation preparation time was sufficient for the contractor to have acquainted itself with all facets of the solicitation, some aspect may have been overlooked or misinterpreted. The contractor may even have been aware that its own personnel had unresolved questions when the quote or offer was submitted; but, in its desire to secure the business, the risks associated with misunderstanding were considered acceptable. The post-award conference provides the government opportunity to clarify its needs and the contractor's obligations under the contract. Through this, a number of potential problems may be avoided. The conference may also be used to acquaint the contractor with the government policies and procedures that are to be observed during the performance of the work (special mention needs to be made of Davis-Bacon requirements), to develop mutual understanding in regard to the administration of the contract, and to answer any questions the contractor may have.

The Purchasing Agent is responsible for making all the arrangements for the conference, including setting the date, time, meeting place, agenda, and attendees of the meeting unless these tasks have been assigned to the engineer responsible for the project. In that case, the engineer responsible for making the arrangements for the conference must, after becoming familiar with the project plans and specifications, meet with his or her staff and/or other government representatives assigned to the project. At this time, an agenda can be developed and all divergent government views on the items to be discussed can be reconciled. A list of items to be covered in the conference should be developed based upon the considerations set forth in FAR 42.502. The following persons should attend the conference:

- A principal of the prime contractor firm
- The prime contractor's superintendent
- A representative of each of the principal subcontractors (if prime contractor agrees)
- The Purchasing Agent
- The engineer
- Other personnel whose participation is desirable

After or during the conference it is often useful to have an informal visit at the work site. This visit can uncover problems which may occur during contract performance (e.g., coordination between contractor and using agency activities, delivery of materials, parking, storage, power, heat, lighting). See Exhibit 14A (ii) "Pre-construction Conference Agenda and Sign-In Sheet".

NOTICE TO PROCEED

A purchase order, delivery order, or contract may state that the contractor cannot begin actual work at the site until a Notice to Proceed is issued by the government. (Normally, notices to proceed are used in formal contracts). The primary purpose of the notice to proceed is to permit scheduling of the work area by the government and to provide the government with the time necessary to make government-furnished property, if any, available to the contractor who received the award. The notice to proceed should be sent only after all actions required by the government have been accomplished. Because the performance period starts upon receipt of the notice, the notice to proceed should be sent by registered mail, return receipt requested, to establish the date of receipt.

However, the doctrine of apparent authority does not apply against the Federal Government. Those contracting with the government have the duty of ascertaining the authority of a government agent. The United States is not bound by acts of unauthorized agents or agents acting beyond the scope of their authority, but in a number of cases where government technical personnel have issued instructions or interpretations which induce a contractor to perform extra work, courts and boards have held that contractors are entitled to reimbursement. See Exhibit 14 A(iii) "Notice to Proceed" letter.

ROLE OF THE CONTRACTING OFFICER'S REPRESENTATIVE (COR)

CORs hold a unique position in government contracting. The COR is the sole point of contact for the issuance of technical direction under a specific contract or task order. Their primary functions are to regulate, evaluate, and inspect contract work as it progresses, and to recommend final acceptance of completed work. Performance of these functions involves dual responsibilities: first, for ensuring that technical specifications and plans are met; second, for ensuring that the contractor complies with the *express terms and conditions* of the contract.

CORs hold a position of trust and responsibility. Purchasing Agents must rely heavily on their judgment in several areas, including inspection and acceptance of workmanship and materials, approval of payments, and provision of information or recommendations on any problems that arise in the day-to-day administration of a project.

Limitations On the COR's Authority

The Purchasing Agent's written COR delegation will state that the COR is directly responsible to the Purchasing Agent for the administration of the contract, with the specific authorities and within the specific limitations stated in the written delegation. In all cases, the Purchasing Agent will reserve the right to make decisions on questions of fact in dispute and the right to make contract amendments and modifications that involve adjustments in price and duration.

The COR does not have the authority to take any action, either directly or indirectly, that would change the pricing, quantity, quality, place of performance, delivery schedule, or any other terms or conditions of the basic contract.

It is important to note that it is the Purchasing Agent who is responsible for contractual changes and modifications that affect the *business relationship* between the parties. In the final analysis, the Purchasing Agent is responsible for including and implementing diverse contractual terms and conditions, analyzing costs, auditing the contractor's books and records, and in general defining and maintaining the legal relationship between the government and the contractor. Consequently, it is important that the COR and other technical specialists guard against taking any actions which violate the authority delegated to them by the Purchasing Agent. The COR may incur personal liability to the contractor for costs the contractor incurred as a result of unauthorized actions by the COR or because of the inability of the government to reimburse the contractor for its costs in the situation.

Official designation of a COR is necessary when: (1) technical direction is to be provided under a contract, (2) task orders are to be used to direct contract performance, or (3) the contract requires unusual or extensive monitoring beyond the capabilities of the Purchasing Agent.

Duties of the COR

Exhibit 14A(iv), at the end of this chapter, provides instructions for the most significant duties CORs must perform in the administration of contracts for on-site services. See Exhibit 14A(v) “Contracting Officer’s Representative (COR) Appointment Letter”.

REVIEWING THE CONTRACT REQUIREMENTS

Once a contract has been awarded, the first task in administering it is to review the requirements and the specific obligations of both the contractor and the government. These requirements and obligations are set forth in the contract itself, largely in the specifications. Even where CORs have themselves written the specifications, they should make a thorough review of the entire package.

It is a basic rule of contract law that the *obligations of the parties* the government and the contractor *are established and governed by the language of the contract*. During negotiations, each party may have made a number of different proposals, but what counts is what was finally agreed to by both parties. After the contract is signed, it is presumed that the contract expresses what was agreed to. If one party, the contractor or the program office--has an intention contrary to what is reflected in the contract language, that intention normally has no legal effect. The words of the contract are taken to mean what they actually say, not what one of the parties meant to say.

When reviewing the awarded contract, the primary concern is with the end results. Unless the contract is formally modified, the Purchasing Agent and his or her representatives can require the contractor to do only those things provided for in the contract. Further, the contractor is generally required to deliver only the level of quality provided for in the contract. With a contract for equipment or supplies, the results are usually straightforward: The contractor delivers the equipment or supplies, the delivery is inspected, and the product is either accepted or rejected. When a contract is for services or research, determining results is much more complex. The government is acquiring the effort of the contractor; there is a need to know what kind of effort has been bought, what the required result is, and what standards of quality have been incorporated into the contract.

PREPARING A CONTRACT ADMINISTRATION CHECKLIST

The COR should make a checklist for each of the major tasks under the contract. These tasks appear as line items on a schedule or specific statements within the specification. If the specification is relatively general, some analysis may be necessary to define what specific tasks are required for successful contract completion.

The checklist of major tasks will serve two main purposes: (l) providing a baseline for project monitoring and scheduling and (2) providing a simple reminder sheet for determining the extent of contract completion. The list will also be helpful in post-award orientation.

For each task required by the contract, the COR should list the important administrative requirements. These include deadlines, deliverables, administrative duties, inspection requirements, government obligations, and payment provisions. The step-by-step preparation of the checklist is discussed below. The checklist should be complete, yet as simple as possible. The only reason for review is to lay the groundwork for efficient contract administration. Excessive review or elaborate listing wastes valuable time.

Required Work
In identifying the work the contractor is legally obligated to perform, remember that documents describing the contractor's job may have been made part of the contract--even though not physically attached to it--by the device called "incorporation by reference." Materials frequently incorporated by reference are:

- Detailed specifications that describe characteristics of what the contractor is to provide.
- Contractor proposals that describe features of what the contractor proposed to provide and the contractor's proposed approach or method. The contractor's proposal is often incorporated by reference through a clause to that effect in the contract schedule. This is done in cases where selection of the contractor has been based (in part, at least) on the merit of the technical approach the contractor proposed.

Deadlines or Time Frames
Next to each task, list the deadline or time frame in which the task is to be accomplished. Tasks that must be completed before other work can go forward should be highlighted. Note any "slack" in the time frame and any deadlines that are absolute.

Administrative Duties and Persons Responsible
Note the government's major administrative duties and determine the person or persons responsible for each. This step is especially important when the contract has any of the following features:

- The contractor is required to perform or deliver at more than one location or more than one time.
- The contractor must coordinate activities with several offices, divisions, or agencies.
- The contractor is providing services or products that benefit several offices, divisions, or agencies.
- The contract requires extensive inspection or testing before acceptance or approval by the government.
- The contract states that the government will provide certain property or information to the contractor.
- The contract requires government action for quality assurance.

Where administrative responsibility is not spelled out in the contract, program personnel should coordinate with the Purchasing Agent to assure that their roles will be clearly defined, that government obligations will be carried out, and that the contractor's efforts will be fully monitored.

Inspection and Quality Assurance Requirements
The inclusion of special requirements for inspection and quality assurance in a contract almost always increases cost because the government is in effect buying the required assurance procedures. Since the COR's responsibility is to see that the government gets what it has bought, enforcement of these requirements is important. The COR should examine the contract and list any special inspection or quality requirements next to the appropriate task.

Obligations of the Government
Just as the government pays extra for special requirements, it pays less when it undertakes certain responsibilities. Determining the obligations of the government is important. For example, the contract may state that the ARS will provide property (Government-Furnished Property-GFP) to the contractor. If the property or data are not provided within the time frame stated in the contract, the contractor often has an excuse for delaying performance and may even have a basis for a monetary claim against the government.

Where possible, each obligation of the government should be listed next to the associated tasks of the contractor. The government person or persons responsible for each obligation should be listed as well.

Payment Provisions
Finally, examine any contract provisions relating to payment. Where progress payments are authorized, show when and under what conditions the progress payments should be made. Note: Normally progress payment provisions are not included in construction contracts/orders of $25,000 or less due to the relatively small dollar amount and the short performance period. Where partial payments are authorized, they should be shown along with the conditions for payment. Where possible, the partial payments should be coordinated with the major tasks. In the case of a contract for a study, for example, payments may be authorized after various required interim reports are submitted.

PREPARING A CONTRACT ADMINISTRATION FILE

As previously indicated, CORs are directly responsible to Purchasing Agents on all matters related to administration of the contract. The Purchasing Agent and the COR have four primary responsibilities. They must (1) establish a contract surveillance program that will permit verification of contractor performance, (2) maintain records, logs, and reports that document the actions taken by the contractor and the government during performance of the contract, (3) verify the invoices submitted by the contractor to assure that payment is made for services rendered, and (4) should provide written status reports to the CO/PA at least monthly. The ARS Form-295 is available for this purpose.

The need to maintain adequate records, logs, and reports cannot be overemphasized. The COR's records constitute part of the official contract file. In the event contractual difficulties are encountered during the performance of the contract, the COR's records may be subject to review by the Board of Contract Appeals or by the courts. The COR, immediately upon receipt of the letter of designation, should set up a contract administration file and a suspense file for the contract. All documents, including internal correspondence, related to the administration of the

contract should be contained in COR official files. Exhibit 14A(ii) is a sample file plan, by major subject headings, which may be used for this purpose.

Exhibit 14A(i)
Sample COR Letter Of Appointment and Assignment Of Duties

From: Purchasing Agent

To:

Subj: Purchasing Agent's Representative (COR); duties thereof

You have been designated to serve as the Purchasing Agent's Representative under Contract No. _____ Order No. _____with _____ . As such, your duties are to furnish technical instructions to the contractor which provide specific details, milestones to be met within the terms of the contract or order, and any other instructions of a technical nature necessary to perform the work specified in the contract or order.

As outlined in our conference, you are not to issue any instructions which would constitute a contractual change. You are not to tell the contractor how to perform, but only what is required of a technical nature. If doubt exists as to whether information to be furnished falls within the contract scope of work, contact this office prior to transmitting the information to the contractor.

In your surveillance of the orders, extreme care must be taken to assure that you do not cross the line of personal services. In administering the contract or order, the difference lies within the distinction between surveillance, which is proper and necessary, and supervision, which is illegal.

Surveillance becomes supervision when you go beyond enforcing the terms of the contract. If you too frequently tell the contractor how, not what to do, the line is being crossed. Then you are using the contractor's personnel as if they were government employees. You are then transforming the contract into one for personal services. This must be scrupulously avoided.

Exhibit 14A(i) (Continued)

SPECIFIC DUTIES WHICH YOU ARE EXPECTED TO PERFORM INCLUDE, BUT ARE NOT LIMITED TO:

1. Monitoring services being performed to assure the contractor utilizes personnel meeting requisite qualifications cited in the contract order and requiring contractor justification for using categories of personnel in disproportion to estimates contained in the contract.

2. Serving as the contact through which the contractor can relay questions and problems of a technical nature to the Purchasing Agent.

3. Reviewing and evaluating contractor's proposals in order to furnish the Purchasing Agent comments and recommendations.

4. Assisting in negotiating supplemental agreements incorporating contractor proposals.

5. Attending post-award conferences, when requested by the Purchasing Agent.

6. Ensuring contractor's compliance with safety and security requirements.

7. Ensuring that inefficient or wasteful methods are not being utilized.

8. Monitoring contractor's progress reports and furnishing the Purchasing Agent a report based on contractor's input and your observations.

9. Being responsible for ensuring that all government technical interface with contractor goes through your office.

10. Being responsible for ensuring that a copy of all government technical correspondence is forwarded to the Purchasing Agent for placement in the contract file.

11. Certifying monthly invoices and comparing against monthly cost charts (progress payments).

12. Alerting the Purchasing Agent to any potential problems.

13. Determining the causes of any slippage in the performance schedule.

14. Determining action required to recover the slippage and making recommendations to the Purchasing Agent for implementation.

15. Monitoring performance to ensure that corrective action implemented by the Purchasing Agent is being complied with by the contractor.

Exhibit 14A(i) (Continued)

16. Furnishing the Purchasing Agent promptly any requests for change, deviation, or waiver (whether generated by government personnel or contractor personnel). Furnishing all supporting paperwork in connection with change, deviation or waiver in a timely manner.

17. Being responsible for inspection and acceptance of services.

18. Furnishing to the Purchasing Agent a performance report at conclusion of the contract, detailing compliance with requirements, timely completion, and any problems associated with the contract or order.

The duties and responsibilities set forth herein are not intended to be all inclusive. Bring specific individual situations that have not been covered or that have created a question to the attention of the Purchasing Agent and obtain advice on proceeding in the best interests of the government.

This appointment shall be effective through the life of the contract; however, failure to comply with the above instructions will result in your termination as a COR under this contract.

This COR authority is not redelegable.

_____ _____

Sign and return 1 copy to the Purchasing Agent Date

Exhibit 14A(ii)
Sample Contract Administration File Plan

Basic Contract File

Copy of contract and all modifications thereto

Copy of specifications, drawings, or manuals incorporated into the contract by reference

Listing of contractor submittal requirements

Listing of government-furnished property or services

Listing of all information or documents furnished to the contractor

Copy of the pre-award survey, if conducted

Short memo to file documenting award rationale

Schedule of compliance reviews

Original of all bonds and insurance certs

File on COR and Contract Monitor Designation

Copy of COR designation

Letters of contract monitor assignments with copy of transmittal letter furnished to the contractor

Listing of specialized contract administration functions delegated to the COR or contract monitor

Internal Correspondence File

Record of communications between COR and other support activities

In-house pre-performance checklist

Copies of all correspondence between the COR and the Purchasing Agent

Copies of correspondence between the COR and contract monitors and sponsoring activities

Exhibit 14A (ii) (Continued)

Contractor Correspondence File

Copy of all general correspondence related to the contract

Original of all contractor submittals of data and reports

Copy of notice to proceed, stop work, or correct deficiencies

Copy of all letters of approval pertaining to, for example, materials, the contractor's quality control program, prospective employees, and work schedules

Payment File

Information relative to discount provisions for prompt payment

Copy of contractor invoices

Copies of inspection reports

Letters pertaining to contract deductions or fee adjustments

Back-up documentation for recommendation of contractor payment or progress payment

SECTION 14B

DAY-TO-DAY CONTRACT ADMINISTRATION

INTRODUCTION

The primary goal of day-to-day contract administration is to verify contractor compliance with the requirements of the contract specifications and to assure satisfactory performance in terms of materials used and quality of workmanship. Proper day-to-day contract administration involves the combined and coordinated efforts of the Purchasing Agent and the Engineer or their designated representatives. The Purchasing Agent, in order to protect the interests of the government, must ensure that all personnel involved with the day-to-day administration of the contract understand their respective responsibilities and that they are carried out in a timely and professional manner.

SPECIFICATION INTERPRETATION

Nearly all facets of contract administration depend on complete understanding of work statements, specifications, and drawings, where applicable. Purchasing Agents require a thorough appreciation of the contents of these documents. Interpretation of technical documents is necessary for performance under the contract; it is also vital in determining responsibility under the contract for variations from the expected pattern of performance which may occur. Once a contract is awarded, responsibility for adequately understanding the work requirements falls primarily upon the contractor. However, sometimes a basic incompatibility is not discovered until after performance has begun.

Many modifications to government contracts are related to interpretation of the work statement or specifications. Administration of the contract Changes Clause, the Termination Clause, the inspection or acceptance of the contractor's work, and the interpretation of government property questions are related to proper interpretation of the statement of the requirement.

Performance Versus Design Specifications

One of the most important aspects of specification interpretation is determination of the basic nature of the document, i.e., performance specification or detailed design specification. The importance of understanding and interpreting contract documents as being either of the design or performance type is based on the fact that the obligations and responsibilities imposed upon a contractor differ depending upon the type of document. A design specification will normally include a description or identification of the procedure for determining whether an item meets the specification, thus identifying its significant characteristics. When this type of document is used, the contractor is not responsible for adequacy of the design the contractor is responsible only for duplication of the design which the government has supplied. On the other hand, where a performance document is used to describe the government's need, the contractor is responsible for achieving that performance outcome which the government has specified.

Problems in Interpretation
Interpretation problems arise in government contracting for many reasons, often because the government changes the precise description of its objective after the contract has been awarded. The incorporation of changes may affect not only the portion of the contract requirement which was changed, but may also impact upon other aspects of performance. This is especially true in the case of construction contracts. Also, due to the vast amount of data that is normally associated with construction projects it is quite possible that internal discrepancies may exist between documents. To combat this problem, government construction contracts normally include a contract provision which sets forth the order of precedence between documents. Such a clause is found under FAR 52.236-21. It requires the contractor to keep specifications and drawings on the job site and stipulates that if an item is shown either in the specifications or drawings, but not both, the correct interpretation is that it belongs in both. Where an item is mentioned in both but there is a discrepancy between them the specifications govern. Contractors must notify the government in the event discrepancies are found between figures set forth in the specifications and the drawings and request clarification. If the contractor proceeds without such clarification, it does so at its own risk.

CHANGE ORDERS

A major provision for modification of contracts is the clause entitled "Changes." It provides for unilateral changes by the government, within the general scope of the contract so that required modifications made after award can be incorporated into the basic contract without delaying performance. Depending upon the type of contract, the clause may differ slightly; the provisions of all of them are, however, essentially the same. Generally, the government has a unilateral right to make changes in the drawings and specifications, within the general scope of the contract. (See FAR 52.243-5, Changes and Changed Conditions) and FAR 52.243-4, Changes.

When a change order is issued, the contractor is obligated to proceed with the work as changed. If there is an increase in the cost of the work or time for performance, the contractor should submit a proposal for adjustment prior to final payment. Should the contract effort be reduced, the government may have a right to an equitable downward adjustment in the contract price.

Any change may be accomplished bilaterally. This merely requires that the Purchasing Agent and the contractor reach an agreement on any price or other adjustment. If, however, the parties cannot reach an agreement, the Purchasing Agent may issue a unilateral modification determining price and/or delivery schedule adjustments considered to be reasonable. The burden is then shifted to the contractor to accept or appeal this unilateral modification. The file should be documented to reflect the CO’s action.

Scope of Work
The changes authorized may relate to any aspect of work to be performed under the contract, but the clause does not authorize any unilateral alteration of the collateral aspects of contract performance, such as standard FAR clauses.

The Implications of Changes

The urgency of implementing a particular change varies widely. At one end of this range are changes to which the government attaches little or no importance. An error made in the drafting office may have no adverse effect on the product. The change may then do no more than amend the drawing. And, the change may simply make performance easier--for example, by enlarging a hole to allow easier access.

In the middle of the range are changes to which the government attaches varying degrees of importance. They may improve performance, increase reliability, reduce down time by improving accessibility, reduce the cost of manufacture, etc. At the other end of the range are changes to which the government attaches very great importance. These are changes developed to remedy serious defects.

To ensure that the government's requirements are met in relation to the incorporation of changes, it is essential that a priority be established for each change, in relation to all other approved changes and in relation to the remainder of the work under the contract. Only the government can make the final decision on the priority to be given to a particular change. The various technical and operational considerations have to be carefully balanced against cost, schedule, and other administrative considerations.

A number of factors will have to be evaluated in determining the priority appropriate to a particular change. First of these will be the importance and value of the advantages expected to be derived from the change, which were the reasons for its initial approval.

If the change is a large one it is very likely to have implications on the delivery or performance schedule. Various lead times are involved. Before approving the change, the government will have to examine and evaluate it, and consultations between various concerned departments and services may be necessary. In cases of urgency, emergency procedures may be used to reduce this time but it can never be entirely eliminated.

As a result of an evaluation of these factors, the contractor may ask for a revision to the contract schedule. Before revising the schedule, it is advisable that a check be made as to the urgency of the original delivery date. Even though this was correctly stated at the time the contract was placed, it may since have changed. A delay may be welcomed due to other circumstances. However, if the original date must be maintained, any revision should not be accepted until other methods of avoiding it have been explored.

If none of the available courses of action will enable the change to be incorporated without a revision to the original delivery schedule, another possible course would be to allow contract performance to proceed without the change, leaving the government responsible for incorporating the change retroactively.

Change Order versus Supplemental Agreement
It is preferable for agreement to be reached between the government and the contractor before instructions are issued for a change to be made. In many instances the contractor will be just as anxious as the government is to see the change approved. The government's bargaining position in relation to the price of the change will be stronger when dealing with a change which has yet to be approved than when dealing with one which has been so ordered by the government despite the objections of the contractor. In these instances, the government can also anticipate more fully the impact of the effects of the change. Instructions for such a change will be issued by means of a supplemental agreement. In some cases, however, the need for the change is so urgent that it cannot wait until the negotiation of its price has been completed. A general change order is then used to get the change made promptly. In that event, the adjustment of contract price is negotiated after the change order has been issued. The Purchasing Agent should still negotiate the adjustment as soon as possible and document the file.

Change Order versus New Contract
There may be times when the Purchasing Agent must make a choice: either to terminate a contract and write a new one, or to issue a sweeping change order. If there is an important design change and little work has been done, it may be best to write a new contract. But the question may arise after the fiscal year in which the contract was placed, and annual appropriations may be involved. A new contract in that case would necessitate a new appropriation, in which case the contracting activity would lose the funds for the first contract. A good deal of delay might also be involved. It might then be preferable to issue a change order, and to use the funds from the original fiscal year. Complex questions might arise about the legality of issuing a change order and obligating funds from the current fiscal year. The Comptroller General has held that any change in the essential nature of the original contract might be considered beyond the scope of the contract. The changed requirement might then be held to be new procurement requiring obligation out of current funds. It would then also be subject to all statutory and regulatory rules that govern new procurement to include a Justification for Other than Full and Open Competition. Questions of this nature can best be resolved with the advice of legal counsel.

INSPECTION

Inspection constitutes not only the on-site inspection of the construction work being performed by the contractor but also inspection of materials, contractor submittals, labor reviews, and a review of the contractor's internal inspection system. The clause relied on to provide contractual authority for government inspection under construction contracts is set forth in FAR 52.246-12. It states that "all work shall be subject to inspection and test by the government at all reasonable times and at all places prior to acceptance." Inspection or tests by the government is for the benefit of the government and does not relieve the contractor of the responsibility it has to provide quality assurances measures to assure compliance with the contract requirements. Nor does inspection or testing by the government constitute or imply acceptance. The inspection function performed by technical personnel is crucial to the overall contract administration function which must be performed by the Purchasing Agent. Accordingly, adequate records must be maintained by the government inspectors on all elements of the work performed and any factors which might later have an impact on contract price. For example, if the contract pricing

arrangement involves unit prices the inspector's records must reflect that quantities claimed to be used by the contractor were verified through the conduct of a quality survey, actual measurement, weight, physical count, or other appropriate measure. Likewise, if the contractor is delayed in progressing with the work because of inclement weather, nonavailability of site, delay in receipt of government-furnished property, differing site conditions, etc., then the inspection logs should reflect such occurrences.

SITE AVAILABILITY

As stated earlier, one of the primary concerns in dealing with construction contracts is the availability of the work area or work site. This is especially true in the case of minor construction, repair, or alteration projects because they normally do not warrant the relocation of building occupants. Nonetheless, the contractor has a right to expect, unless otherwise stated in the specifications, free and unencumbered use of the work site for the periods specified in the agreement. Government personnel must be aware of this basic right of the contractor because if hampered in work performance due to government personnel, the contractor has a right to seek equitable adjustment.

When scheduling a site for a construction project, consideration must be given to the potential impact of other contractors working in the same area. Delays caused by other contractors may also result in claims for equitable adjustments. On larger construction projects, the government tries to mitigate such potential damages through the inclusion of the clause entitled Other Contracts (FAR 52.236-8). This clause stipulates that the government may award other contracts for work and require the contractor to carefully fit in its work so as not to interfere with the work of others. Otherwise, the contractor may become liable for delays encountered by others which result from noncompliance with this requirement.

This clause may be included in purchase orders and should be included in BPAs and indefinite delivery contracts when there may be more than one contractor at the same site.

COMPLIANCE WITH FEDERAL, STATE, AND LOCAL CODE REQUIREMENTS

Contract administration includes verifying contractor compliance with all applicable Federal, State, and local laws, codes, regulations, and permits pertaining to construction projects that are written to protect the building occupants, their parties, or the contractor's workforce. Legal requirements to protect the occupants are generally related to the types of building materials used, fire safety equipment, and fixtures and appurtenances associated with the facility.

On the other hand, legal requirements designed to protect third parties relate to the security of the work site, water and noise pollution, zoning restrictions, and so forth. Legal requirements to protect the workforce relate to safety standards (i.e., the Construction Safety Standards Act), environmental conditions at the work site, and work hours on the job. See the FAR clause at 52.236-7 entitled "Permits and Responsibilities."

ACCEPTANCE

Acceptance is defined in FAR as an acknowledgment that the supplies or services conform with applicable contract quality and quantity requirements.

Acceptance by the government of any article or service under fixed-price contracts is conclusive except regarding latent defects, fraud, or as regards the government's rights under any warranty or guarantee or such gross mistakes as to amount to fraud. Acceptance is, of course, the desired outcome of the contract. All would be well if all goods and services presented to the government met the requirements of the contract so that the government could assent to ownership in confidence. Unhappily, such confidence would often be inappropriate-thus the need for inspection.

Acceptance is the responsibility of the Purchasing Agent or an authorized representative. The COR should send a memo to the CO advising that the project is complete and the work is accepted.

WARRANTIES AND DEFECTS

The Standard Inspection clause in a government contract is conclusive in nature. (Note: Use of warranty clauses in ARS contracts must be approved one level above the CO by the HCAD (Director, PPD)). However, guarantee or warranty clauses may be used in contracts or purchase orders when the government wishes to extend the period of contractor's liability for defects beyond acceptance. The purpose of a warranty clause is to provide an extension of time after acceptance during which the government can assert a right to correction of defects. The advisability of such a clause depends entirely on the circumstances of the procurement. Historically, the government has placed its primary reliance with respect to the quality of products on its inspection or quality assurance procedures. Even so, the government must still prove there is a defect within the period of the warranty. Generally, protections in such a warranty clause are accumulative or in addition to the acceptance clauses mentioned concerning latent defects. When a defect is the result of defective construction which is not discernible by inspection, it is a latent defect within the meaning of the Acceptance clause and entitles the government to correction or replacement.

On construction contracts it is not uncommon that materials incorporated by the contractor carry a manufacturer's warranty regardless of whether or not the contract or purchase order includes a specific requirement for such warranties. Since the government, through the purchase of the item, is entitled to any commercial warranties that may apply to the materials incorporated in the construction work, it is most important that the rights to such warranties be transferred to the government. Contract administration and technical personnel should therefore require the contractor to assign the rights in any warranties to the government, regardless of whether or not the contract or purchase order contains a warranty provision.

EQUITABLE ADJUSTMENTS

Several clauses, in addition to Changes and Changed Conditions, call for "equitable adjustments" in price/cost and/or schedule under certain circumstances. Among these are:

- Differing Site Conditions (FAR 52.236-2)
- Suspension of Work (FAR 52.242-14) (Cost Only - No Profit)
- Government Property (Fixed-Price Contracts) (FAR 52.245-2)
- Inspection of Construction (FAR 52.246-12)

By far, the most common adjustments are those arising under the Changes and Changed Conditions clause. The same general principles apply to all equitable adjustments and to other supplemental agreements, such as a government request for acceleration of the delivery schedule. The following discussion, however, is based on the most common problem of adjustments under the Changes clause.

Equitable adjustments should result in both parties being made whole; that is, neither the government nor the contractor should secure a gain or suffer a loss as a result of the adjustment. Profitable contracts should remain equally profitable; losses should not be mitigated at the expense of the government. This is what is meant by the word *equitable*.

Equitable adjustments to price, estimated cost, or delivery schedules must be reflected in a supplemental agreement. If no agreement can be reached on the amount of a change, then the Purchasing Agent is allowed to issue a unilateral decision subject to Disputes procedures. The possibility of a dispute over an adjustment and of final prices or increases in cost exceeding government estimates and available funding should act as a discouragement to issuance of unilateral change orders. It is far better to negotiate the amount of monetary and/or schedule adjustment prior to invoking the unilateral right of changes. This allows for processing of a single modification reflecting both the change and the adjustment. Not only is the paperwork burden reduced but also the possibility of excessive claims by the contractor.

Proposal Submission

The contractor must, prior to final payment, submit a proposal for adjustment to the Purchasing Agent, setting forth the general nature and monetary impact of the change.

Where a formal Change Order is not issued, contractors seeking relief in a constructive change (See discussion in Section 14C) situation *not involving defective specifications* generally cannot recover costs incurred more than 20 days prior to the required notification discussed above. This 20-day limitation cannot be waived. In the case of defective specifications, this notice is not required; however, the costs are limited to those reasonably incurred in attempting to comply with the defective specifications. Naturally, recovery for defective specifications is appropriate only if the government is responsible. Negotiation of equitable adjustments is covered in the next Section.

SECTION 14C

PROBLEM SOLVING AND EXTRAORDINARY ACTIONS

INTRODUCTION

As the title suggests, much of construction contract administration involves problem solving which entails the gathering and analysis of facts and the identification and evaluation of alternatives. Often the solution to the problem requires extraordinary actions. Extraordinary actions and remedies must be taken by someone who has the authority to legally obligate the government, i.e., the CO (Purchasing Agent).

The most common types of extraordinary actions pertain to:

- Constructive changes
- Negotiating equitable adjustments
- Suspension of work
- Accelerations
- Differing site conditions
- Delays
- Strikes and labor relations
- Disagreements/unsatisfactory performance
  - -- Performance instructions
  - -- Disputes, claims, and appeals
- Terminations

In many cases, the number and type of contractual problems related to these areas are so common that specific contract clauses have been developed to help deal with them by defining the rights and responsibilities of both parties to the contract.

CONSTRUCTIVE CHANGES

Written or oral orders, including direction, instruction, interpretation, or determinations causing a change within the general scope of contract performance may be treated as changes, depending upon the circumstances. It is not always clear as to what exactly constitutes the "general scope of the contract."

Most so-called "constructive" changes originate because of differences of opinion over the proper interpretation of the contract. In certain instances, the CO may firmly and reasonably believe that questionable work is called for under the terms of the contract and consequently will refuse to issue a formal change order. If the Purchasing Agent's interpretation is found to be in error, relief can be granted under the constructive change theory. Only the Purchasing Agent has the authority to issue change orders; thus, it should not be too difficult for the government to avoid most constructive changes if everyone understands the situation and is aware of the potential implications of his or her actions.

Nevertheless, although the clause stipulates that all changes must be made in writing by the Purchasing Agent, there is ample legal precedent for certain actions of the Purchasing Agent, or other government personnel, being considered as changes based upon verbal advice. Actions which are construed as changes even though they do not follow the clause are called constructive changes. They occur often in construction contracting where the Changes clause itself provides for the possibility of unwritten change orders being issued. In other types of work, however, the same sort of situation can arise. A COR, for example, may have substantial rights of technical monitoring. In the course of the technical monitoring of the contract, the COR may exceed his or her authority and the contractor may later claim that a constructive change has been made and seek an equitable adjustment.

Where a COR is assigned to monitor progress, given authority should be set forth in writing and specifically preclude any actions which affect the cost or price of the work. There is, unfortunately, a fine dividing line between a change and technical monitoring. What may not seem to change the cost or price at the time may end up having substantial effect on the final costs or performance. In such cases it is only reasonable to expect that the contractor will file a proposal for adjustment. It is good practice to have a contract clause describing the limits of the COR's or other monitor's authority.

Quantity of Work

Changes affecting only the quantity of work are generally outside the scope of the contract and not subject to the Changes clause. Additional work is a new acquisition subject to requirements for publicizing and for obtaining competition; substantial reductions in or deletions from the work are actually terminations (to be covered in a later section) rather than changes. Even if the deletion of work is stated in terms of an alteration in the drawings or specifications, it may not be covered by the Changes clause. Minor modifications in design, however, are covered by the Changes clause even if they result in more or less work being performed by the contractor. A determination as to whether a proposed modification is a new acquisition, a termination, or a change must be made based on the particular case.

Defective Specifications

A defective specification is one which, if followed, will not produce a satisfactory result. A defective specification is not necessarily an ambiguous one - the specification could be perfectly clear but, absolutely wrong! Defective specifications or drawings which are later clarified by the government may be considered as changes under the clause even though no formal change order is issued. When some ambiguity is discovered in the statement of the government's requirements or it is discovered that the work as specified is impossible to perform satisfactorily due to a specification defect, a change order is the proper mechanism for correcting the contract. Cases involving defective or ambiguous specifications are normally settled in favor of the contractor.

Excessive Changes

Some contracts may result in numerous change orders prior to completion. Excessive changes are a major source of cost overruns. Although control of the technical aspects of a contract is the responsibility of the project officer, the Purchasing Agent must issue the actual change order under the clause. It is often advisable for the Purchasing Agent to discuss the effects of a change with the requiror prior to issuing it. Changes which are provisional in nature, that is, which are

known to require further changes, might best be delayed until the full implications of the first change are known. The requiror is apt to be performance oriented and not consciously concerned about costs or even schedules. It therefore may be necessary that the Purchasing Agent carefully coordinate changes to assure integrity of the contract while pursuing technical excellence.

NEGOTIATING EQUITABLE ADJUSTMENTS

Need to Evaluate Cost/Benefit

Because needs sometimes change rapidly, there is constant pressure to improve performance. This pressure does not stop with the award of a contract. Both the government and the contractor may continue to seek product improvements as the work proceeds.

The Purchasing Agent must remember, however, that time and funds are limited. More likely than not, the issuance of a change order will increase the cost of the contract to the government. Each proposed change should be reviewed carefully to balance its benefits against its cost.

Factors to be considered in this evaluation are:

- The contract's state of performance. A change in a contract requirement which is approaching completion may plainly be much more difficult to justify than a similar change is in the early stages of performance.
- Relative difficulty of meeting the delivery date/performance schedule.
- Urgency of meeting the delivery date/performance schedule. A changed item available later may be more valuable than an unchanged item delivered/performed as planned.
- Importance of the change to its intended use. At one end of the scale a change may be convenient whereas at the other end it may be absolutely vital.
- Complexity of the change. This factor interacts with all of the others. The more complex the change, the more likely are adverse and unforeseen effects on cost and schedule.
- Relationship of the change to other work required under the contract.

Generally speaking, the earlier during contract performance that a change is introduced, the less adverse will be the effects on cost. If a change can be introduced while the design (or the part of the design to which the change relates) is still on the drafting board, the cost may be nominal. Once construction is under way, the adverse cost effects tend to become larger.

Unchanged Work

One important factor which may result in cost increases and schedule delays is the effect of changes on unchanged work. It may appear that a change can be made without affecting the remainder of the work, and in many instances this is so. In others, however, effects on the unchanged work may be serious. The change may disrupt the process by requiring that a finishing process be performed at a different point. It may compete for capacity on a particular machine that is already fully committed. It may affect the unchanged work in many other ways. These are planning matters which lie in the field of the engineer, but if they are not fully explored before the approval of the change, cost increases and schedule delays may pose serious problems.

Estimating the Cost of a Change

In evaluating a proposed change, contracting activities usually allow for a preliminary cost estimate for planning and budgeting purposes. Some get a cost estimate from the contractor. While such estimates are not binding in later price negotiations, they are expected to be reasonably accurate. Sometimes the same change is proposed for two or more existing contracts. Its effects still have to be analyzed for each contract since the completion status of the work affects the cost of the change. In the case of one of the contracts, construction may have scarcely begun when affected by change, and it may be possible to incorporate change with little or no extra work. In the case of the other contract, however, construction may be in an advanced state and the change may entail considerable reworking.

Estimates of the cost of a change are often hard to make. Negotiation of an adjustment without cost or pricing data is therefore difficult. If the initial contract was a firm fixed-price, the administrator might discover that the contractor's accounting system is not adequate for purposes of providing cost or pricing data. Such situations are not uncommon. They necessitate a particularly thorough and careful price analysis by the Purchasing Agent before a supplemental agreement can be negotiated. Where cost data is available, the administrator's analysis may still involve some difficulties.

The estimate of costs of work deleted can be based on either: (1) the costs estimated at the time cost of the work was included as a part of the contract, or (2) the cost at the time the change is made. If the original contract estimate is used, then a contractor who is in a loss position on the changed portion of the work will have a smaller downward adjustment made than if a current estimate is used. The net effect for the contractor is therefore a gain. On the other hand, if performance of the changed portion was likely to be highly profitable, then the reduction in price would exceed likely costs and the net effect to the contractor would be a loss of profit on the entire contract.

Such a method of computing adjustments thus, to some extent, rewards inefficiency and penalizes efficiency. On the other hand, it may be nearly impossible to estimate current costs of the changed portion even though use of that figure would result in a more equitable adjustment. Contractor-initiated changes should be carefully reviewed before negotiation of an adjustment to assure that they have not been suggested merely to take advantage of the reverse incentives inherent in pricing based on initial cost estimates.

Adjustments Based on Costs

Adjustments are most often based on costs although they may be priced by reference to catalog or market values of supplies or services. If they are based on costs, adjustments must consider the effects of the change on the entire contract, and not merely on those portions directly affected.

Changes in costs may also require an adjustment to profit or fee which is commensurate with the new situation. In certain instances, an adjustment may be negotiated only with respect to the fee, e.g., in the case of delivery of non-conforming supplies on a cost-reimbursement contract.

Single Orders Making Two Changes
Computation and negotiation of adjustments is complicated when the same change results in deletions from, and additions to, the work at the same time. In effect a single order has made two changes: the first deletes work and results in a decrease in costs; the second adds work and results in an increase in cost. In the end the net result may be very small, even to the point of being exactly equal.

The concept of equity, however, requires consideration of both aspects of the change. Thus, if the contractor's claim amounts to only a few dollars, it is not safe to presume that there is little need for scrutiny in pricing the change. The deleted work may be labor intensive, i.e., the costs are mostly in the form of wages and salaries and therefore subject to the application of overhead. The added work may be capital intensive, i.e., the costs are mostly for depreciation of machinery and not subject to the same overhead rates.

Unless the contract administrator is careful, the contractor could convincingly (and honestly) compare only the direct costs of the deleted and added portions and end up collecting for overhead expenses no longer incurred in performance.

Reasonableness and Equity
Changed work is usually done by the firm currently performing the contract; hence, negotiation almost always takes place in a sole-source environment. The contractor therefore has a very strong bargaining position. Moreover, it may have special reasons to press its advantage. Contract performance may not have proceeded as planned. And the possibility cannot be excluded that it bid low to win the contract, hoping to recoup the potential loss on changes.

Whether or not this is the case, every effort must be made to determine a fair and reasonable price for the change. The problem of doing this is compounded by the fact that the contractor's accounting system does not usually separate changed costs from other costs. The changed price may include adjustments for deleted as well as added work, unchanged as well as changed work, subcontract as well as prime contract work, and the cost of disruption on each.

Basic techniques should be used in evaluating the estimated decrease or increase in work. Profit should be adjusted by subtracting an appropriate amount for deleted work and adding a like amount for new work. The adjustment should be specifically limited to the scope of the change. The cost of work deleted is calculated by estimating the cost as of the time the change is to be made. This approach does not alter the actual cost/profit relationship. It relates profit to the quality of the job done by the contractor in designing, constructing, and adhering to performance schedules. Because the dollar value of any change will be determined by negotiation with the contractor, the tests of reasonableness and equity always apply.

Correction of Deficiencies
When a change is made necessary by a deficiency in the contractor's design or performance, the incentive approach should be used. The first step is to determine whether the cost of the change should be borne wholly or in part by the contractor. If responsibility is fixed with the contractor, and the change is negotiated so that the contractor bears at least a significant part of the cost, the question of profit reduction becomes moot. If, however, the responsibility is shared in such a

way that it becomes reasonable for the government to pay all or a significant part of the cost of the changes, the figure agreed upon should include little or no provision for profit.

Adjusting Pricing after Work Completion

Pricing of adjustments after the fact is much simpler than use of any estimate of costs for added work under a change. The contractor's data may clearly show the actual costs of the change to which a "reasonable" profit may be added. This is an appealing rationale, but it has its dangers. If a change order has been issued and the work is completed prior to pricing the adjustment, the contractor has had absolutely no incentive toward controlling costs. If the contractor's "customary" profit is to be added, then the more that is spent on the added work, the larger the contractor's profit will be. This may be interpreted as a cost-plus-percentage-of-cost contract which is specifically prohibited by law.

The percentage of profit on adjustments made after work completion should be substantially less than the profit customarily applied to changes using forward pricing. Profit analysis factors (FAR 15.404-4) include assumption of cost risks. In pricing adjustments, after the fact, the contractor has assumed minimal cost risk and profit should be allowed proportionate to that risk.

Even if the contractor can be trusted to control costs in such a situation, the government will not have had an opportunity to review the contractor's proposed costs and possibly point out more efficient production methods or management controls.

Forward pricing, which is the preferred method, that is, issuance of a single supplemental agreement instead of a unilateral order followed by an adjustment, allows for a complete negotiation on technical as well as price aspects of a change. It may not be practicable to do this for all changes, especially if there are many small ones to be made. In that case a single negotiation session resulting in a single supplemental agreement may be preferred.

Documentation

Documentation on controls and standard procedures should be kept. The Purchasing Agent should record engineering change proposals and contract change notifications. The procedures for price changes should be agreed upon with the contractor.

Estimating procedures used by the contractor should also be a matter of record. The factors, such as rates for labor, overhead, and other indirect expenses, should be negotiated in view of the contractor's estimate. The final rates agreed upon should also be subject to periodic review and adjustment.

A negotiation memorandum should be prepared promptly after the completion of negotiations. This documentation identifies discussions and principles to be agreed upon. It also provides the basis for all compromises reached.

Summary
The pricing of modifications involves the evaluation of each element of cost. These elements are directly applicable to the pricing of changes and other modifications. The typical change encompasses added and deleted sections; therefore, each element of the added or deleted section must be analyzed. The value of the deleted portion is deducted from the value of the added portion, resulting in an increase or decrease of the contract price or estimated cost.

SUSPENSION OF WORK

Due to the nature of construction work, it is necessary from time to time to suspend, delay, or interrupt work scheduled to be performed under a contract so that technical or administrative difficulties can be resolved. Such action may be necessary to prevent the government from incurring a substantial loss due to the need for rework or alteration of the design. The Suspension of Work clause (52.242-14) is designed to accommodate this requirement without terminating the contract for convenience and without entering into a breach of contract situation.

The Suspension of Work clause entitles the Purchasing Agent to suspend, delay, or interrupt all or any part of the work for a reasonable period of time and authorizes the contractor to seek recovery of costs only. There is no provision in this clause for either profit or time extension.

ACCELERATION

When contract performance has been delayed (and sometimes for other reasons in the government's interest), the Purchasing Agent may order an Acceleration clause even if not specifically mentioned in the Changes and Changed Conditions clause. An order to accelerate constitutes a change. However, an order to accelerate to make up lost time for an unexcused delay is not a change. It has also been held that refusal to extend time for performance where there has been an excusable delay constitutes acceleration in some circumstances and is therefore a change (constructive acceleration). On the other hand, an order to delay performance is not a change, and contractor relief for suspension must be found in other specific clauses or as a constructive change.

DIFFERING SITE CONDITIONS

By its nature construction contracting involves some unknowns. This is especially true in cases involving earthwork or where the work involves repair or alteration of existing facilities for which as-built drawings are not available. The FAR in recognition of this risk requires construction contracts in excess of the simplified acquisition threshold to include the Differing Site Conditions clause (FAR 52.236-2). (This change may be incorporated in construction contracts of lesser amounts or the Purchasing Agent may rely on the "Changed Conditions" portion of the Changes and Changed Conditions clause (FAR 52.243-5)). It requires the contractor to promptly notify the Purchasing Agent in writing, and before disturbing the conditions, when such conditions are encountered and whether they will affect cost or time of performance. It is important to note that such change can result in a request for equitable adjustment for the contractor but may also result in a recovery to the government when substantially less difficult conditions are encountered than anticipated. Upon receipt of such

notice, the Purchasing Agent must ascertain the facts and, if necessary, modify the contract and develop records to substantiate the change. There are requirements for notice and promptness which must be adhered to. Upon failure of the contractor to make a timely claim, the Purchasing Agent can unilaterally decide the adjustment. Careful monitoring is required in the event recovery for unchanged work is due the government.

Examples of subsurface or latent conditions differing materially from those indicated in contract documents include situations where the following are encountered:

- Rock where test borings indicated none
- Substantially more rock than borings indicated
- Ground water where it had not been shown to exist

A second type of changed condition is based on unknown conditions of an unusual nature differing from those ordinarily encountered and generally recognized as a part of such work. If the condition is one which could not have been reasonably inferred or anticipated from study of drawings, specifications, borings, or site examination, some adjustment will generally be allowed. However, relief is generally denied when the contractor should have known, or expected, such conditions--for example, water encountered in an area where it should have been expected. Rainfall, flooding, or cold weather are not necessarily changed conditions if they should have been foreseen. Nonphysical conditions are not changed conditions. Further, miscalculation by the contractor is not a changed condition, nor is the contractor's failure to investigate the site.

Notice of changed conditions at site is very important. The government must be given the opportunity to investigate the condition if a claim for equitable adjustment is to be allowed. It is

equally important that claims be made in accordance with requirements of the FAR. Some general principles with respect to notice of change and timing of claims are as follows:

- Even though timely notice was not given, court decisions on the merits of a claim will operate to waive the notice requirement.

- Disclaimers of liability in the provisions or specifications of a solicitation cannot be used to limit or nullify the Differing Site Conditions clause.* For example, stating in the specification that a contract drawing was for information only failed to offset the protection of the Differing Site Conditions clause in *Fehlhaber Corporation v. United States*, 138 C. CLS. 571. 584 (1957).

- Even a provision requiring bidders to investigate the site and warning that additional payment would not be made regardless of conditions encountered was insufficient to void the protection of the clause* in *Derby Construction Co., Inc. and Perkins Construction Co.*, Eng. C. & C Board No. 543 (1954).

  *NOTE: In other words, you cannot escape liability simply by saying that you cannot be held liable!

The Differing Site Conditions clause is intended to protect the government and the contractor equally and presents considerable difficulty in administration of the contract. Fairness and equity within the contract terms, the applicable regulations, and guidelines from authenticated cases form the basis upon which it is administered.

EXCUSABLE DELAYS AND TIME EXTENSIONS

Excusable Delays

Delay in the performance of a government contract is frequently encountered. Furthermore, when encountered, the circumstances surrounding a delay are often complex and difficult to discern. The normal presumption in a contractual relationship is that the contractor is responsible for timely performance.

The extent of a delay must be determined to access its impact on the government's needs. The cause for delay must be determined since, in some circumstances, it may be an excusable delay. When a delay occurs as a result of government contract actions or as a result of causes beyond the control and without the fault or negligence of the contractor, it is excusable. In that case, the contractor may be entitled to an adjustment of the delivery schedule, the contract price, or both. These adjustments are of vital importance to the contractor. The significance of a monetary adjustment is obvious and schedule adjustments may be equally important. The absence of an excusable cause may make a contractor subject to determination for default or a downward adjustment in price to compensate the government for delay-related damages.

Delays in contractor performance can be the result of many factors, including the contractor's own failures; but it can also be the result of government actions as a party to the contract, government actions as sovereign, acts of God, or other circumstances beyond the contractor's control. Determining which are excusable delays requires identifying the cause. In some cases an excusable delay requires only adjustment to schedule; in others, to money or to both. Risk is determined by the contract clauses and circumstances. In general, the rule is that the delay is excusable if it was beyond the control of the contractor, without fault or negligence. Delays caused by a subcontractor are not excusable unless beyond the control of both the prime and the subcontractor and not procurable elsewhere. Delays caused by the government as sovereign are not necessarily excusable.

The construction contract clause (52.249-10 Default (Fixed-Price Construction) uses the term *unforeseeable*. Unusually severe weather may be an excusable delay when it causes an unusual amount of lost days and is so unusual that the contractor could not have anticipated it. Delays caused by lack of ability, equipment, or manpower are usually not excusable--unless it can be demonstrated that it was a practical impossibility to proceed. Delays due to financial problems are not excusable. Even though an excusable cause exists under the clauses, the contractor must show that the excusable cause was, in fact, the reason for delay.

Time Extensions
The contractor clauses on excusable delays do not provide for money compensation, only time. However, delays may be compensable when the reason for the delay is related to government property, suspension of work, of stop work clauses, and it can be shown that the government assumed the risk. A claim for damages due to government-caused delay must show that the government promised something, that its failure to keep the promise was inexcusable, and that the government-caused delay, in fact, increased the cost of performance. Circumstances which may be found to warrant compensation for delay include:

- Government negligence or failure to exercise diligence
- Unreasonable delays in approvals
- Unreasonable delays in testing or inspecting
- Issuance in writing (by other than the Purchasing Agent) of a stop order known as a constructive suspension
- Issuance of change orders beyond the scope of the contract
- Delays caused by defective specifications

STRIKES AND LABOR RELATIONS

It is the general policy of the government to remain impartial in any labor relations problems, disputes, or strikes which may occur between management and labor of private business enterprises. Accordingly, contract administration personnel and purchasing activities must refrain from taking a position on, or undertaking conciliation, or arbitration of, a labor dispute. Nevertheless, contract administrative personnel should monitor and analyze the effects of a labor dispute on the performance of the work under contract. Such monitoring serves two primary purposes. First, it permits the government alternative course of action in the event a strike-bound contractor has a detrimental effect on the government's/Agency's primary mission and, second, it facilitates government evaluation of the excusable delays which may be granted as a result of the strike to note that a contractor may not be relieved of delays incurred that are not beyond its contract. A delay caused by a strike which the contractor could not reasonably prevent can be excused only to the extent that such delays do not go beyond the point at which reasonably diligent contractor could resume the delayed performance by taking action toward ending the strike.

INSURANCE CLAIMS

Construction contractors working on government installations are generally held liable for any and all damage they may cause to property of the government. Since most contractors do not have the financial resources to assume such risks without the protection offered by underwriting firms, Purchasing Agents should assure that the government interests are adequately protected by requiring the contractor to show positive proof of financial responsibility. (For assistance in this regard, the Purchasing Agent should contact the PAO). Financial responsibility may be established by the contractor by obtaining a certificate of general liability insurance directly from the underwriter. Evidence of insurance should be obtained directly from the insurance underwriter and be in a form which sets forth the policy's limits, expiration date, and the noncovered or covered risks.

Claims against the insurance must be assessed against the construction contractor since there is no privity of contract between the underwriter and the government.

CLAIMS, DISPUTES, AND APPEALS

During the course of performing the work required under the Purchase Order/contract, a number of adjustments may be required to equitably adjust the agreement for changes which have taken place. Purchasing Agents are primarily responsible for negotiating such adjustments in a forthright and equitable manner. Most negotiations run smoothly. Both parties agree that the proposed settlement or adjustment is fair and both go on to other things. Sometimes, however, there are problems. The parties may not be able to reach any sort of agreement or even to approach one. The contractor, in such cases, may feel that it has a valid claim against the Government and may elect to file its demand for equitable adjustment under the Contracts Disputes Act. The claim may finally be settled by the contractor and the purchasing agent. If that is not possible, the contractor may submit its claim to the Administrative Board of Contract Appeals or even to the Court of Federal Claims (COFC).

The Role of the Purchasing Agent in Settling Claims

Purchasing Agents are responsible for monitoring the performance of work and for ensuring that procurement objectives are met. As such, the Purchasing Agent must represent the interests of the government in contractor claims against the Government. It is the Purchasing Agent who must decide whether it is in the best interest of the government to take a specific action or course of action. Thus, when a change order has been issued, for example, the Purchasing Agent must decide whether or not to pay the contractor what it claims as an equitable adjustment or to continue negotiating for a lower figure. (See previous discussion).

The process of reaching the decision will involve the Purchasing Agent in fact-finding, analysis, and negotiations on behalf of the government, and as such is a party to the process. But when called upon to render a final decision on a dispute that cannot be settled by agreement, the Purchasing Agent is required to render it impartially and independently.

This change in role seems, to some, to be an almost impossible task. How can the same person be an advocate for one position and then, on a moment's notice, be transformed into an impartial judge? The conflict, however, is more apparent than real. Even when acting as a party to the disagreement, the Purchasing Agent is supposed to be seeking an equitable adjustment or settlement that takes into account the value claims of the contractor.

If the Purchasing Agent is giving his or her best effort to reach an equitable solution, even in the role of a party to the dispute, the change to impartial arbiter is hardly a change at all since the goal of equity is the same.

Disputes
The Contract Disputes Act requires that all claims against the government and government claims against a contractor "relating to a contract" be submitted to the Purchasing Agent for a decision.

If it develops that the Purchasing Agent and the contractor cannot agree regarding a claim they must turn to the Disputes clause. This clause requires the Purchasing Agent to make a final written decision on remaining issues. FAR 33.211(a) provides guidance on the content and format of a final decision. Establishing the date of receipt by the contractor of a final decision is a matter of some importance. FAR 33.211(b) requires that it be delivered by certified mail or other means which provide a receipt for delivery and the date.

The Purchasing Agent must render a decision on a claim of $100,000 or less within 60 days after he or she receives the contractor's request that a decision be made within that period. For claims submitted for more than $100,000, the contractor must certify that the claim was made in good faith and that the supporting data is accurate. The Purchasing Agent must then render a decision within 60 days of the certification or notify the contractor of the time within which the decision will be made. In any event, the decision should be issued within a reasonable time.

The contractor has two alternatives for appeal if it disagrees with the Purchasing Agent's decision. One route is to appeal the decision to the Agriculture Board of Contract Appeals (AGBCA). That action must be taken within 90 days after receipt of the Purchasing Agent's decision. If either party is dissatisfied with the Board's decision, they have the right to appeal that decision to the COFC within 120 days of receipt of the Board's decision. The other route available to the contractor is to go directly to the Court within 12 months after receipt of the decision.

Another key provision of the Act provides that, for decisions in its favor, the contractor will receive interest on its claim amount for the period from the date the Purchasing Agent receives the claim to the date of payment. Previously, the interest period started on the date the contractor appealed the Purchasing Agent's decision.

Appeals Processed by the Board
The Department of Agriculture has implemented the requirements of Public Law 95-563 through the publication of the AGBCA Rules of Procedure in 7 CFR, Part 24. (See AGAR Subpart 433.2). Decisions reached are final unless the contractor appeals the Board's decision to the COFC Court of Appeals for the Federal Circuit (CAFC) within 120 days after the date of receipt of the Board's decision, or the Secretary determines that an appeal should be taken to the CAFC. Such action must also be taken within 120 days. The CAFC may render an opinion and judgment on appeal of a Purchasing Agent's decision when such is brought directly to the court on an appeal of a Board decision, provided such appeals are filed in a timely manner. Appeals of Board decisions may be, at the court's discretion, sent back to the Board for further action or the court may take additional evidence or action as may be necessary for a final disposition of the case.

PERFORMANCE REMEDIES

There are numerous contract remedies available to the government, depending on the circumstances. Performance time problems can be dealt with through application of the default and liquidated damage provisions. Change in the government's needs may necessitate use of the Termination for Convenience clause.

The clauses required in most government contracts assert two grounds upon which government contracts may be terminated, or ended. These are in addition to laws of commercial practice which center on the common law principle of breach, on the doctrines of termination by mutual assent, and on performance of all contractual agreements. The two alternatives are termination for convenience of the government and termination for default when the contractor is delinquent. In the former, the Purchasing Agent determines what will be in the best interest of the government, whereas in the latter, the establishment of some degree of contractor nonperformance is necessary.

When contracting, the government has the same rights and is subject to the same liabilities as a private party. The basic difference is that the government cannot be sued without its consent. The clauses inserted in government contracts are included solely for the purpose of protecting the government against some loss. They are not intended to be coercive, arbitrary, or punitive in nature. Accordingly, the government has equitable duties which require it to take action that will

mitigate or minimize its ultimate damage. The remedies exercised must be examined and used in light of acquisition objectives.

Remedies Short of Termination

Contracting personnel (and *only* contracting personnel) may take a range of actions in relation to unsatisfactory performance. In order of priority, the actions are:

- Orally bringing the deficiency to the attention of the contractor and asking for corrective action;
- Initiating a letter (from the Purchasing Agent) directing the attention of the contractor to a deficiency and asking for a response that includes plans for corrective action (show cause letter);
- Requesting, orally or by letter from the Purchasing Agent, a meeting with the contractor's management to focus attention on the problem and get commitment to corrective action; and
- Accepting deficient performance in exchange for a reduction in price or other consideration.

The Purchasing Agent may take any one or several of the actions listed above before resorting to termination.

Damages
Where the contractor fails to comply with contract delivery/performance schedules, the government has the legal and contractual right to assess actual damages against the account of the contractor assuming the government's damages are the fault of the contractor. However, the actual damages assessed must be ascertainable and proven as well. It should also be noted that the government has a responsibility to mitigate the damages assessed.

The most common circumstance wherein the assessment of actual damages is contractually provided for is in the Termination for Default clause. When the government terminates a fixed-price contract for default, the clause provides that the contractor shall be liable for the excess costs of the reprocurement, and liquidated damages accrued (if otherwise provided for in the contract this is not normally the case in small purchase contracts for construction) or, in the absence of liquidated damages, the actual damages suffered by the government. The last provision of the standard Default clause provides that the rights and remedies of the government under the clause are in addition to any other rights and remedies provided under law or contract clause.

Withholding of Contract Payments
Under fixed-price type contracts, payments made by the government are directly tied to the value of the work actually accomplished and/or the value of the products or services delivered. If the contractor fails to perform, the government can withhold payments and eventually terminate the contract for default, which may precipitate an even more serious financial loss for the contractor in terms of the excess costs of repurchase. This basic relationship involves the legal concept of mutuality of consideration; the buyer (i.e., the government) pays the seller (i.e., the contractor) only for the predetermined value of the benefit delivered or otherwise received.

TERMINATION FOR DEFAULT

FAR Subpart 49.4 defines termination for default as being "the exercise of the government's contractual right to completely or partially terminate a contract because of the contractor's actual or anticipated failure to perform its contractual obligations." FAR Subpart 49.5 provides several different contract clauses which state the conditions under which a contract may be terminated and the effects thereof. Fixed-price construction contracts contain unique provisions and must be treated separately.

Exercise of Discretion
The right to terminate is discretionary. Many considerations are involved in deciding whether to terminate for default. The Purchasing Agent should take no action without considering the following factors:

- Provisions of the contract;
- Specific failures of the contractor and excuses;
- Period of time another contractor would require to complete the job;
- Effects on guaranteed loans, advance payments, or progress payments;
- Availability of funds to cover increased costs; and
- Other pertinent facts.

The Purchasing Agent is expected to exhaust all reasonable efforts to induce the contractor to correct the underlying factors. In some situations, default may be justified but not advisable. The contract should then be administered carefully to preserve the right to terminate for default should this become necessary later. Alternatively, if excusable delay is found to be the reason for nonperformance, but the originally scheduled completion date must still be met, acceleration or termination for convenience may have to be considered.

When a contractor actually is in default, and a decision has been made to terminate its fixed-price contract, the policy is to terminate for default rather than for convenience. To do otherwise might provide a basis for profit settlement not otherwise earned by the contractor, and may be a waiver of vested rights of the government.

Terminating Construction Contracts for Default
Construction contract default provisions permit the government to terminate the contractor's right to proceed with the work if the contractor:

1. Refuses or fails to prosecute the work with such diligence as will ensure its completion within the time specified in the contract.

2. Fails to complete the work within the time specified in the contract.

3. Expressly repudiates the contract (anticipatory breach).

Purchasing Agents should not initiate action prematurely, since the contractor has 10 days to advise the government of delays arising from unforeseeable causes beyond its control and without its fault or negligence. Situations 2 and 3 are fairly straightforward, but the Purchasing Agent is faced with some difficult judgment calls in situation 1. Any termination for failure to make satisfactory progress should be initiated only when it is very clear that the contractor will not finish on time. If the contractor still has an outside chance, it may be able to have the default termination converted to a termination for convenience.

Using Cure and Show Cause Notices
Cure Notice
If termination action is considered by reason of failure to make progress or for failure to comply with some other contract provision, the clause provides that the Purchasing Agent must notify the contractor of the failure and allow at least 10 days in which the contractor may correct or cure its failure. Such a notice, often called a *10-day cure notice*, must set forth in concise but complete form all of the provisions of the contract which the contractor has failed to meet or a summary of the findings which have demonstrated that the contractor has failed to make acceptable progress in performance. The notice may refer to prior correspondence, but, if it does, the prior correspondence must be fully identified. The notice must state that at the expiration of the given period (at least 10 days) the contract may be terminated for default and list the contractor's liabilities under the contract if it is terminated. If the contractor fails to cure the situation or to provide a satisfactory explanation for its delay, then a notice of termination may be issued. See Exhibit 14C(i) for a sample "Cure Notice" format.

Show Cause Notice
If the time remaining in the contract delivery schedule is not sufficient to permit a realistic "cure" period of 10 days or more, a "show cause" notice may be issued. It should be issued immediately upon expiration of the delivery period. Note that whereas issuance of a "cure" notice is required prior to a termination for default for failure to make progress, issuance of the "show cause" notice is not required in cases of actual default since the government has already been damaged. As a general rule, however, it is advisable to issue a "show cause" notice and give the Contractor an opportunity to explain the circumstances of the default since terminations for default must be converted to terminations for convenience if it is determined that the contractor's default was excusable. See Exhibit 14C(ii) for a sample "Show Cause Notice" format.

Notice of Termination
To be held legally sufficient, default can be effected only upon the basis of a written notice having been provided to the contractor. Prior to issuing a Termination for Default notice, the Purchasing Agent must prepare its findings and determinations. Care should be taken in the preparation of the notice, and legal advice obtained. The Notice of Termination for Default should be sent by certified or registered mail with proof of delivery requested. Provisions of the FAR should be reexamined to ensure that the notice meets the specified requirements. In this respect, FAR 49.402-3 prescribes that the Notice of Termination for

Default shall:

- Set forth the contract number and date;
- Describe the act or omissions, and the extent of the resultant delay, constituting the default;
- State that the contractor's right to proceed further with performance of the contract (or a specified portion of the contract) is terminated;
- State that the government may cause the contract to be completed and that the contractor will be held liable for any increased costs;
- State that the government reserves all rights and remedies provided by law or under the contract, in addition to the charging of increased costs;
- State that the notice constitutes a decision, pursuant to the Disputes clause, that the contractor is in default as specified and that the Purchasing Agent has determined that the delay is not excusable;
- State that the contractor has the right to appeal as specified in the Disputes clause;
- Instruct the contractor concerning safeguarding and disposition of government property in its possession;
- State (when applicable) that the contractor and its surety remain liable for liquidated damages through reasonable completion time after contract completion date has passed; and
- Instruct the contractor regarding the turnover of materials on site.

Reprocurement
Under a Termination for Default of a fixed-price contract, the government, pursuant to the Termination for Default clause, has a right to charge the excess costs of completing such work to the contractor. This right is not without limitation, however, as the courts will protect the rights of a defaulting contractor as well as those of the party against whom it has defaulted. These limitations stem from the rule that an injured party has the duty to mitigate damages and from the fact that the government is only entitled to performance which is substantially the same as that promised by the defaulting contractor. It has been held that these considerations require that the government establish that:

- Repurchase was made within a reasonable time after default;
- The repurchase price was reasonable;
- The government endeavored to mitigate its damages; and
- The government repurchased a similar item.

The fact that the price of repurchase is considerably higher than that of the defaulted contract does not make it *per se* unreasonable. Part of the determination of the reasonableness of the repurchase prices will depend on the extent to which the government attempted to obtain the best possible prices. This attempt may be made by seeking competition. The government's choice of the method of repurchase and the selection of the source will depend upon the circumstances at the time of repurchase. Thus, although it would be desirable to go to the second lowest bidder on the original purchase, that bidder may be eliminated when it can be shown that it is in difficulty on another government contract at the time of repurchase. The government may decide to complete the work itself when it can show that to go through another contractor would require an additional amount of time.

Whether or not repurchase has been accomplished within a reasonable time after default termination is similarly something that will depend upon the circumstances and that no particular time period will automatically govern. When there has been a delay of five months and that time has been spent in negotiation with the repurchase contractor and there do not appear to be any price increases caused by the delay, it is held to be a reasonable time. If a delay is caused by conferences called at the instigation of the defaulting contractor, it will not be held unreasonable. When there has been a delay in repurchase, the government will not be prejudiced unless the contractor can demonstrate that lower prices could have been obtained without the delay.

There is also the question of whether the item being repurchased is similar to that offered by the defaulted contractor under the defaulted contract. Generally, the term "similar" has been defined to mean similar in physical and mechanical characteristics as well as in functional purpose. Lesser quantities, changes in design, significant relaxation in specifications, use of more expensive material, etc., have been successfully argued as having contributed to minimal cost under the contract and resulted in reduction or disallowance of excess costs to the government. The government must prove similarity, while the defaulted contractor has been held to bear the burden of proving that excess costs resulted from the repurchase.

Conversion to Termination for Convenience
The Purchasing Agent must exercise discretion in handling actions under Default provisions. Consideration must be given to the possibility of excusable delays, for example. Any termination action which is improper either in its substance or in its form will be converted to a termination for convenience. Thus, if the Purchasing Agent merely queries a delinquent contractor as to why there is not sufficient progress being made on the contract (without stating an intention to terminate in 10 or more days) and then proceeds to terminate it, the termination rights will end up the same as if the termination were for convenience. This results in a dual disadvantage to the government; not only is repurchase necessary without recovery of excess costs, but the government also becomes liable for payment of the costs of performance up to the date of termination, including an allowance for profit to the defaulting contractor and termination settlement costs. Further, although the government has the right of repurchase under fixed-price contracts and also has the right to assess the excess costs of repurchase against the account of the defaulted contractor, the government is expected to act reasonably in awarding the repurchase contract in order to protect *both* the interests of the contractor and the government. In fact, failure to do so may very well result in the conversion of the termination for default to one for convenience when the contractor can show that the government did not properly or reasonably take appropriate steps to minimize repurchase costs.

TERMINATION FOR CONVENIENCE

The right to terminate a contract for the convenience of the government is, simply stated, the right of the government to refuse to continue with contract performance, to stop the work, and to settle with the contractor at the point of termination. This termination can result only from an action by the Purchasing Agent. Termination for convenience promotes the best interests of the government, but it does not necessarily result from any fault on the part of the contractor. In government contracts, the right to terminate for convenience arises because the parties to the contract agree to this right through incorporation of the appropriate clause into the contract.

Notice of Termination
FAR Subpart 49.6 sets forth approved formats of notice of termination. As a rule, notice is first given by telegraph and confirmed thereafter by letter. Letter notice alone may be used, however. In any case, the notice should clearly state:

- Effective date of the termination.
- Whether all work is to be stopped.
- Specific work to be terminated, if the termination is partial. The notice may also include special instructions about the continuation of certain work, disposition of materials, or other matters. Thus, special requirements may be reflected in the notice of termination. In addition, the notice of termination must contain recommended actions that minimize subcontract expenses.

Notice to the contractor will drastically alter the contractor's operations. Therefore, the notice cannot be rescinded or modified without consent of the contractor.

Contractor Responsibility
Upon receipt of the notice, the contractor is obligated to comply with the termination clause and the terms of the notice. FAR 49.104 outlines those duties which include:

- Stopping work immediately on the terminated portion of the contract;
- Terminating related subcontracts;
- Continuing with the unterminated portion and promptly requesting any equitable adjustment in price on the continued portion;
- Taking action to protect and preserve any government property or to return it as directed by the Purchasing Agent;
- Settling claims and liabilities arising from terminated subcontracts; and
- Promptly submitting its own claim for settlement.

The Purchasing Agent's Responsibilities
FAR 49.105 lists the Purchasing Agent's duties after issuance of the termination notice. Among other duties, the Purchasing Agent must arrange a meeting with the contractor to develop a

definite plan for effecting the termination settlement. The discussion covers all topics related to the principles, policies, and procedures governing the settlement. Among these are:

- Extent of the termination;
- Status of plans, drawings, and other data;
- Status of the continuing work;
- Contractor's termination of subcontracts;
- Transfer of title to the government of any materials it requires;
- Interim financing; and
- Schedule for the contractor's and subcontractor's submission of the settlement proposal, inventory schedules, and accounting data.

Settlement of Fixed-Price Contracts
FAR Subpart 49.2 covers policies and procedures for settlement of fixed-price contracts. FAR 49.201 states that:

> A settlement should compensate the contractor fairly for the work done and the preparations made for the terminated portions of the contract, including a reasonable allowance for profit. . . . The use of business judgment, as distinguished from strict accounting principles, is the heart of a settlement.

This flexibility in negotiating a settlement should be kept in mind. The goal is to reach a prompt and reasonable settlement, not necessarily the lowest one possible.

Termination Profit
Profit on a termination should be allowed only for work done or preparations made. This differs from the rule of common law for breach of contracts which would apply if there were no provisions in the law or in the contract for termination for convenience. Under the common law, the contractor would be entitled to *anticipatory profits*--or the full amount of profit that would

have been made if the contract was completed. FAR 49.202 lists a number of factors to be considered in negotiating the level of profit. The final profit negotiated should not necessarily be a prorated share of the initially negotiated profit based on the percentage of costs incurred. It should rather be based on careful consideration of the risks and difficulties involved in the work done or the preparations made as compared to the overall risk and difficulty of the initial contract.

Termination Loss

If the contractor would have sustained a loss on the contract upon completion, the final settlement should provide for a net loss in proportion to the projected loss for the whole contract (FAR 49.203).

Termination Negotiation Memorandum

Once negotiations on a settlement are completed, the Purchasing Agent must draft a memorandum explaining how agreement was reached. It should include all information which may be needed by reviewing authorities to understand the basis of the settlement (See FAR 49.110).

Exhibit 14C(i)
Sample "Cure Notice" Format

CURE NOTICE

You are notified that the government considers your ..... [specify the contractor's failure or failures] a condition that is endangering performance of the contract. Therefore, unless this condition is cured within 10 days after receipt of this notice [or insert any longer time that the Purchasing Agent may consider reasonably necessary], the government may terminate for default under the terms and conditions of the ..... [insert clause title] clause of this contract.

(End of notice)

Exhibit 14C(ii)
Sample "Show Cause Notice" Format

SHOW CAUSE NOTICE

Since you have failed to ..... [insert "perform Contract No. ..... within the time required by its terms," or "cure the conditions endangering performance under Contract No. ..... as described to you in the government's letter of ..... (date)"], the government is considering terminating the contract under the provisions for default of this contract. Pending a final decision in this matter, it will be necessary to determine whether your failure to perform arose from causes beyond your control and without fault or negligence on your part. Accordingly, you are given the opportunity to present, in writing, any facts bearing on the question to ..... [insert the name and complete address of the contracting officer], within 10 days after receipt of this notice. Your failure to present any excuses within this time may be considered as an admission that none exist. Your attention is invited to the respective rights of the Contractor and the government and the liabilities that may be invoked if a decision is made to terminate for default.

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

(End of notice)

SECTION 14D

ADMINISTRATION OF LABOR STANDARDS PROVISIONS

DAVIS-BACON ACT

The Davis-Bacon Act of 1931 was designed to prevent Federal construction dollars from being used as an instrument to depress local wage standards. A key provision of the statute was that the rate of wages for all laborers and mechanics employed by the contractor or any subcontractor shall not be less than the prevailing wage rate for work of a similar nature in the city, town, village, or other civil district of the State in which the contract is performed. A determination of the prevailing wage rate is to be made by the Secretary of Labor, and his decision with respect to that wage is conclusive on all parties to the contract.

As was discussed in Section 10D, the Act applies to all contracts involving the employment of laborers or mechanics in the construction, alteration, or repair of public buildings of the United States or of the District of Columbia, if the contract is for an amount in excess of $2,000. Its coverage has also been extended to other federally funded construction by specific enactments.

The Act is important because it established the concept of the prevailing wage by which the Secretary of Labor is empowered to prescribe minimum wages payable under government contracts. It has been the subject of periodic controversy. Some of the controversies have surrounded the procedure by which prevailing wages are determined and, more recently, the tendency of the prevailing wages to accelerate the pace of inflation.

Provisions of the Act
The Act provides that:

- Laborers and mechanics performing work at the sites of construction must be paid no less than the prevailing minimum hourly wage as set by the U.S. Department of Labor (DOL), in a determination included in the contract. Laborers and mechanics are those who work with their hands or with tools or machinery associated with the construction trade. The term includes *working* foremen and truck drivers employed by the construction contractor or subcontractors. It does not include office workers or supervisory foremen.

- The government may withhold payments to the contractor if under payments are made to workers.

- The government may terminate the contract for violation and complete performance by contracting with another firm. (Under such action, the terminated contractor is liable for any excess costs incurred by the government).

- The contractor may be debarred from government contracts.

- *Classification of Laborers*. The DOL issues separate rates for two categories of construction: Buildings, and Heavy and Highway. Laborers must be paid according to the classification which most nearly describes the type of work they do. If they do different types of work, they must be paid at the different rates accordingly or at the highest rate earned during the day.

- *Fringe Benefits*. The normal wage determination includes a basic hourly rate of pay plus fringe benefits. Fringe benefits may include medical and hospital care, unemployment benefits, vacation and holiday pay, etc. Establish at the pre-work meeting how the contractor intends to pay fringe benefits. The contractor fulfills its obligation to pay fringe benefits by:

  -- Making direct payment in cash to employees equivalent to the amount specified in the wage determination for fringe benefits;
  -- Making contributions to a trustee or third party, e.g., payment into an insurance fund;
  -- Incurring costs itself by a commitment to carry out a benefit program. This usually requires evidence that the contractor has assets in a separate account to insure that it can meet its obligations under the program. The employee must be informed in writing of the details of the program; or
  -- Any combination of the above.

Note: Disagreements concerning equivalent fringe benefits should be handled by the Purchasing Agent; the questions raised and the Purchasing Agent's recommendations should be submitted to the Secretary of Labor for final determination.

- *Payments*. Contractors and subcontractors must pay laborers and mechanics once each week.

- *Poster*. At the time of award, the contractor should be furnished with one copy of the poster "Notice to Employees Working on Federal or Federally Financed Construction Projects". The contractor should be instructed that the poster and the accompanying wage decision must be displayed on the job site so that it can be seen by all employees.

VERIFICATION OF CONTRACTOR COMPLIANCE

The primary tool used to monitor compliance with the requirement of the Act is the review of the contractor's weekly payroll records which must be submitted in accordance with the requirements of the contract clause entitled Payrolls and Basic Records. The Purchasing Agent or his or her designated representative must "spot check" contractor and lower-tier subcontractor payroll records to assure that the rates paid to the contractor's and subcontractor's laborers and mechanics are not less than those stipulated in the contract. This spot check, including interview of employees on a sampling basis, should be conducted as often as necessary to insure compliance. During any such reviews particular attention must also be given to the correctness of the employees' wage rate classifications and the ratio of laborers, helpers, apprentices, or trainees to journeymen.

The accuracy of the contractor's and subcontractor's payroll records must be verified by direct observation at the work site and by random interviews of the contractor's employees. During such employee interviews, the Purchasing Agent or his or her representative should verify not only the accuracy of the payroll records but also the employee's wage rate classification. Oral or written statements made by employees during such interviews must be treated as confidential and must not be disclosed to the employer without the written consent of the employee. Site visits made by the Purchasing Agent should be scheduled on a random basis.

Persons Covered by the Davis-Bacon Act

Employees

Questions may arise as to whether certain categories of employees are covered by the Davis-Bacon Act. The general rule in determining coverage is: If the employee is a laborer or mechanic performing construction work at the site, he or she is covered. The following are examples of employees who are covered and of those who are not:

- *Working Foremen* are covered because they perform labor in addition to supervisory responsibilities. They are listed on the payroll according to their proper classification and must be paid at least the minimum wage for that classification.
- *Supervisory Foremen* are not covered because they spend no more than an incidental amount of their overall time (20 percent) in performing work.
- *Owner-Operators of Construction Hauling Equipment* (e.g., trucks) are covered. However, by decision of the DOL, minimum hourly wages are not enforced for these people.
- *Owner-Operators of Construction Equipment* (e.g., tractors, backhoes) are covered and must be paid by the hour at no less than the hourly rate shown in the wage determination for power equipment operator of the class of machinery being used.
- *Office Clerks and Watchmen* are not covered, since they normally only deliver materials to the site and perform no construction labor. If they also perform labor, at the site, they are covered for those hours.
- *Partnerships and Joint Ventures.* If two or more individuals submit a bid as a partnership or joint venture (a limited form of partnership), these individuals are all considered owners rather than laborers. They share in the contract's proceeds and are therefore not covered by the Act. However, all others working on the job would be covered.

Apprentices and Trainees

Apprentices are permitted to work only when they are included in an apprenticeship program registered with the Bureau of Apprenticeship and Training, U.S. Department of Labor, or a State apprenticeship agency. Wage determinations do not include apprenticeship rates. They are usually included in the registered program and are based on prevailing State apprentice scales. The ratio of apprentices to journeymen in any classification cannot be greater than the ratio permitted the contractor for its entire work force under the apprenticeship program. The main technique for assuring compliance with the Apprentices and Trainees provision is for the Purchasing Agent during the course of site visitation to investigate any complaints initiated by employees. Random field interviews and payroll and field verification or permitted program ratios for trainees or apprentices are other means of assuring compliance.

CONTRACTOR'S RESPONSIBILITY

The contractor is fully responsible for the acquisition, supervision, and management of all labor required for completion of the work and for compliance with all labor standard provisions contained in the contract or otherwise made applicable by law or regulation, whether such labor is employed by the contractor or by any subcontractor.

PURCHASING AGENT'S RESPONSIBILITY

The Purchasing Agent is responsible for the administration and enforcement of the labor standards provisions contained in the contract, pursuant to the DOL regulations. He or she must make sure that the contractor is fully aware of his or her responsibility to comply with the labor standards provisions contained in the prime contract, to insert such provisions in all subcontracts, and to ensure the compliance of subcontractors at any tier. These responsibilities must be transmitted to the contractor immediately upon award of the contract.

The contractor's responsibilities should also be discussed and explained at the preconstruction conference (See discussion below and FAR 36.212).

Preconstruction Conference

During the preconstruction conference the Purchasing Agent may distribute samples of payroll forms and discuss the requirement for weekly submission of the forms, covering wages paid to any subcontractor employees as well as to the contractor's own employees. Detailed discussions shall be held on applicable labor standards. Such discussions should include, but need not be limited to, the following topics:

- Employment of foremen, laborers, mechanics, and others.
- Wage and fringe benefits payments.
- Payrolls and statements of compliance.
- Correctness of employee classifications.
- Addition of classifications.
- Benefits to be realized by contractors and subcontractors in keeping complete work records.
- Liquidated damages and other sanctions for violations of labor standards provisions.

In addition, the Purchasing Agent should advise the contractor of the requirements of the Department of Labor Regulations, Part 3 (29 CFR Subtitle A), pertaining to permissible payroll deductions pursuant to the Copeland "Anti-kickback" Act.

The Purchasing Agent is also responsible for conducting payroll reviews, making on-site inspections and interviewing employees to determine contractor compliance with labor standards.

On-Site Compliance Checks

The Purchasing Agent should initiate regular checks as necessary to ensure compliance with labor standards requirements. On-site compliance checks will be conducted by the Purchasing Agent or the COR and must, at a minimum, include the following:

- Interviews of contractor and subcontractor employees to determine correctness of classification and rates of pay, including fringe benefit payments.
- Inspections to determine: (1) the ratio of laborers, helpers, apprentices, or trainees to journeymen; and (2) types and classifications of work being performed; (3) number of workers; and (4) fulfillment of posting requirements.
- Inspections to determine that apprentices are employed under a bona fide apprenticeship program.
- Spot checks to assure that payrolls of prime contractors and subcontractors have been submitted on time and that they are complete and correct.
- Comparison of the above information with other available data, including daily time sheets.

In the case of isolated locations, the on-site compliance check schedule must be adhered to when feasible. In no event shall acceptance of the work be made and final payment rendered to the contractor prior to a compliance check and resolution of labor violations. Where the Purchasing Agent determines that compliance checks cannot be performed, the contract files must be documented with the reasons why.

On-Site Interviews

The Purchasing Agent, the COR, or other designated representative must conduct employee interviews by obtaining the information needed to complete Standard Form 1445--Labor Standards Interview. The form is signed and dated by the interviewer and by the employee. If the employee declines to sign, the interviewer should note this on the form. Any oral or written statements made by on-site employees must be treated as confidential. The form shall be filed under the contract number or employer name to avoid violation of the Privacy Act. No employee's name may be disclosed to the employer, in relation to the statements made, without the written consent of the employee. SF-1445 should be used by the Purchasing Agent or his or her representative in determining correctness of payrolls and compliance with labor standards provisions.

Investigations

Where circumstances indicate, the Purchasing Agent should initiate an investigation, pursuant to FAR 22.406-8, relating to apparent or alleged violations of the labor provisions. The investigation should be recorded on SF 1446.

Additional Classifications

If any laborer or mechanic is to be employed in a classification not listed in the wage determination applicable to the contract, the contractor must submit to the Purchasing Agent a request for authorization stating the proposed additional classification and minimum wage rate including any fringe benefits payments. SF-1444 is used for this. Upon receipt, the Purchasing Agent should:

- Review the contract's wage determination schedules to see if there is a classification that can be used to cover the work to be performed; for example, a "crane operator" classification shown in the appropriate schedule may be used to cover a "dragline operator."

- Ensure, if there is no applicable classification and rate, that any new classification or reclassification requested is either generally used in the construction industry or used locally, and that the rate proposed is not less than that which prevailed in the area 10 days before bid opening.
- Determine that a proposed rate conforms with other rates in the contract. An example of nonconformance is listing a crane operator at one wage rate but proposing an additional dragline operator classification at a significantly different rate.
- If the proposed additional classification or reclassification and rate are satisfactory, check the appropriate box and sign SF-1444. Any differences of opinion between the parties should be resolved, if possible, by obtaining additional information or discussing the problem, or both.
- Approvals by Purchasing Agents are subject to review by the DOL. The DOL will approve, modify, or disapprove every additional classification action within 30 days of receipt or will notify the Purchasing Agent within the 30-day period that additional time is required.
- If the contractor and the Purchasing Agent cannot agree on the proper classification or reclassification and rate, check the box on SF-1444 indicating that the question will be referred to the Secretary of Labor for final determination. (This referral should include substantiating data and the Purchasing Agent's recommendations.)

The SF-1444 should be distributed as follows:

- Original and supporting data, for submission to the DOL, with a copy retained by the Purchasing Agent.
- Copy to the COR.
- Copy to the contractor, indicating either approval or referral to the Department of Labor, as appropriate.

If the matter is referred to the DOL for determination, the Purchasing Agent will notify the contractor promptly upon receipt of a determination of the proper classification and rate.

If the Purchasing Agent has approved a proposed additional classification or reclassification but a correction or objection is received from the DOL, the Purchasing Agent must implement the DOL's position.

Subcontracts

The Purchasing Agent should obtain from the contractor a list of subcontractors. This list must be kept current and used by personnel who check payroll submissions. Subcontracts for labor only should be closely scrutinized as they may merely be devices used to avoid payment of required wage rates.

PAYROLLS AND STATEMENTS OF COMPLIANCE

Submission of Payrolls and Statements of Compliance

Payrolls and statements of compliance (see Exhibit 14D(i)) should be checked to determine whether or not all of those required have been submitted. Inquiry should be made if no payrolls are received from a subcontractor. In addition, inquiry may be warranted where the total value

of labor shown on all payrolls submitted is substantially lower than the estimated value of the labor required to perform the work. Care should be taken to ascertain that payrolls are submitted for crafts covering all branches of the work; for example, if payrolls show only painters, inquiry should be made if plumbing or any other work not customarily performed by painters is specified.

Examination of Payrolls and Statements of Compliance
The Purchasing Agent or his or her designated representative will examine payrolls and statements as necessary to assure compliance with contract, statutory, and regulatory requirements. In addition, the payroll examiner must compare the payrolls with the information shown on the completed SF-1445, Labor Standards Interview. The following guidelines apply:

- A detailed check for accuracy and completeness must be given the first several payrolls submitted by the prime contractor and each subcontractor.

- When it has been determined that the contractor is in compliance, detailed checks may be made less frequently and only to the extent necessary for reasonable assurance of continued compliance. If satisfactory compliance is not established or the information shown on the completed SF-1445 shows a possible violation, all payrolls of the firm involved must be checked promptly.

- When a contract is nearing completion, payrolls must be reviewed to determine the need for additional checking so that any corrective action required can be taken without delaying final settlement. Particular attention should be given to contracts of short

  duration and to contracts at isolated locations where on-site compliance checks may not have been performed on a continuing basis.

Correction of Payrolls
The contractor shall be notified of any discrepancies and advised of the corrective action required. Prompt submission of amended or supplemental payrolls showing corrections will be required.

Retention of Payrolls and Statements of Compliance
The contractor must retain payrolls and statements of compliance for 3 years from the date of completion of the contract, and must produce them at the request of the Secretary of Labor at any time during that period. (See FAR Subpart 4.7--Contractor Records Retention.)

SUSPENSIONS AND DEDUCTIONS OF CONTRACT PAYMENTS

Processing Funds for Payment to Employees
The contractor or subcontractor must make restitution within a reasonable time after the under payments are called to their attention. If not made within a reasonable time--and, in any event, prior to final payment--the Purchasing Agent must issue a final decision outlining the contractor's violations of contract requirements and the action to be taken to comply.

If the contractor does not appeal this decision within 30 days, or agrees with the decision but is unable to locate the employees involved to make restitution, the Purchasing Agent must submit to the NFC a completed SF-1093--Schedule of Withholdings under the Davis-Bacon Act. A narrative report setting forth the facts and circumstances upon which the determination of under payments and related recommendations are based should be attached along with relevant documents and correspondence.

Where disregard of obligations is found, as opposed to errors or misunderstandings, the Purchasing Agent will forward a comprehensive report to the General Accounting Office. The report should include a chronological narrative of the facts, a copy of any investigative report, payrolls, and copies of correspondence showing administrative action taken and explanations given by offenders, as well as any other related information. SF-1093 is used to report withholdings under the Contract Work Hours and Safety Standards Act to be restored to employees. However, the amounts due employees for Davis-Bacon Act violations and Contract Work Hours and Safety Standards Act violations shall be tabulated separately and the total findings shown in a consolidated summary.

Notification of Claims Division, General Accounting Office
If the Purchasing Agent is advised of a change in status of the claim of an employee after funds have been transferred to General Accounting Office for payment, he or she must promptly notify Finance, who in turn will notify the Claims Division, General Accounting Office.

Reports
Reports of violations of labor provisions and semi-annual enforcement reports shall be submitted in accordance with 29 CFR 5.7(a) and (b), Department of Labor Memorandum No. 126. (See FAR 22.406-13).

Contract Terminations
When a contract is terminated for violation of labor standards provisions, a report must be forwarded to the Secretary of Labor and to the Comptroller General. The report must give the name and address of the terminated contractor or subcontractor as well as the name and address of the contractor or subcontractor, if any, who is to complete the work. It must also contain the amount and number of the replacement contract and a description of the work to be performed.

THE COPELAND ACT

The Copeland ("Anti-kickback") Act (see FAR clause 52.222-10) protects laborers and mechanics on all construction contracts from being coerced or forced to give up any compensation lawfully due them. The Act requires the contractor and each subcontractor to furnish with each payroll submitted to the government a statement with respect to the wages paid each employee during that payroll period. The statement is printed by the Department of Labor as Form WH-348 and is also included on the reverse of the payroll form WH-347 issued by DOL.

Authorized Payroll Deductions

In order to assure compliance with the Copeland Act, i.e., to avoid kickbacks, the DOL's regulations specify whose deductions are proper. *All other deductions require special approval from DOL*. Deductions permissible without approval of DOL are:

- Those made in compliance with Federal, State, or local law, e.g., tax withholding, social security tax
- Deductions to recoup salary advances to employees
- Those required by court process to be paid to someone other than the contractor or subcontractor
- Contributions by the employee to fringe benefit programs established by the employer, provided that:

  -- The deduction is not prohibited by law
  -- Has the employee's prior consent in writing or is provided for in an applicable collective bargaining agreement
  -- Contractor neither makes a profit nor receives benefit from it

- Voluntary contribution for U.S. bonds or contribution to United Givers Fund or other charitable organizations

- Voluntary deduction to repay loan

- Voluntary deduction for union dues, if the applicable collective bargaining agreement allows the deduction
- Reasonable cost of board, room, and other facilities furnished, *provided that* employee first *consents in writing*
- Safety equipment of nominal value, such as safety shoes, safety glasses, safety gloves, and hard hats, if the contractor is *not* required by law to furnish the equipment. [The deduction must be at the actual cost of the item without profit and must be voluntarily consented to in writing by the employee or provided for in a bona fide collective agreement between the contractor (or subcontractor) and representatives of the employees.]

  Note: All deductions must be identified and itemized on each payroll form.

Copeland Act Compliance

Within 7 days after each employee payment date, weekly statements of wages paid to laborers and mechanics must be delivered by the contractor or subcontractor to the appointed ARS representative at the work site. In cases where an ARS representatives is not present at the work site, weekly statements must be mailed to the purchasing office. Upon receiving these statements they must be examined and either filed at the field office or, if violations are found, transmitted to the DOL, along with a report stating the particular violation(s).

Compliance with the Copeland Act provisions also requires that contractors and subcontractors retain all weekly payroll records for three years from the date of contract completion. These records must contain:

- Name and address of each laborer and mechanic
- Correct classification
- Pay rate
- Daily and weekly work hours
- Deductions made
- Actual wage paid

All such payroll records must be available at all times for inspection by the Purchasing Agent, his or her representative, or representatives of the DOL.

EQUAL EMPLOYMENT OPPORTUNITY

The U.S. Department of Labor, Office of Federal Contract Compliance, requires that contractor employees working on federally financed contracts be advised of their rights under the Equal Employment Opportunity Law. For this purpose, the contractor shall be required to display the poster "Equal Employment Opportunity is the Law," Form OFCCP-1420, (Exhibit 9D(ii)), on the job site in a location where it can be easily seen by all employees. A copy of this poster should be given to the contractor at the time of issuance of the purchase order, or award of the SF-1442.

Exhibit 14D(i)
Payroll And Statement Of Compliance (WH-347)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

PAYROLL

(For Contractor's Optional Use; See Instructions, Form WH-347 Inst.)

Persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

OMB No.: 1215-0149
Expires: 03/31/2003

NAME OF CONTRACTOR ☐ OR SUBCONTRACTOR ☐		ADDRESS	
PAYROLL NO.	FOR WEEK ENDING	PROJECT AND LOCATION	PROJECT OR CONTRACT NO.

(1) NAME, ADDRESS, AND SOCIAL SECURITY NUMBER OF EMPLOYEE	(2) NO. OF WITHHOLDING EXEMPTIONS	(3) WORK CLASSIFICATION	OT. OR ST.	(4) DAY AND DATE							(5) TOTAL HOURS	(6) RATE OF PAY	(7) GROSS AMOUNT EARNED	(8) DEDUCTIONS						(9) NET WAGES PAID FOR WEEK
				HOURS WORKED EACH DAY										FICA	WITH-HOLDING TAX			OTHER	TOTAL DEDUCTIONS	
			O								0.00		$0.00						$0.00	$0.00
			S								0.00	/								
			O								0.00		$0.00						$0.00	$0.00
			S								0.00	/								
			O								0.00		$0.00						$0.00	$0.00
			S								0.00	/								
			O								0.00		$0.00						$0.00	$0.00
			S								0.00	/								
			O								0.00		$0.00						$0.00	$0.00
			S								0.00	/								
			O								0.00		$0.00						$0.00	$0.00
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			S								0.00	/								

We estimate that it will take an average of 56 minutes to complete this collection of information, including time for reviewing instructions searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding these estimates or any other aspect of this collection of information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, ESA, U. S. Department of Labor, Room S3502, 200 Constitution Avenue, N. W., Washington, D. C. 20210.

FORM WH-347, Revised Nov. 1996 - FORMERLY SOL 184 - *PURCHASE THIS FORM DIRECTLY FROM THE SUPT. OF DOCUMENTS*

Exhibit 14D(i)
Payroll And Statement Of Compliance (WH-347)
(Continued)

Date ____________________

I, ______________________________________, ______________________________________
(Name of Signatory Party) (Title)

do hereby state:

(1) That I pay or supervise the payment of the persons employed by

____ on the
(Contractor or Subcontractor)

____; that during the payroll period commencing on the
(Building or Work)

_______ day of ______________, _______, and ending the ______ day of ______________, ______,

all persons employed on said project have been paid the full weekly wages earned, that no rebates have been or will be made either directly or indirectly to or on behalf of said

____ from the full
(Contractor or Subcontractor)

weekly wages earned by any person and that no deductions have been made either directly or indirectly from the full wages earned by any person, other than permissible deductions as defined in Regulations, Part 3 (29 CFR Subtitle A), issued by the Secretary of Labor under the Copeland Act, as amended (48 Stat. 948, 63 Start. 108, 72 Stat. 967; 76 Stat. 357; 40 U.S.C. 276c), and described below:

____

____

____

____

(2) That any payrolls otherwise under this contract required to be submitted for the above period are correct and complete; that the wage rates for laborers or mechanics contained therein are not less than the applicable wage rates contained in any wage determination Incorporated into the contract; that the classifications set forth therein for each laborer or mechanic conform with the work he performed.

(3) That any apprentices employed in the above period are duly registered in a bona fide apprenticeship program registered with a State apprenticeship agency recognized by the Bureau of Apprenticeship and Training, United States Department of Labor, of if no such recognized agency exists in a State, are registered with the Bureau of Apprenticeship and Training, United States Department of Labor.

(4) That:

(a) WHERE FRINGE BENEFITS ARE PAID TO APPROVED PLANS, FUNDS, OR PROGRAMS

☐ – in addition to the basic hourly wage rates paid to each laborer or mechanic listed in the above referenced payroll, payments of fringe benefits as listed in the contract have been or will be made to appropriate programs for the benefit of such employees, except as noted in Section 4(c) below.

(b) WHERE FRINGE BENEFITS ARE PAID IN CASH

☐ – Each laborer or mechanic listed in the above referenced payroll has been paid, as indicated on the payroll, an amount not less than the sum of the applicable basic hourly wage rate plus the amount of the required fringe benefits as listed in the contract, except as noted in Section 4(c) below.

(c) EXCEPTIONS

EXCEPTION (CRAFT)	EXPLANATION

REMARKS:

NAME AND TITLE	SIGNATURE

THE WILLFUL FALSIFICATION OF ANY OF THE ABOVE STATEMENTS MAY SUBJECT THE CONTRACTOR OR SUBCONTRACTOR TO CIVIL OR CRIMINAL PROSECUTION. SEE SECTION 1001 OF TITLE 18 AND SECTION 231 OF TITLE 31 OF THE UNITED STATES CODE.

* U.S. G.P.O.:1997 519.861