

**CHAPTER 7 - CONTRACT ADMINISTRATION**

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## CHAPTER 7 - CONTRACT ADMINISTRATION

### Part 7.1. Maintaining Records

#### 7.1.1. Procurement Files (Purchase/Delivery/Task Order or Contract Files)

- a. A file must be established and maintained for every purchase action, solicitation, and contract. Procurement files must be maintained in a secured area and otherwise not left unattended nor in open view when personnel without a need-to-know are present. Access to procurement files and related documents must be limited to authorized judiciary procurement and audit personnel. See [Guide, Vol 1, Chapter 8, Part D](#) for a discussion on obtaining and disclosing procurement documents in accordance with the Procurement Integrity Act. Purchases made with the purchase card are exempt from the requirement to establish files for each individual transaction. However, the transaction must be recorded in either an electronic or manual purchase card log (see [Judiciary Purchase Card Program Manual](#)). The type of files depends on the dollar amount and award type (See [Chapter 4](#) for contract types. Purchases are awarded using a purchase order for open market purchases, which are less than the judiciary's small purchase threshold (see [3.4.1.c.](#) and [Guide Volume 1, Chapter 8, Part B](#)). Delivery orders are used for products and task orders are used for services in accordance with the contract (i.e. GSA federal supply schedule, other federal agency contract, indefinite delivery contracts, etc.). If the purchase is estimated to be over the judiciary's small purchase threshold or whenever formal contract procedures are used, then it will use a contract file. The judiciary's threshold for open market purchases with or without competition is \$5000 (see [3.4.2.a.](#)). When placing orders against a GSA federal supply schedule or another federal agency contract, the judiciary must comply with the other federal agency's competition threshold as well as the other federal agency's contract terms and conditions. Files for each procurement must contain the following documentation:
- b. **Open Market Purchases With or Without Competition- up to \$5,000 (purchases from GSA schedule or other federal agency contracts up to GSA or the other federal agency's competition threshold)**
- (1) requisition or statement of need with signature of authorizing official;
  - (2) signed purchase/delivery/task order and any signed modifications;
  - (3) supporting documentation for each purchase/delivery/task order modification, including the documentation required in [3.1.5.d.](#) for GSA schedule orders;
  - (4) copies of all invoices or vouchers; and,
  - (5) any other pertinent information (e.g. documented phone conversations with offerors/contractors, evaluation worksheets, correspondence to and from offerors, commercial agreements, etc.).
- c. **Small Purchases greater than the applicable noncompetitive purchase threshold (1. greater than \$5,000 open market and less than or equal to the judiciary's small purchase open market threshold or 2. purchases from GSA schedule or other**

**federal agency contracts greater than their competition threshold and up to the judiciary's delegated limit for GSA schedule or other federal agency contracts):**

- (1) determination of need with signature of authorizing official;
- (2) rationale for selection of source of supply;
- (3) evidence of the level of competition required by the specific contract in its terms of use;
- (4) justification if other than full and open competition, including required written approvals;
- (5) copy of the one-time delegation of procurement authority from the PE (applicable if the procurement exceeds the CO's delegation level);
- (6) copies of solicitations, amendments, questions, clarifications, all correspondence with prospective offerors and their replies;
- (7) copies of unsuccessful offers;
- (8) determination of fair and reasonable and basis of selection. (If price is not the basis of selection, the required PMD written approvals must be included.);
- (9) signed purchase/delivery/task order and any signed modifications with the supporting documentation;
- (10) copies of receiving documents;
- (11) copies of all invoices or vouchers;
- (12) if multiple payments, a log of payments made and balances remaining; and
- (13) and any other pertinent information (e.g., documented phone conversations with offerors, evaluation worksheets, commercial agreements, records of site visits by prospective offerors, etc.).

**d. Formal Competitive Open Market Contracts - over the judiciary's small purchase threshold**

- (1) determination of need with signature of authorizing official;
- (2) rationale for selection of source of supply;
- (3) one-time delegation of procurement authority from the PE (applicable if the procurement exceeds the CO's delegation level or is not covered by one of the special delegations);
- (4) copy of the issued solicitation and any of its amendments, if applicable;
- (5) justification if other than full and open competition, including required written approvals;
- (6) copies of the advertisement of the requirement and/or documentation that the requirement was advertised locally or on the GPE (or the approved exception from advertising);
- (7) copies of all offers received;
- (8) copies of all correspondence to prospective offerors and their replies;
- (9) determination of fair and reasonable and basis of selection. If price is not the basis of selection, include the required written approvals;
- (10) copy of the contract and delivery order/task order, if an IDIQ contract, and all modifications and all other documents supporting them (i.e. copies of solicitations, competitive range determinations, memo of negotiations, pre-

- negotiation positions, post performance assessment, contractor reports and copies of deliverables, if appropriate; etc);
- (11) copies of unsuccessful offers;
- (12) copies of debriefing from unsuccessful offerors and documentation of debriefing, if any;
- (13) documentation of protests, if any;
- (14) copy of the obligating document and any modifications to that document;
- (15) copies of receiving documents;
- (16) copies of all invoices or vouchers; and
- (17) any other pertinent information (e.g., designation of COTR, documented phone conversations with potential/actual offerors, evaluation worksheets, commercial agreements, records of site visits by contractors, logs of payments, etc.)

## **Part 7.2. Responsibilities**

### **7.2.1. Contract Administration Process**

- a.** Once a procurement is awarded, the contract administration process begins. Every contract-related issue that arises after the procurement is awarded becomes part of the contract administration process. Contract administration encompasses a broad range of functions that, together, ensure that the judiciary obtains exactly what it has purchased. For contract administration involving sureties, see [6.2.3](#). The contract administration process includes:
  - (1) receiving, inspecting, and either accepting or rejecting contractor deliverables in a timely manner;
  - (2) monitoring the contractor's progress, making sure deliverable schedules are maintained and that products and services are of acceptable quality;
  - (3) ensuring that the judiciary is meeting its own contractual obligations, such as reviewing deliverables timely or providing the contractor data that it may need;
  - (4) placing orders under some procurement types and treating those orders as mini-contracts which must be separately administered;
  - (5) providing guidance, answering questions, and addressing contractor issues;
  - (6) changing or modifying the procurement as necessary;
  - (7) ensuring that the contractor is paid only the amount to which it is entitled, but is not paid prior to delivery and fulfillment of acceptance criteria of each procurement;
  - (8) ensuring that other functional specialists provide assistance to the CO in addressing unusual contract actions when necessary, such as protests, disputes, terminations, etc.; and
  - (9) closing out the contract and orders. (See [3.4.11](#) for closing out purchase orders.)
- b.** There are many individuals involved in the contract administration process. Each of these individuals or groups has specific functions, responsibilities, and accountability.

### **7.2.2. Participants in the Contract Administration Process**

- a.** The contracting officer (CO) is the only judiciary employee who is delegated authority to legally commit the judiciary to the purchase of products and services. The CO is supported by other individuals in the judiciary. One of the support individuals is the contracting officer's technical representative (COTR). This individual is appointed by the CO after the person completes the required COTR training. Appointments are evidenced by signed certificates. Such appointments may be renewed only if refresher training is completed every three years.
- b.** The CO delegates specific contract administration responsibilities to the COTR through a written designation. Through this memo of designation, the COTR is empowered to fulfill the delegated responsibilities on a specific contract and/or delivery or task order as appropriate. The respective roles of the CO and COTR are discussed in more detail in [7.2.3.](#) below.
- c. Other Participants**
  - 1. OGC staff members provide essential requested legal reviews and guidance.
  - 2. Financial and budget officials provide the funding that may be required to exercise options, make changes, and settle claims.
  - 3. The CO tracks expenditures against contracts/orders, weighs the adequacy and accuracy of vouchers and invoices, and ultimately approves payments to the contractor.
  - 4. Other financial officials ultimately provide payments to the contractor after written approval of the CO. They also track expenditures against contracts/orders, and weigh the adequacy and accuracy of vouchers and invoices.
- d.** With the single exception of the COTR, all support personnel operate under their own authorities derived through their organizations. It is only the COTR who, through formal appointment and designation, shares authorities otherwise reserved exclusively for the CO.

### **7.2.3. Distinctions between Contracting Officer(CO) and Contracting Officer's Technical Representative (COTR)**

The CO is the only person with the legal authority to commit the judiciary to a business arrangement and expend appropriated funds for that purpose. It is the sole responsibility of the CO to administer each contract. The COTR assists the CO by providing specific services as directed by the CO. However, the CO has the final word and signature authority in the contracting matter. The CO and the COTR are the primary members of a team which provides proper contract administration and oversight. This team's efforts ensure that tax dollars are being wisely and efficiently expended and that the judiciary and, in particular, the customer organization that generates each requirement, is receiving the full measure of the products and/or services which it has purchased.

### **7.2.4. Functions of the CO and COTR**

- a. Monitoring the progress of a contractor and making sure deliverable schedules are maintained. This is a shared responsibility. However, the CO and the COTR often look at different aspects of the contractor's performance. The CO will examine delivery and reporting schedules and consult with the COTR to determine if the contractor is making all deliveries in accordance with the procurement's delivery schedule. Since the COTR is more closely involved in the contractor's day-to-day activities, the COTR acts as the eyes and ears of the CO and customer. The COTR is in effect an early-warning system. For instance, the COTR will be the first one to know when a contractor does not understand or meet a procurement requirement, is making inaccurate assumptions, or is asking questions that suggest that it is not making adequate contract performance progress.
- b. Making sure that the judiciary is meeting its contractual commitments. This is a shared responsibility. For instance, when the judiciary is required by the procurement to provide the contractor equipment or publications for the contractor to do its work, it must be done within the time frame set forth in the procurement. If the judiciary is required to provide equipment or publications as in this example, the COTR provides the material or, in some circumstances, oversees the provision of this material by other employees. The CO, in turn, manages the procurement to ensure that the judiciary meets all of its contractual responsibilities. If the judiciary is failing to meet its responsibilities, the contractor may be entitled to an equitable adjustment. The CO may then have to negotiate a change with the contractor, which may ultimately cause the expenditure of further judiciary funds and/or a delay in delivery or other contract performance.
- c. **Placing orders under some contract types and often treating those orders as mini-contracts, which must be separately administered** The CO is responsible for the placement of orders since it normally involves obligating judiciary funds. Administering each of these orders requires similar actions as the administration for the contracts under which the orders were issued.
- d. **Receiving, inspecting, and either accepting or rejecting contractor deliverables** The COTR recommends acceptance or rejection of the deliverable. If applicable the COTR will normally provide this recommendation only after consulting with customer organizations to confirm their satisfaction with the contractor's performance. This is because the COTR is generally on-site and either observes the provision of services first-hand or is the delivery point for material deliverables. The CO has the final decision for acceptance or rejection after accepting or discussing the delivery or performance with the COTR.
- e. **Providing "technical direction," consisting of guidance, answering questions, and addressing other issues that the contractor may have; but not "changing" the procurement** The COTR provides technical direction. Only the CO can change a procurement. This is a vital area for both the CO and the COTR since open communication between the contractor and the judiciary can mean the difference between success and failure. The COTR may provide guidance only within the general scope of the procurement and only if the guidance does NOT alter any of the procurement specifications or the statement of work, or terms and conditions of the procurement.

Guidance and/or direction that is outside the scope of the procurement or which alters specifications, terms, or conditions would be considered new work. Only the CO is empowered to change a procurement, whether any adjustment in the contract price will result or not. COs and COTRs must work together closely in this area as it is often quite difficult to distinguish between “technical direction” and “changes.”

- f. **Changing or modifying the contract** As discussed above, this is a function strictly reserved for the CO and it may not be delegated. However, the COTR will be asked to support this process by evaluating offers, participating in negotiations, etc.
- g. **Ensuring that the contractor is paid for services and products that have been delivered and accepted** This is primarily a COTR function which requires the COTR to work closely with accounting/disbursement personnel, to ensure that payments are made in proper amounts and within reasonable or contract specified timeframes.
- h. **Maintaining procurement files** Both the CO and the COTR must maintain files for every purchase action, solicitation, and contract. The file requirements for the CO are located in [7.1.1](#). The COTR must maintain a contract work file. The CO files, the COTR files, and other procurement documents must be maintained in a secured area and otherwise not left unattended nor in open view when personnel without a need-to-know are present. Access to procurement files and related documents must be limited to authorized judiciary procurement and audit personnel. See [Guide, Vol 1, Chapter 8, Part D](#) for a discussion on obtaining and disclosing procurement documents in accordance with the Procurement Integrity Act. The contract work file must contain all relevant documentation such as notes of conversations with the contractor, written instructions given to the contractor and similar items as called for by the CO. The COTR must document all significant actions including any technical directions given to the contractor in an action file. This file must contain enough detail so that if a contract dispute or claim occurs, the CO can reconstruct what the COTR did or did not do. Because it is often difficult to determine what might be the subject of a dispute or claim, the COTR must adequately document significant actions that might develop into a problem later. The file must also contain copies of the contract, all modifications, the COTR delegation letter, and all correspondence between the COTR and the contractor or the CO. The file must be maintained intact and updated by each successor COTR until the contract ends.
- i. **Closing out contracts and orders** This is a shared function. First the COTR ascertains that final receipt and acceptance of all products and services has occurred and recommends that the contractor must be relieved of any further legal responsibilities under the contract. Then the CO determines if final payment has been made. The CO negotiates any final payments or actions for the closeout of the contract.
- j. **Supporting unusual contract actions when necessary, such as protests, disputes, terminations, etc.** This is always a joint function but with a clear separation of responsibilities. The COTR plays a major part in the program related aspects of the action, including providing supporting information which impacts the specification or statement of work. The CO has sole responsibility for negotiations and the business and



financial aspects of the transaction, such as deciding whether any payments will be made to the contractor.

### **7.2.5. COTR's Obligations to the Customer Office**

- a.** Aside from the COTR responsibilities to the CO, the COTR also has concurrent responsibilities to the customer office. The COTR must work closely with customer personnel during contract delivery or performance to ensure that the customer office is receiving satisfactory products and services in accordance with the procurement. Moreover, the COTR needs to be involved closely enough with the project to anticipate newly evolving requirements which may result in the need to change the procurement. Under certain types of contracts, the COTR will also be responsible to draft work requirements which will be assigned to the contractor through task orders. The COTR will review and approve technical offers and quotations that the contractor may be required to submit, and will participate in negotiations.
- b.** The COTR also has the critical responsibility to recommend acceptance or rejection of contract/order deliverables and/or performance. If there is premature acceptance of the performance or deliverables, the judiciary may inadvertently waive many of its rights to require the contractor to perform remedial activities or modify the deliverables. Thus, the COTR must closely observe the contractor's performance or delivery and consult often with management within the customer office and with the CO before deciding whether or not to accept performance or deliverables.

**7.2.6. Role of COTR's Supervisor** The COTR's direct supervisor must provide all of the individual's time and resources needed to allow the COTR to fulfill all of the delegated COTR responsibilities. Formal COTR appointment and designation comes from the PLO (in the court units and FPDOs) and from the COs (in the AO). Therefore, the COTR will have procurement responsibilities to the CO. The COTR will also have procurement and non-procurement responsibilities to the COTR's direct supervisor. If a COTR's work conflicts in fulfilling these concurrent responsibilities, the COTR's direct supervisor must confer with the CO to resolve the conflict. Finally, in evaluating job performance, the COTR's direct supervisor must take into account performance as a COTR by gathering input from the CO prior to issuing a rating.

### **7.2.7. Becoming a COTR**

- a.** Judiciary employees are normally nominated in writing by the customer organizations. Provided that the individual completed the required training and is otherwise capable, the PLO (or in the AO the CO) will appoint the employee as a COTR. Information about the required COTR training is available on the procurement website on the J-Net. A formal appointment is evidenced by the issuance of a certificate signed by the PLO or the Administrative Office CO.

- b. The CO will subsequently designate the COTR for specific contracts, delivery orders, and task orders. Formal designation to act as a COTR on a specific contract, delivery order, and/or task order is evidenced by a letter of designation, signed by the CO. A copy of this designation will be furnished to the COTR's immediate supervisor, and to the contractor.
- c. The designation letter will describe the exact functions the COTR will be required to perform on the particular contract. Separate letters of designation will be required for each contract, delivery order, or task order assigned to the COTR. COTR designations expire automatically at the conclusion of the contract, delivery order, or task order under which the COTR was designated.

#### **7.2.8. Use of Contractors to Monitor Contract Performance**

- a. Facilities Contracts COs may contract with architects, engineers, or real estate management professionals to assist in selected contract administration functions that may be delegated to a judiciary COTR.
- b. Other Contracts COs may contract with third parties to perform contract administration responsibilities such as testing for conformance (but not acceptance); reviewing contractor submittals, shop drawings, written requests for design approval; developing negotiation positions; reviewing offers; advising panels; drafting mods; etc. However, the CO remains as the signature authority for any contract actions.

#### **7.2.9. Relationship Between Judiciary and Contractor Representatives**

- a. The objective of any purchase action is performance or delivery of the contract requirements, not control of the contractor's business. Judiciary administrative personnel must devote their efforts to tasks associated with that requirement, such as quality assurance, cost monitoring, and other activities intended to ensure compliance with contract terms. They may not direct the contractor's management activities or intervene to supervise, train, or discipline contractor personnel (See [5.1. - Personal Services](#)).
- b. Disputes with contractors are an obstacle to contract performance or delivery. CO's and their supporting staffs must seek to resolve contract disputes through businesslike approaches that promote efficiency and cost-effectiveness and enforce the judiciary's interests.

#### **7.2.10. Clauses**

- a. The following clauses are included in all solicitations and contracts:
  - (1) [Clause 7-1](#), "Contract Administration;" The CO will provide the CO's name, business address, e-mail address and telephone number in a cover letter accompanying the solicitation or contract.
  - (2) [Clause 7-5](#), "Contracting Officer's Technical Representative;"

- (3) [Clause 7-10](#), “Contractor Representative;” The offeror will appropriately complete the clause’s blank spaces.
  - (4) [Clause 7-15](#), “Observance of Regulations/Standards of Conduct;”
  - (5) [Clause 7-20](#), “Security Requirements;”
  - (6) [Clause 7-25](#), “Indemnification”(also include in purchase orders when applicable);
  - (7) [Clause 7-30](#), “Public Use of the Name of the Federal Judiciary;” and
  - (8) [Clause 7-35](#), “Disclosure or Use of Information.”
- b. [Clause 7-40](#), “Judiciary-Contractor Relationships” is included in all solicitations and contracts which do not involve the use of judiciary information technology funds.
  - c. [Clause 7-45](#), “Travel” is included in all solicitations, RFQs, contracts, and purchase orders when travel is reimbursable either as a separate line item in an award that is otherwise fixed price or as part of cost-reimbursement contract.
  - d. [Clause 7-50](#), “Parking” is included in all solicitations, RFQs, contracts, and purchase orders when performance will be at the AO.
  - e. [Clause 7-55](#), “Contractor Use of Judiciary Networks” is included in all solicitations RFQs, contracts, and purchase orders when the contractor will use judiciary computer networks during performance.

### **Part 7.3. Judiciary Property**

#### **7.3.1. General**

- a. The CO must review the contractors' property control systems to ensure compliance with the contract's property clauses, if applicable.
- b. The CO must notify the contractor in writing when its property control system does not comply with the contract requirements, requesting prompt correction of deficiencies. If the contractor does not correct the deficiencies within a reasonable period, the CO may:
  - (1) notify the contractor in writing of any required corrections and establish a schedule for completion;
  - (2) caution the contractor that failure to take the required corrective action within the time specified will result in withholding or withdrawing system approval; and
  - (3) advise the contractor that its liability for loss of or damage to judiciary property may increase if approval is withheld or withdrawn.
- c. **Clauses**
  - (1) [Provision 7-60](#), “Judiciary Furnished Property or Services” is included in all solicitations.
  - (2) [Clause 7-65](#), “Protection of Judiciary Buildings, Equipment, and Vegetation” is included in solicitations and contracts for services to be performed on judiciary installations.
  - (3) [Clause 7-70](#), “Judiciary Property Furnished ‘As Is’” is included in solicitations RFQs, contracts, and purchase orders when judiciary property is to be furnished "as is."

### 7.3.2. Property Records

- a. Contractor records of judiciary property, established and maintained under the terms of the contract, are the judiciary's official records.
- b. Contracts must provide for the official records to be maintained by the judiciary when judiciary property is furnished to a contractor:
  - (1) for repair or servicing and return to the shipping organization;
  - (2) for use at a judiciary installation;
  - (3) under a local support service contract;
  - (4) under a contract with a short performance period or involving judiciary property having a contract cost of \$50,000 or less; and
  - (5) when otherwise determined by the CO to be in the judiciary's interest.
- c. A detailed inventory list of judiciary-furnished products, material or services specifying, applicable, quantity, nomenclature, serial number, model number, and general condition must be maintained in the contract file and kept current at all times.

## **Part 7.4. Subcontracting**

### 7.4.1. General

- a. When a contract contains [Clause 7-75](#), "Subcontracts" the contractor must give the CO advance notice of its intent to subcontract. The contractor may enter into a subcontract unless notice of disapproval is received from the CO within 15 days from the date the CO was notified. The CO must:
  - (1) promptly evaluate contractor notices of intent to subcontract;
  - (2) obtain assistance in this evaluation, as necessary, from subcontracting, audit, pricing, technical, or other specialists; and
  - (3) notify the contractor in writing if the subcontract is disapproved.
- b. The CO must review the notice of intent to subcontract with any supporting data and consider the following:
  - (1) Will the subcontractor acquire special test equipment or facilities that are available from judiciary sources?
  - (2) Is the subcontractor's selection of the particular products, equipment, or services technically justified?
  - (3) Was adequate price competition obtained for the subcontract, or its absence justified?
  - (4) Did the contractor adequately assess its subcontractor's alternate offers?
  - (5) Does the contractor have a sound basis for selecting and determining the responsibility of the subcontractor?
  - (6) Has the contractor performed adequate price or cost analysis of the subcontract?
  - (7) Is the proposed subcontract type appropriate for the risks involved and consistent with current policy?

- (8) Has the contractor adequately and reasonably translated prime contract technical requirements into subcontract requirements?
  - (9) Is the proposed subcontractor on the list of debarred, suspended, and ineligible contractors?
  - (10) Has the contractor incorporated terms and conditions contained in the prime contract which are expressly applicable to the subcontract(s)?
- c.** Particularly careful and thorough consideration is necessary when:
- (1) the prime contractor's purchasing system or performance is inadequate;
  - (2) close working relationships or ownership affiliation between the prime and subcontractor may preclude free competition or result in higher prices;
  - (3) subcontracts are proposed on a noncompetitive basis, at prices that appear unreasonable, or at prices higher than those offered the judiciary in comparable circumstances; or
  - (4) subcontracts are proposed on other than a fixed-price basis.
- d. Clauses**
- (1) [Clause 7-75](#), "Subcontracts" is included in solicitations and contracts when contemplating:
    - (a) a cost-reimbursement contract;
    - (b) a letter contract that exceeds the judiciary's small purchase threshold;
    - (c) a fixed-price contract that exceeds the judiciary's small purchase threshold under which unpriced contract actions (including unpriced modifications or unpriced delivery orders) are anticipated;
    - (d) a time-and-materials contract that exceeds the judiciary's small purchase threshold; or
    - (e) a labor-hour contract that exceeds the judiciary's small purchase threshold.

The CO will appropriately fill in the clause's blank spaces;.
  - (2) [Clause 7-80](#), "Competition in Subcontracting" is included in solicitations and contracts when the contract amount is expected to exceed the judiciary's small purchase threshold, unless:
    - (a) a firm-fixed-price contract, awarded on the basis of adequate price competition or whose prices are set by law or regulation, is contemplated or
    - (b) a time-and-materials, labor-hour, or architect-engineer contract is contemplated.

## **Part 7.5. Contract Performance**

### **7.5.1. Contract Performance**

- a. Postaward Orientation** Postaward orientation is conducted by the CO. It is optional and is normally conducted in cases of complex service contracts. It is a planned and structured discussion between judiciary and contractor representatives that focuses on:

- (1) introducing judiciary and contractor representatives;
  - (2) ensuring the understanding of the technical aspects of the contract;
  - (3) identifying and resolving oversight issues;
  - (4) preventing problems;
  - (5) averting misunderstandings;
  - (6) establishing a methodology to solve problems that may occur later; and
  - (7) reaching agreement on communication issues.
- b.** The CO decides whether postaward orientation is necessary. The CO must consider the:
- (1) nature and extent of any preaward survey or other previous discussions with the contractor;
  - (2) procurement type, value, and complexity;
  - (3) procurement history of the required products or services;
  - (4) requirements for spare parts and related equipment;
  - (5) urgency of the delivery schedule and relationship of the products or services to critical programs;
  - (6) length of the planned production cycle;
  - (7) extent of subcontracting;
  - (8) contractor's performance history and experience with the products or services;
  - (9) safety precautions required for hazardous materials or operations; and
  - (10) financing arrangements contemplated.
- c.** When a postaward orientation is conducted, it must be held promptly after award. The CO must prepare an agenda before the orientation and summarize by memorandum the actual topics covered in the orientation session. The CO and the contractor, and, whenever possible, all principal parties must attend any post-award conference (for example, COTRs, project officers, program managers, and other appropriate subject matter experts)
- d.** A postaward orientation may not be used to change the contract. However, any changes identified in a postaward orientation, determined by the CO to be necessary, must be made by the CO in a contract modification.

### **7.5.2. Performance Record Keeping**

- a.** Maintenance of complete records on contract performance is essential in monitoring contractor performance.
- b.** The contractor must maintain records for three years after final payment on the contract. [Clause 7-85](#), "Examination of Records" is included in all solicitations and contracts.
- c.** The CO and COTR both maintain records on each procurement assigned to them. Records must be maintained by the CO in a separate official procurement file (see [7.1.1.](#)) and by the COTR in a contract work file (see [7.2.4.h.](#)).

### **7.5.3. Performance Monitoring**

- a. Performance monitoring involves those contract administration activities that COs, COTRs, and support personnel use to ensure that products and services received conform to the procurement's quality, quantity, and other specific requirements.
- b. **Judiciary Policy on Performance Monitoring** Judiciary policy requires that the CO ensure that:
  - (1) procured products or services meet contract requirements and are delivered/performed in accordance with contract delivery schedules;
  - (2) procedures for assuring that these contract requirements are met and performed before acceptance of products or services under the procurement; and
  - (3) no procurement precludes the judiciary from performing inspection.
- c. **Monitor Actions of COTR and other Support Personnel** The CO is responsible for the actions of all other personnel involved in the administration of the contract. The CO must instruct judiciary officials not to require the contractor to do anything that is not specified in the procurement.
- d. When a contract is signed, it is the intent of both parties to perform their respective obligations. Poor performance or late deliveries may cause costly delays in the program that the contract supports. The judiciary monitors contract performance closely to ensure that required end items are delivered on time. Monitoring and inspection supports many objectives, including those to:
  - (1) identify potential delinquencies;
  - (2) isolate specific performance problems;
  - (3) support contractor requests;
  - (4) point out the need for judiciary assistance;
  - (5) reveal actual or anticipated default; and
  - (6) identify judiciary-caused delays.
- e. **Review of Contractor Deliverables** Review of contractor deliveries is an important method of enforcing contract requirements and contract terms which require submission and written approval and thus must be strictly enforced. The CO will ensure that contractor deliveries are disapproved only for failure to meet a material requirement of the procurement. If a contractor delivery indicates that the procurement specifications are inadequate, the CO must determine the appropriate specifications with the assistance of technical personnel and modify the contract to reflect those revised specifications.
- f. COs and their representatives will approve, conditionally approve, or disapprove contractor deliveries promptly and in accordance with any time limits set forth in the procurement. Disapprovals and conditional approvals will clearly indicate what the contractor must do to comply with the contract requirements. Approval of late deliveries or deliveries of less than conforming products or services may constitute relaxation of contract performance or delivery requirements. When such relaxation occurs for reasons other than conditions caused by the judiciary, they constitute changes to the procurement that require the negotiation of consideration. See [7.6.3](#) for remedies.

## **Part 7.6. Quality Assurance**

**7.6.1. General** The CO is responsible for ensuring that products and services received under each contract conform to the quality and quantity requirements of the contract, including inspection, acceptance, warranty, and any other measures associated with quality assurance.

**7.6.2. Contract Remedies** Contract remedies are forms of relief that the judiciary can pursue to compensate for contractors' nonperformance or noncompliance with a contract term or condition. These forms of relief can be provided by clauses or from basic rights provided in government contract law and, occasionally, in commercial contract law.

### **7.6.3. Types of Remedies**

- a.** The judiciary has several methods at its disposal to remedy a given situation without resorting to terminating the contract. Remedies include:
- (1) rejecting nonconforming products and services;
  - (2) invoking written warranties;
  - (3) invoking implied warranties;
  - (4) proving the existence of latent defects, fraud, or gross mistakes amounting to fraud;
  - (5) imposing liquidated damages; and
  - (6) modifying contracts to relax or delete requirements provided that consideration is obtained.
- b.** All proposed application of remedies involving a cure notice or show cause letter must be reviewed by the PE. The PE may seek the advice of OGC.

### **7.6.4. Including Liquidated Damages**

- a.** When the contract includes a liquidated damages clause, assessment of liquidated damages must be reasonable and considered in light of contract requirements and done on a case-by-case basis. Any rate amount established without reference to probable actual damages may be interpreted as punitive and thus unenforceable.
- b. All Evidence is Documented** The CO must document any evidence of the contractor's failure to deliver the products or perform the services within the time specified in the procurement. This documentation will focus on the:
- (1) stage of completion;
  - (2) probable amount of damages sustained by the judiciary;
  - (3) reason and excusability for a delay; and
  - (4) contractor's ability to complete the contract.
- c. The Amount Due is Computed** When assessment of liquidated damages is appropriate, the CO withholds payment based on an accurate computation of the amount due. The



actual computation will depend, on the specific amount or specific formula in the contract.

- d. The Assessment is Discussed with the Contractor** After the CO has determined the judiciary is entitled to assess liquidated damages, the CO must discuss the situation with the contractor. Prior to the actual assessment of liquidated damages, the CO will advise the contractor of the:
  - (1) judiciary's intention to assess liquidated damages unless the contractor provides evidence to the judiciary by a specified date that such an assessment would be improper;
  - (2) basis or bases for the judiciary's assessment of these damages; and
  - (3) amount of the planned liquidated damages assessment, detailing the reasons for any reduction in a specified amount stated in the contract.
- e. Preparation and Issuance of Liquidated Damages Notice** A liquidated damages notice must indicate:
  - (1) the reason for assessing the damages provided in the clause;
  - (2) the dollar amount of the damages; and
  - (3) any steps the contractor may be able to take to avoid further assessment of liquidated damages.
- f. The Contractor's Reply is Obtained and Analyzed** The CO does not have discretion to waive liquidated damages unless one of the following applies. The contractor:
  - (1) documents a reasonable case for an excusable delay;
  - (2) claims impossibility of performance; or
  - (3) claims the work is substantially complete.
- g.** Liquidated damages are generally not appropriate after the work can be considered "substantially complete." Substantial completion occurs on the day the product is ready for use in the manner intended by the judiciary at the place required by the contract.
- h. Remedies** Based on the evidence, the CO needs to decide to either:
  - (1) forego assessing liquidated damages;
  - (2) assess a reduced amount; or
  - (3) assess maximum allowable liquidated damages.

#### **7.6.5. Nonconforming Products or Services**

- a.** Products or services that do not conform to the terms of the procurement must be rejected before acceptance. After a product or service has been accepted, it cannot be rejected later, except for:
  - (1) latent defects;
  - (2) fraud; and
  - (3) gross mistakes amounting to fraud.
- b.** Prior to acceptance the CO must reject the products or services when the nonconformance adversely affects safety, health, reliability, durability, performance, or any other basic objective of the specification.

- c.** COs must normally reject products or services not conforming in all respects to contract requirements. COs must discourage the repeated delivery of nonconforming products or services, including those with only minor nonconformance. In such cases, the CO must take appropriate action, such as rejection and documentation of the contractor's performance record.
- d.** Contractors may be given an opportunity to correct or replace nonconforming products or services.
- e.** Unless the CO specifies otherwise, correction or replacement must be at no additional cost to the judiciary.
- f.** The judiciary reserves the right to charge the contractor the cost of reinspection and retesting needed because of prior rejection.
- g.** The CO may require the contractor to correct or replace any products or to reperform the services that fail to comply with the requirements of the contract.

  - (1) *For Products* The CO may reject defective products which do not conform to the contract requirements and require replacement or correction of the defects; acquire replacement products from another source and charge the contractor for any costs incurred by the judiciary; or accept the products at a reduced price. Any remedy such as replacement, correction, or reimbursement for re-procurement will be determined by the CO. Corrected or replaced products may not be tendered again unless the former tender and the requirement for correction or replacement are disclosed. If the contractor fails to proceed with reasonable promptness to perform replacement or correction, and if it can be performed within a ceiling price, the CO may by contract, or otherwise, remove, replace, or correct the products and charge the cost to the contractor; or terminate the contract for default. (See [Clause 2-5A](#) "Inspection of Products".)
  - (2) *For Services* The CO may require the contractor to perform the services again in conformity with the requirements, at no increase in contract amount. When the defects in services cannot be corrected by re-performance, the CO may require the contractor to take necessary action to ensure that future performance conforms to contract requirements; and reduce the contract price to reflect the reduced value of the services performed. If the contractor fails to promptly perform the services again or to take the necessary action to ensure future performance in conformity with contract requirements, the CO may by contract or otherwise, perform the services and charge to the contractor any cost incurred by the judiciary that is directly related to the performance of such service; or terminate the contract for default. (See [Clause 2-5B](#) "Inspection of Services".)
- h.** The CO will consider the following when making a determination whether nonconforming items will be accepted:

  - (1) information regarding the nature and extent of the nonconformance including the procurement specifications and degree to which the nonconforming item departs from the specifications;
  - (2) advice of technical personnel that the product/service is safe and will perform the intended purpose;

- (3) a request from the contractor for acceptance of the products or services; and
  - (4) the procurement adjustment considered appropriate, including any adjustment offered by the contractor.
- i.** Before making a decision to accept nonconforming items, the CO will obtain the written concurrence of the requesting office.
- j. Acceptance of Minor Nonconformance** The CO can accept a product or service when the basis for the nonconformance is minor. The CO will consult with technical personnel as necessary in making this determination. Generally, a minor nonconformance does not adversely affect:
- (1) safety;
  - (2) health;
  - (3) reliability;
  - (4) durability;
  - (5) performance;
  - (6) interchangeability of parts or assemblies;
  - (7) weight (if a procurement requirement);
  - (8) appearance (if a procurement requirement); or
  - (9) any other basic requirement of the procurement.
- k.** The CO may accept minor nonconformities without receiving consideration from the contractor when the savings realized by the contractor by not conforming does not exceed the administrative cost to the judiciary for processing a formal modification. In all other instances, consideration must be obtained.
- l.** When the value of the deviation exceeds the cost of administrative processing, the CO must issue a formal contract modification specifying appropriate consideration for accepting the nonconforming deliverable. A downward price adjustment is the most common form of consideration, though consideration may take many other forms, such as additional quantities of items, or accelerated deliveries.
- m. Substantial Nonconformance** The CO may not accept products or services whose nonconformance is substantial and adversely affects satisfaction of a basic procurement requirement, unless acceptance is clearly in the judiciary's interest. The CO's determination to accept the products or services must be in writing and must be based on:
- (1) information on the nature and extent of the nonconformance;
  - (2) advice of the technical activity that products or services are safe and will perform the intended purpose;
  - (3) the contractor's request for acceptance of the products or service;
  - (4) a recommendation for acceptance by the intended user, with supporting rationale; and
  - (5) appropriate monetary or other consideration.
- n. Consideration for Acceptance of Defective Performance** When nonconforming products or services are accepted, and the CO determines consideration is due the judiciary, the CO must modify the contract to provide for an equitable price adjustment or other consideration unless:

- (1) it appears that the savings to the contractor in providing the nonconforming products or performing the nonconforming services exceeds the cost to the judiciary of processing and enforcing a modification; or
- (2) the judiciary's interests otherwise require a contract modification.
- o. Notice of Rejection** Contractors must be given prompt written notice of rejection, including the reasons for rejection when:
  - (1) the products or services have been rejected at a place other than the contractor's facility;
  - (2) the contractor persists in offering nonconforming products or services for acceptance; or
  - (3) delivery or performance was late without excusable cause.
- p.** A rejection notice does not extend the delivery period. The contractor is still required to provide products and services which conform to the contract's delivery schedule.
- q.** A contractor may respond to a notice of rejection by submitting:
  - (1) an offer to correct the work;
  - (2) an offer to provide a downward price adjustment for acceptance; or
  - (3) an offer to analyze and negotiate a revised delivery schedule for a conforming product with consideration.
- r.** Before any decision is transmitted to the contractor, the CO must obtain the review of the PE.

#### 7.6.6. Acceptance

- a.** Acceptance constitutes acknowledgment that products or services conform with quality, quantity, and packaging requirements set forth in the procurement.
- b.** Acceptance may take place before delivery, at delivery, or after delivery, depending on the procurement's requirements.
- c.** Products and services must not ordinarily be accepted before completion of judiciary inspection and other quality assurance actions.
- d.** Acceptance must be evidenced by execution of an acceptance certificate on an inspection form, receiving report, or commercial shipping document or packing list.
- e. Clauses**
  - (1) [Clause 7-95](#), "Contractor Inspection Requirements" is included in solicitations RFQs, contracts, and purchase orders for products or services when the procurement amount is expected to be at or below the judiciary's small purchase threshold and inclusion of the clause is necessary to ensure an explicit understanding of the contractor's inspection responsibilities.
  - (2) [Clause 7-100A](#), "Limitation of Liability (Products)" is included in all solicitations and contracts in excess of the judiciary's small purchase threshold requiring delivery of products.

- (3) [Clause 7-100B](#), “Limitation of Liability (Services)” is included in all solicitations and contracts in excess of the judiciary’s small purchase threshold requiring performance of services.

**7.6.7. Responsibility for Acceptance** Product or service acceptance must be specified in the contract and is the responsibility of the CO. When this responsibility is redelegated to a COTR or another judiciary employee, acceptance by that person is binding on the judiciary.

**7.6.8. Place of Acceptance** Each procurement must specify the time and place of acceptance. Procurements providing for judiciary inspection at source (i.e., contractor’s place of business) ordinarily provide for acceptance at source; those providing for inspection at destination (i.e., judiciary’s facilities) ordinarily provide for acceptance at destination. Products accepted at a place other than destination may not be reinspected at destination for acceptance purposes, but must be examined for quantity, damage in transit, and possible substitution or fraud.

**7.6.9. Certificate of Conformance**

- a. At the CO's discretion, a contractor certificate of conformance may be substituted for judiciary inspection, whether acceptance is at source or destination. Acceptance based on such a certificate may be in the judiciary’s interest when:
  - (1) only small losses will be incurred in the event of a defect; or
  - (2) the contractor's reputation or past performance suggests that the products or services furnished will be acceptable, and any defective work will be replaced, corrected, or repaired without contest.
- b. [Clause 7-105](#), “Certificate of Conformance” is included in solicitations RFQs, contracts, and purchase orders for products or services when one or more of the following conditions apply:
  - (1) acceptance on the basis of a contractor's certificate of conformance is in the judiciary's interest;
  - (2) small losses would be incurred in the event of a defect; or
  - (3) because of the contractor's reputation or past performance, it is likely that the products or services furnished will be acceptable and any defective work would be replaced, corrected, or repaired without contest. In no case must the judiciary's right to inspect products under the inspection provisions of the procurement be prejudiced.

**7.6.10. Transfer of Title and Risk of Loss**

- a. Title to products passes to the judiciary upon formal acceptance, regardless of when or where the judiciary takes physical possession, unless the procurement specifically provides for earlier passage of title.
- b. Unless the procurement specifically provides otherwise, risk of loss or damage to products remains with the contractor until:
  - (1) delivery of the products to a carrier if transportation is F.o.b. origin; or
  - (2) acceptance by the judiciary or delivery to the judiciary at the destination specified in the procurement, whichever is later, if transportation is F.o.b. destination.

#### **7.6.11. Implementing Express Warranties**

- a. An express warranty is a written promise or affirmation given by a contractor to the judiciary regarding the nature, usefulness, or conditions of the products or performance of services furnished under the procurement.
- b. Written warranties can limit the judiciary's risk when relying upon the contractor's own inspection methods to ensure the quality of the requirement.
- c. Express warranties are the contractor's way of assuring the judiciary the product or service:
  - (1) is free from defects in workmanship; and
  - (2) will conform to the requirements of the procurement.
- d. Express warranties must:
  - (1) state the duration of the warranty; and
  - (2) specify a period during which notice of any defect must be given to the contractor.
- e. The CO must accurately determine the contractor's responsibilities and the judiciary's rights under the terms and conditions of the warranty and must verify that the warranty does not erode nor limit any of the judiciary's rights conferred elsewhere in the procurement. Warranties may provide alternate remedies such as:
  - (1) repair the defect;
  - (2) replace the item;
  - (3) reperform the service;
  - (4) make an equitable adjustment; or
  - (5) pay for repairs, replacements, or reperformance when the judiciary has obtained the products or services from other sources

#### **7.6.12. Fraud, Gross Mistake, or Latent Defects**

- a. The judiciary's acceptance of contractor products and services is final unless:
  - (1) the defect is latent;
  - (2) there is evidence of fraud; or
  - (3) there is evidence of a gross mistake amounting to fraud.
- b. For a defect to be latent it must:

- (1) not be susceptible to discovery using inspection methods that are reasonable under the circumstances; and
- (2) be in existence at the time of acceptance.
- c. The contractor is responsible for latent defects discovered at any time after final acceptance. There is no expiration of liability for a latent defect, but the extent of its liability is prorated over the useful life of the item.
- d. **Determining Fraud or Gross Mistake Amounting to Fraud** The only difference between fraud and gross mistake is intent. To prove a gross mistake, the judiciary need only prove that the mistake was truly irrisponsible.
- e. Proving fraud requires a showing that the misrepresentation or concealment of fact was made with the intent to mislead.
- f. A finding of facts for fraud must show evidence of:
  - (1) a misrepresentation of fact (actual or implied), or a concealment of material fact;
  - (2) contractor knowledge of the fact concealed or misrepresented;
  - (3) an intent to mislead the judiciary into relying on its misrepresentation or concealment; and
  - (4) judiciary injury suffered as a result of the concealment or misrepresentation.
- g. The contractor can be forced to repair or replace the product or reperform the service at its own cost any time after acceptance when fraud is proven. The judiciary can avail itself of all other remedies, including termination for default.

### 7.6.13. Bankruptcy

- a. Once a contractor declares bankruptcy, the right of the judiciary to take unilateral action with respect to the contractor is limited. COs need to monitor the financial strength of the contractor to anticipate possible problems that could arise in this area and take prompt action to protect the interests of the judiciary upon notification of a contractor's bankruptcy.
- b. **Procedures** Upon notification that a contractor is in bankruptcy proceedings, the CO must:
  - (1) furnish the notice of bankruptcy to the PE with a copy to the PLO (in courts and FPDOs);
  - (2) determine the amount of any claims which the judiciary may have against the contractor on any procurements which have not been closed out;
  - (3) take actions necessary to protect the judiciary's financial interests;
  - (4) safeguard judiciary property; and
  - (5) furnish pertinent procurement information to the PE.
- c. **Consultation with Office of General Counsel** The PE will consult with OGC as necessary prior to taking any action regarding the contractor's bankruptcy proceedings.
- d. **Clause** [Clause 7-110](#), "Bankruptcy" is included in all solicitations and contracts exceeding the judiciary's small purchase threshold.

### Part 7.7. Payments

### 7.7.1. General

- a. Payments fall into two general categories:
  - (1) delivery payment - a payment made once delivery has been made and the product or service has been accepted;
  - (2) partial payment - a partial payment is a method of payment based on acceptance of a particular portion of the procurement deliverables.
- b. Partial payments can assist contractors to participate in judiciary procurements with minimal or no contract financing. Partial payments are a method of payment, not a method of contract financing. When delivery or performance is authorized in installments or when a number of items of work are called for by the contract, payment of a portion of the price may be made before the entire work is completely delivered or performed. Schedule of payments must be negotiated and incorporated into the contract. A payment should reflect the complete value of the deliverable (product, report, etc.) or a time frame of a delivered service (i.e. monthly), so that if the contract is terminated the CO will know the value of the payments for finished work, as well as the value of the terminated work. Partial payments are not based on amounts which have been expended by the contractor.
- c. The judiciary has limited authority to make advance or pre-payments. See [JP3 Subpart 2.2.11](#), Contract Financing.
- d. Nonpayment and delays in payment have harmful effects on contractors, especially small businesses. COs and financial personnel must ensure that payments legitimately due are made promptly. If a dispute arises regarding the contractor's entitlement to payment, the CO must pay the contractor any amount not in dispute, except for withholding as allowed under [7.7.4](#).
- e. If partial payments are specified in the payment provisions of the procurement, the CO will generally approve requests for partial payment upon partial delivery of products or services that fulfill procurement requirements. When the procurement does not provide unit prices, the CO may determine an appropriate formula for payment.
- f. Requests for payment under cost-reimbursement type contract must be reviewed and approved for payment by the CO, with the assistance of technical personnel, to determine that such requests comply with the requirements for allowability, allocability, and reasonableness (see [4.7](#)).
- g. In addition to commercial advance payment (see [2.2.11](#)), the judiciary may make payment in advance for certain publication charges and when making payment to other federal agencies. See [5.5, Interagency Agreements \(IAs\) and Memoranda of Understanding \(MOUs\) for Obtaining Products and Services](#).

### 7.7.2. Invoices

- a. Payment will be made only after receipt of an invoice.



- b. **Submission** Invoices must be sent to the paying office specified in the procurement. A copy is sent to the CO, if required by the procurement. Invoices sent to any other person or office are not considered properly submitted. Invoices submitted before performance or delivery are in violation of the certification provision of the Invoices clause.
- c. [Clause 7-125](#), “Invoices” is included in all solicitations and contracts unless another “Invoices” clause is appropriate. The CO will include a schedule of payments in the contract. For experts and consultant services, then the clause with its Alternate I must be included in solicitations and contracts.

### 7.7.3. Payment

- a. **Means of Payment** Payments may be made by check or electronic funds transfer (if available), as requested by the contractor and approved in writing by the CO.
- b. **Time of Payment** As a matter of judiciary policy, payment must be made as close as possible to, but not later than, the 30<sup>th</sup> calendar day after receipt of an invoice or product/service acceptance, whichever occurs later.
- c. **Payment of Interest** The Prompt Payment Act of 1982 is not applicable to the judiciary. [Clause 7-130](#), “Interest (Prompt Payment)” is included in all solicitations and contracts.
- d. **Final Payment** Final payment may be made after acceptance of the product or service. However, final payment may not be made under any contract involving retainage, payment or performance guarantees, until the CO receives a release from the contractor discharging any further obligations under the contract. Contract closeout may not be finalized until all delivery and payment issues are settled.
- e. **Clauses**
  - (1) [Clause 7-135](#), “Payments” When a fixed-price products or services contract is contemplated, then this clause must be included in solicitations and contracts, unless another “Payments” clause is appropriate (i.e., [Clause 5-1](#), “Payments under Personal and Professional Services Contracts”). When the CO uses a “Payments” clause and an “Inspection” clause is not included in the contract, then payment means acceptance.
  - (2) [Clause 7-140](#), “Discounts for Prompt Payment” is included in solicitations and contracts when a fixed-price products or services procurement is contemplated.
  - (3) [Clause 7-145](#), “Government Purchase Card” is included in solicitations and contracts when the CO determines that a purchase card can be used to make payments on the contract.
  - (4) [Clause 7-150](#), “Extras” is included in solicitations and contracts when a fixed-price product, service, or a transportation procurement is contemplated.
  - (5) [Clause 7-155](#), “Certification of Final Indirect Costs” is incorporated into all solicitations and contracts which provide for establishment of final indirect cost rates.

### 7.7.4. Withholding Payments

- a. The CO may refuse to pay a contractor, may suspend payments until resolution is received on an issue, may disallow a cost, or may withhold payments otherwise due, in whole or in part, when:
  - (1) the contract provides for withholding for cost plus fixed fee or incentive fee contracts when retainage is authorized withholding is in accordance with the applicable fee clause;
  - (2) in cost reimbursement contracts, elements of the amount invoiced by the contractor are not allowable (see [4.7.1.](#)), allocable (see [4.7.3.](#)), or reasonable (see [4.7.2.](#));
  - (3) the contractor has been overpaid or otherwise owes the judiciary money as a result of the contractor's actions or inactions under the contract;
  - (4) the contractor owes the judiciary money for reasons unrelated to the procurement under which payment will be withheld; or
  - (5) as a result of judicial action or applicable law, parties other than the contractor have made claims against the judiciary, or have not waived rights exercisable against the judiciary.
- b. Nonpayment may be damaging to a contractor's business and may jeopardize performance. Therefore, the CO must carefully consider the reasons for withholding or refusing payment and process disputes regarding payment expeditiously.
- c. The CO must notify the contractor of any intended withholding and must provide an opportunity for the contractor to object. If time permits, notice must be in writing.
- d. **Clause [Clause 7-160](#)**, "Limitation on Withholding of Payments" is included in solicitations and contracts when a products procurement, service procurement, time-and-materials contract, or labor-hour contract is contemplated that specifies two or more circumstances authorizing the temporary withholding of amounts otherwise payable to the contractor for products delivered or services performed.

#### 7.7.5. Disallowing Costs

- a. At any time during the performance of a contract, the CO may issue the contractor a written notice of intent to disallow specified costs incurred or planned. However, before issuing the notice, the CO must make a reasonable effort to reach a satisfactory settlement through discussions with the contractor.
- b. If the contractor disagrees with the deduction from current payments, the contractor may:
  - (1) request in writing that the CO consider whether the unreimbursed costs must be paid and discuss the matter with the contractor; and/or
  - (2) file a claim under [Clause 7-235](#), "Disputes."
- c. **Third-Party Claims** The judiciary may be subject to claims by third parties for compensation otherwise due a contractor. When a claim is filed with the CO, the PE must be notified immediately.
- d. **Withholding Payment Under Clauses** Some contract clauses, such as [Clause 2-75](#), "Liquidated Damages" provide for withholding payment in certain circumstances. In

addition, some clauses provide for withholding a percentage or portion of payments otherwise due to induce continued acceptable performance. The CO must strictly enforce such clauses and maintain a complete record of the amounts withheld under any clause, the basis for withholding, and the disposition of funds withheld.

**e. Clauses**

- (1) [Clause 7-165](#), “Penalties for Unallowable Costs” is included in all solicitations and contracts over \$500,000, except fixed-price contracts without cost incentives.
- (2) [Clause 7-170](#), “Notice of Intent to Disallow Costs” is included in solicitations and contracts when a cost-reimbursement contract or a fixed-price incentive contract is contemplated.

**7.7.6. Reserved**

**7.7.7. Assignment of Claims**

- a.** A contractor may assign monies coming due to a single bank, other financial institution or other party approved by the PE, with the written approval of the CO. Any other attempted assignment may be treated as a breach of contract.
- b. Approval** COs may approve in writing any authorized assignment that does not jeopardize contract performance.
- c. Assignments by Law** This part does not govern assignments ordered by a court or by operation of law. COs must notify the PE, who will consult with OGC, in such cases.
- d. Clauses**
  - (1) [Clause 7-175](#), “Assignment of Claims” is included in solicitations and contracts expected to exceed the judiciary’s small purchase threshold unless the procurement will prohibit the assignment of claims.
  - (2) [Clause 7-180](#), “Prohibition of Assignment of Claims” is included in solicitations and contracts for which a determination has been made that the prohibition of assignment of claims is in the judiciary's interest.
- e. Assignments**
  - (1) Assignments by corporations shall be:
    - (a) executed by an authorized representative;
    - (b) attested by the secretary or the assistant secretary of the corporation; and
    - (c) impressed with the corporate seal or accompanied by a true copy of the resolution of the corporation’s board of directors authorizing the signing representative to execute the assignment.
  - (2) Assignment by a partnership may be signed by one partner, if the assignment is accompanied by adequate evidence that the signer is a general partner of the partnership and is authorized to execute assignments on behalf of the partnership.
  - (3) Assignments by an individual shall be signed by that individual and the signature acknowledged before a notary public or other person authorized to administer oaths.

- f. Filing** The assignee shall file the notice of assignment and copy of the instrument of assignment with:
- (1) the CO,
  - (2) the surety on any bond applicable to the contract, and
  - (3) the disbursing officer designated in the contract to make payment.
- The assignee shall forward to each party, specified above, an original and three copies of the notice of assignment together with one true copy of the instrument of assignment. The true copy shall be a certified duplicate or photostat copy of the original assignment.
- g. Format for the Notice of Assignment** [Exhibit 7-3](#) is a suggested format for use by an assignee in providing the notice of assignment.

## **Part 7.8. Contract Modifications**

### **7.8.1. Policy**

- a.** Only COs are authorized to sign contract modifications on behalf of the judiciary. Other judiciary personnel may not:
- (1) sign contract modifications;
  - (2) act in such a manner as to cause the contractor to believe that they have authority to bind the judiciary;
  - (3) direct or encourage the contractor to perform work that must be the subject of a contract modification but has not yet been executed; or,
  - (4) accept products and/or services that are the result of a contract modification that has not been executed.
- b.** Contract modifications, including changes that can be issued unilaterally, will be priced before their execution, if doing so can be done without adversely affecting the interest of the judiciary. If a significant price increase could result from a contract modification and time does not permit negotiation of a price, at least a maximum cost ceiling must be established.
- c.** If an unpriced contract modification is issued, the CO must justify, in writing, the reasons for the issuance of the unpriced modification.
- d.** The CO cannot execute a contract modification, including a change order, if doing so will cause an increase in the funding level of the contract without having first obtained a certification of the availability of funds. The certification must be based on the anticipated cost/price or the anticipated maximum cost/price. If the actual cost/price exceeds the certification of the availability of funds, then additional funds must be requested before executing the modification (also see [7.8.4.](#)).
- e.** Modifications may be:
- (1) initiated by either party;
  - (2) changed within the scope bilaterally;
  - (3) a unilateral change (such as an administrative change of the funds certification);
  - (4) new work within the scope of the contract;

- (5) outside the scope. However, this requires either competition or a justification for other than full and open competition.
- f. The contractor may request a contract modification. Examples of reasons for the change are when it is:
  - (1) beyond the contractor's control (excusable delay, stop work order issued, constructive change, settlement for contract termination for convenience);
  - (2) due to action by the contractor (name changed, consideration offered for nonexcusable delay, novation agreement); and
  - (3) required by the contract (i.e. economic price adjustment, price redeterminations, Department of Labor wage rate increases for an exercised option).
- g. When submitting such requests, the contractor must provide all necessary documentation as required by the CO. The CO must include the contractor's DUNS number in the name and address block of the modification document. The CO will review the request and its documentation, process a modification, or make a determination that the change is not warranted.

### 7.8.2. Types of Modifications

Modifications are of the following types:

- a. **Bilateral modification within the scope of the contract**
  - (1) A bilateral modification (also known as a supplemental agreement) is a modification that is signed by both the contractor and the CO. A bilateral modification is the preferred type of modification for accomplishing a change. Bilateral modifications are used to:
    - (a) change the contract in accordance with the changes clause;
    - (b) make negotiated equitable adjustments resulting from the issuance of a change order;
    - (c) reflect other agreements of the parties modifying contract terms;
    - (d) definitize a letter contract; or
    - (e) approve changes required by the contract, such as economic price adjustments.
  - (2) Most supplemental agreements involve negotiation of price and other terms, usually involving tasks that are similar to award of the basic contract. A bilateral agreement is used when:
    - (a) the change has an effect on the substantive rights of either party;
    - (b) there is sufficient time to negotiate a supplemental agreement; or
    - (c) there is no basis in the contract's terms for issuing a unilateral modification.
- b. **Unilateral modification within the scope of the contract**
  - (1) A unilateral modification is a modification that is signed only by the CO as permitted within the operation of an existing contract clause. Unilateral modifications are of three basic types:
    - (a) *Administrative Changes* These are changes that are minor in nature and do not materially affect contract performance. Examples include:

- 1) correction of a fund citation;
  - 2) addition of a zip code on a delivery address;
  - 3) designation of change in COTR or other contract administrators;
  - 4) novation agreements; and
  - 5) name-change agreements.
- (b) *Change Orders* This term refers to the actual issuance of a change authorized by [Clause 7-185](#), “Changes.” A change order is a written order, signed by the CO, directing the contractor to make a change, without the contractor’s consent, within the general scope of the contract, including:
- 1) changes to the drawings, designs, or specifications, when the products to be furnished are to be specially manufactured for the judiciary in accordance with the drawings, designs, or specifications;
  - 2) method of shipment or packing;
  - 3) and place of delivery (e.g., changing the delivery address from one state to another).

A change order is the least preferred method of changing a contract. A supplemental agreement is the preferred method (see [7.8.2.a.](#), Bilateral). The Changes clause is cited as the authority for the modification. Change orders must be used only when there is not enough time to negotiate with the contractor and/or the change must be put into effect immediately. Under the terms of the change order, the contractor is required to submit its offer for an equitable adjustment within 30 days (also see [7.8.7.](#), Changes).

- (2) **Changes authorized by other contract clauses** Although these are not termed change orders, they can be issued unilaterally. Examples are the issuance of a stop work order, termination notice, or exercise of an option. [Clause 7-185](#) “Changes” authorizes changes within the scope of the procurement and within the conditions specified in the clause (see also [7.8.3.a.](#) and [7.8.7.](#)).
- (3) The CO will select a unilateral modification when:
- (a) the change has no effect on the substantive rights of the contractor or the judiciary;
  - (b) the change can be made unilaterally under a specific contract term (e.g., Stop Work, Termination or Option clauses);
  - (c) the contractor’s agreement with the change is not required; or
  - (d) in the case of a change order, the time required to negotiate a bilateral agreement would cause a delay that would adversely affect the judiciary’s interest.

### 7.8.3. Notification of Contract Changes

- a.** Under the “Changes” clause, when a contractor considers that any written or oral order (including direction, interpretation, instruction, or determination) from the CO, or another judiciary representative, constitutes a change in the contract, the contractor must notify the CO in writing that the contractor regards the order as a change order. The CO must then evaluate the order and:
- (1) confirm that it is a change,
    - (a) direct the mode of further delivery or performance;
    - (b) plan for its funding; and
    - (c) issue a formal change order;
  - (2) countermand the alleged change; or
  - (3) notify the contractor that no change is considered to have been ordered.
- b.** The CO must determine that any contract change, initiated by either the judiciary or the contractor, is “within the scope” of the contract. Factors indicating “within scope” changes are:
- (1) the function of the product or service has not changed;
  - (2) the basic contract purpose has not changed;
  - (3) the dollar magnitude of the change is proportionate to the price of the contract;
  - (4) competitive factors of the solicitation are the same; and
  - (5) specification or statement of work changes are not extensive.
- c.** The CO must answer the following questions when determining whether a requested change is “within scope:”
- (1) Does the changed work represent what both parties reasonably contemplated at the time of award?
  - (2) Is the changed work essentially the same as the agreement?
  - (3) Is the nature of the requirement altered by the change?
  - (4) Would this type of change normally be expected for this kind of requirement (sophisticated, complex requirements)?
- d.** If the CO determines that the contemplated action is not in scope, the change must be regarded as a cardinal change (see [7.8.7.c.](#)), or new work (possibly subject to further competition).

#### **7.8.4. Availability of Funds**

- a.** The CO may not execute a modification that causes or will cause an increase in funds without having first obtained a certification of funds availability, except for modifications to contracts that:
- (1) are conditioned on availability of funds; or
  - (2) contain a limitation of cost or funds clause.
- b.** In both instances, however, the CO must first obtain either a certification of funds conditioned on availability of funds or a memo from a funding official signifying intent to fund the requirement.
- c.** A certification of funds availability must be based on the negotiated price. Modifications executed before agreement on price may be based on the best available estimate.

### 7.8.5. Exercise of Options

- a.** Options provide the judiciary with firm prices for additional quantities or periods of performance, but only for a specific period of time. That time period may extend beyond the basic contract period and must be identified in the basic contract. The judiciary is under no legal obligation to exercise an option and the contractor has no recourse against the judiciary when an option is not exercised.
- b.** The option clause will normally require that the CO provide advanced notification of any intent to exercise an option at a specified period before the option would take effect. The CO will normally be required to provide notice 60 days before the contract expires (or within another stated timeframe in the clause), or at a specified time in advance of the required delivery of additional quantities, or the judiciary will lose its unilateral right to exercise the option. This notification does not bind the judiciary to exercise the option. Every option will state a date before which the CO may exercise an option. The modification is generally signed 30 days prior to the expiration of the contract.
- c.** Options must be exercised exactly as they are stated in the contract. The CO may not change quantities, for instance, unless the option itself authorizes the specific change. Options are generally exercised unilaterally by the CO.
- d.** Before exercising an option, the CO must place a determination in the official contract file. This written determination must show that:
  - (1) the judiciary has a need for the products or services covered by the option;
  - (2) exercise of the option is the most advantageous alternative, price and other factors considered ("other factors" includes any need for continuity of operations and potential costs to the judiciary of disrupting operations);
  - (3) the option exercise complies with the terms of the contract; and
  - (4) funds are available (or will be available).
- e.** A determination that the option price is the most advantageous must be based on one of the following:
  - (1) an informal investigation of prices, or other examination of the market, indicates clearly that a better price than that offered by the option cannot be obtained;
  - (2) the time between the award of the contract containing the option and the exercise of the option is so short that it indicates the option price is the lowest price obtainable under the conditions;
  - (3) consideration of such factors as market stability and a comparison of the time since award with the usual duration of contracts for such products and services; or
  - (4) a new solicitation would fail to produce a better price than that offered by the option.
- f.** If the contract provides for economic price adjustment, the effect of such adjustment on prices under the option must be determined when considering whether or not to exercise the option.
- g.** When an option is to be exercised, the CO must:
  - (1) make a written determination that the option may properly be exercised in accordance with the availability of funds (see [7.8.4.](#));



- (2) give written advanced notification of intent to the contractor within the time period specified in the contract; and
- (3) give the contractor written notification of the exercise of the option by executing a modification, citing the option clause as authority for the purchase.

### 7.8.6. Correction of Mistakes

- a. A contract may be modified to correct or mitigate the effect of a mistake such as the following:
  - (1) a mistake, ambiguity, or unclear expression in a written contract of the agreement as both parties understood it;
  - (2) a contractor's mistake so obvious that it was or must have been apparent to the CO; and
  - (3) a mutual mistake as to a material fact.
- b. A claim of mistake asserted by the contractor after award is a claim subject to the procedures of [Clause 7-235](#), "Disputes." A decision to deny, in whole or in part, a claim of mistake asserted after award is a final decision under the clause.

### 7.8.7. Changes

- a. The "Changes" clause permits the CO to make unilateral changes, as specified in the clause, within the general scope of the contract. These changes are accomplished by issuing written change orders (see [7.8.2.b.\(1\)\(b\)](#), Change Orders).
- b. **Constructive Change** A constructive change is an implied change. It occurs when judiciary officials, without CO authority, change the contract via verbal or written action. Constructive changes are considered unauthorized commitments under the Changes clause of the contract. See [1.5., Ratification](#), for procedures concerning ratifying unauthorized acts.
- c. **Cardinal Changes** Changes outside the scope of the contract represent "new work" and are described as "cardinal changes." The contractor is not obligated to make the change.
- d. Under a change order, the contractor must continue performance of the contract as changed, except that in cost reimbursement or incrementally funded contracts the contractor is not obligated to continue performance or incur costs beyond the amount incrementally funded, or limits established in [Clause 4-85](#), "Limitation of Cost" or [Clause 4-90](#), "Limitation of Funds."
- e. **Clauses**
  - (1) [Clause 7-185](#), "Changes" is included in all solicitations and contracts
  - (2) [Clause 7-190](#), "Change Order Accounting" is included in solicitations and contracts for products and contracts of significant technical complexity, if numerous changes are anticipated.

### 7.8.8. Equitable Adjustments

- a. Change orders are not priced before performance. They usually require two documents - the change order and a supplemental agreement reflecting a resulting equitable adjustment.
  - (1) If an equitable adjustment in the price or delivery terms, or both, can be agreed upon in advance, only a supplemental agreement need be issued.
  - (2) If the change order has no effect on price or delivery, no equitable adjustment is needed and there will be no related supplemental agreement.
  - (3) Administrative changes (such as a change in an accounting citation) and changes issued pursuant to a clause giving the judiciary an unilateral right to make a change (such as an option clause) require only one document, signed only by the CO.
- b. COs must promptly negotiate equitable adjustments resulting from change orders and follow up when claims for equitable adjustment are not received within 30 days after the change order.
- c. Before negotiating an equitable adjustment, the CO must ensure that a price and cost analysis, as appropriate, is accomplished to also consider the contractor's segregable costs of the change. If additional funds are required as a result of the change, the funds must be available before the supplemental agreement accomplishing the equitable adjustment is executed.
- d. To avoid controversies that may result from a supplemental agreement making an equitable adjustment, the CO must ensure:
  - (1) that all elements of the equitable adjustment have been presented and resolved; and
  - (2) a release is included in the supplemental agreement.
- e. **Equitable Adjustments for Delays** The contractor bears the risk of schedule and cost effects for delays it causes or for delays within its control. Generally, the contractor is excused from nonperformance due to delays caused by factors for which neither the contractor nor the judiciary is responsible. However, the contractor must bear the cost impact of such delays. The judiciary is responsible for the schedule and cost effects of delays it causes, delays that are under its control, or delays for which it has agreed to compensate the contractor.
- f. **Excusable Delays**
  - (1) A contractor may be granted an extension of the delivery or performance schedule for an excusable delay.
  - (2) A contractor's failure to perform may be considered an excusable delay when it arises out of either of the following types of causes:
    - (a) causes beyond the control and without the negligence of the contractor - including acts of God or the public enemy; acts of the judiciary in its sovereign capacity or the judiciary in its contractual capacity; and fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather; or
    - (b) a subcontractor default due to causes beyond the control and without the fault or negligence of both the contractor and the subcontractor, unless the

products or services were obtainable from other sources in time to permit the contractor to meet the delivery schedule.

- (3) [Clause 7-195](#), “Excusable Delays” is included in all solicitations and contracts for products and services, when a cost-reimbursement contract or firm-fixed price procurement is contemplated. The CO must also insert the clause in time-and-materials contracts and labor-hour contracts.

**g. Compensable Delays** A contractor may be granted an extension of the contract delivery or performance schedule, a price adjustment, or both, as the CO deems appropriate, when an unreasonable delay in performance is caused by the judiciary or is under its control, or when it has agreed to pay the contractor for the delay. Situations that may entitle the contractor to an equitable adjustment (schedule, cost, or both) include:

- (1) delay in issuing the notice to proceed;
- (2) delay in availability of the site;
- (3) differing site conditions;
- (4) actual or constructive changes or delays;
- (5) delay in providing funding;
- (6) delay in inspections;
- (7) delay in issuing changes;
- (8) delay in providing judiciary-furnished equipment; and
- (9) failure of performance of other judiciary contractors.

**h.** The contractor has the burden of proof in establishing the basis for the equitable adjustment required to overcome the delay.

**i. Concurrent Causes** When a delay is attributable to both the judiciary and the contractor, a delivery or performance schedule adjustment must not normally be granted for a period of delay caused at least in part by actions or failures on the part of the contractor. Damages may not be assessed against the contractor in such situations.

**j. Solicitation Provisions and Clauses**

- (1) [Clause 7-200](#), “Judiciary Delay of Work” is included in solicitations and contracts when a procurement is contemplated for products. The clause may also be used when a fixed-price procurement is contemplated for services.
- (2) [Clause 7-205](#), “Payment for Judiciary Holidays” is included in all solicitations and contracts when a time-and materials or labor-hour procurement is contemplated.
- (3) [Clause 7-210](#), “Payment for Emergency Closures” is included in all solicitations and contracts.

### 7.8.9. Acceleration of Performance

**a.** The judiciary has the right to require accelerated performance under [Clause 7-185](#), “Changes.” However, acceleration can be very costly. Therefore, this right must be exercised only when required to maintain the operational capability of the judiciary or when the CO otherwise determines acceleration is necessary.

- b. COs must document the specific facts that require acceleration of performance and the estimated impact on price. Whenever possible, the CO must negotiate acceleration actions as supplemental agreements, rather than by issuance of change orders.
- c. COs must be alert to constructive acceleration situations. Constructive acceleration occurs when the judiciary does not agree to a delivery or performance schedule extension to which the contractor is entitled, or is later determined to be entitled. This has the effect of causing the contractor to accelerate performance. Such acceleration may form the basis for a claim against the judiciary for an increase in price.

#### 7.8.10. Novation and Change of Name Agreements

- a. **Novation Policy** The judiciary generally prohibits the transfer of judiciary contracts from the contractor to a third party by contract novation (see [Exhibit 7-1](#)). All contemplated novation agreements must be reviewed by the PE, who will consult with OGC. However, when it is in its interest, the judiciary may recognize a third party as the successor in interest when the third party's interest arises out of the transfer of:
  - (1) all the contractor's assets; or
  - (2) the entire portion of the assets involved in performing the contract.
- b. Situations, in which novation may be permitted, include but are not limited to:
  - (1) sale of the contractor's assets with a provision for assuming liabilities;
  - (2) transfer of assets as part of a merger or corporate consolidation; and
  - (3) incorporation of a proprietorship or partnership, or formation of a partnership.
- c. When a contractor asks the judiciary to recognize a successor in interest, the contractor must submit to the CO three signed copies of the proposed novation agreement and one copy each, as applicable, of the following:
  - (1) the document describing the proposed transaction, e.g., purchase/sale agreement or memorandum of understanding;
  - (2) a list of all affected contracts between the transferor and the judiciary, as of the date of sale or transfer of assets, showing for each, as of that date, the:
    - (a) contract number and type;
    - (b) name and address of the CO;
    - (c) total dollar value, as amended; and
    - (d) approximate remaining unpaid balance;
  - (3) evidence of the transferee's capability to perform; and
  - (4) any other relevant information requested by the CO.
- d. Except as provided in paragraph e (below), the contractor must submit to the CO one copy of each of the following applicable documents as the documents become available:
  - (1) an authenticated copy of the instrument effecting the transfer of assets; e.g., bill of sale, certificate of merger, contract, deed, agreement, or court decree;
  - (2) a certified copy of each resolution of the corporate parties' boards of directors authorizing the transfer of assets;

- (3) a certified copy of the minutes of each corporate party's stockholder meeting necessary to approve the transfer of assets;
  - (4) an authenticated copy of the transferee's certificate and articles of incorporation, if a corporation was formed for the purpose of receiving the assets involved in performing the judiciary contracts;
  - (5) the opinion of legal counsel for the transferor and transferee stating that the transfer was properly effected under applicable law and the effective date of transfer;
  - (6) balance sheets of the transferor and transferee as of the dates immediately before and after the transfer of assets, audited by independent accountants;
  - (7) evidence that any security clearance requirements have been met; and
  - (8) the consent of sureties on all contracts listed under [7.8.10.c.\(2\)](#) of this section if bonds are required, or a statement from the transferor that none are required.
- e.** If the judiciary has acquired the documents during its participation in the pre-merger or pre-contract review process, or the judiciary's interests are adequately protected with an alternative formulation of the information, the CO may modify the list of documents to be submitted by the contractor.
- f.** When recognizing that a successor in interest to a judiciary contract is consistent with the judiciary's interest, the CO will execute a novation agreement with the transferor and the transferee. It will ordinarily provide in part that:
- (1) the transferee assumes all the transferor's obligations under the contract;
  - (2) the transferor waives all rights under the contract against the judiciary;
  - (3) the transferor guarantees performance of the contract by the transferee (a satisfactory performance bond may be accepted instead of the guarantee); and
  - (4) nothing in the agreement will relieve the transferor or transferee from compliance with any federal law.
- g.** The CO will use the Novation Agreement format (see [Exhibit 7-1](#)) when the transferor and transferee are corporations and all the transferor's assets are transferred. This format may be adapted to fit specific cases.
- h.** Before concurring in a contract novation, the CO must determine that the successor in interest is a responsible contractor (see [3.3.1.](#)) and obtain PE concurrence.
- i.** When it is not in the judiciary's interest to concur in a contract novation, the original contractor remains responsible for contract performance and the contract may be terminated for default for failure to perform.
- j.** The agreement must be signed by:
- (1) the contractor (transferor);
  - (2) the successor in interest (transferee); and
  - (3) the judiciary by which, among other things, the transferor guarantees performance of the contract, the transferee assumes all obligations under the contract, and the judiciary recognizes the transfer of the contract and related assets.
- k.** The CO is responsible for:

- (1) determining, in consultation with the PE, who will consult with OGC, whether to permit contract novation; and
  - (2) processing and signing novation and change-of-name agreements (see [Exhibit 7-1](#)).
- l. Clause [Clause 7-215](#), “Notification of Ownership Changes”** is included in all solicitations and contracts.
- m. Change of Name Agreement** If only a change of the contractor’s name is involved and the government’s and contractor’s rights and obligations remain unaffected, the parties shall execute an agreement to reflect the name change. The contractor shall forward to the responsible contracting officer three signed copies of the Change-of-Name Agreement, and one copy each of the following:
- (1) the document effecting the name change, authenticated by a proper official of the state having jurisdiction;
  - (2) the opinion of the contractor’s legal counsel stating that the change of name was properly effected under applicable law and showing the effective date;
  - (3) a list of all affected contracts and purchase orders remaining unsettled between the contractor and the government, showing for each the contract number and type, and name and address of the contracting office. The contracting officer may request the total dollar value as modified and the remaining unpaid balance for each contract.
- n.** The CO is responsible for:
- (1) determining whether to recognize the contract change of name;
  - (2) processing and signing change-of-name agreements (see [Exhibit 7-2](#)); and
  - (3) processing and signing the contract modification specifying that the name has been changed using the following language:  
 “The purpose of this modification is to incorporate the attached Change-of-Name Agreement between the contractor and the judiciary. This contract is hereby modified by substituting the name (contractor’s previous name) for the name (contractor’s changed name) wherever it appears in the contract. All other terms and conditions remain unchanged.”
- o.** The CO may accept a vendor’s change of name or novation agreement from another federal government agency.

## **Part 7.9. Claims and Disputes**

### **7.9.1. Policy**

- a.** It is the policy of the judiciary to resolve contractual issues by mutual agreement at the level of the CO. The CO must consider holding informal discussions between the parties to resolve differences before issuing a final decision on a claim.
- b.** A contract dispute means a written claim, demand or assertion by a contracting party for:
  - (1) the payment of money in a sum certain;

- (2) the adjustment or interpretation of contract terms; or
  - (3) other specific relief arising under or relating to the contract.
  - (4) A dispute also includes a termination for convenience settlement proposal; and
  - (5) any request for an equitable adjustment, which is denied.
- c. Claim Initiation**
- (1) The contract dispute must be submitted in writing to the CO. A contract dispute must be filed within 12 months of its accrual unless superseded by a different time period as specified in the contract's terms and conditions. The CO must document the contract file with evidence of the date of receipt of any submission that the CO deems to be a claim.
  - (2) The dispute must contain a detailed statement of the legal and factual basis of the dispute with any accompanying documents to support the claim.
  - (3) The claimant must specify the specific relief as provided in paragraph **b.(1)-(5)** above.
  - (4) If the CO requires additional information the CO will promptly request the claimant to provide such information.
  - (5) The contractor must proceed with performance of the contract pending resolution of the dispute.

### 7.9.2. Decisions and Appeal

- a. Claim Settlement** COs are authorized to decide or settle all disputes under the Disputes clause. The CO must issue a written decision on any contractor claim against the judiciary within 60 days of receipt of all the requested information from the vendor. If the CO can not render a determination within 60 days, the CO will notify the vendor of the date on which a determination will be made. The determination of the CO will be considered the final determination of the judiciary.
- b.** The claim may be denied when the CO determines that the contractor is unable to support any part of the claim and there is evidence that the inability is attributable to either misrepresentation of fact or fraud on the contractor's part.
- c.** When a claim by or against a contractor cannot be resolved by agreement and a decision under [Clause 7-235](#), "Disputes" is necessary, the CO must:
  - (1) review the facts pertinent to the claim;
  - (2) obtain assistance from the PE, who will consult with OGC and other advisors; and
  - (3) issue a final decision in writing. The decision must include:
    - (a) a description of the claim or dispute with references to the pertinent contract provisions;
    - (b) a statement of the factual areas of agreement and disagreement; and
    - (c) a statement of the CO's decision with supporting rationale.
    - (d) The CO's final decision must contain the following paragraph:  
"This is the final decision of the contracting officer pursuant to the clause of your contract entitled Disputes.

Contractors may appeal this decision to a court of competent jurisdiction."

- d. The CO must furnish a copy of the decision to the contractor by certified mail, return receipt requested, or by another method that provides evidence of receipt.
- e. If the settlement agreement requires a modification to the contract, it is executed on [Standard Form 30 \(Amendment of Solicitation/Modification of Contract\)](#). The modification must include the following statement:
  - “This modification is intended to and does constitute a full and final settlement and disposition of all matters relating to the claim dated (*insert date*) and is a full release, accord and satisfaction of any and all claims, demands or causes of action that the contractor has against the judiciary arising out of or related to this claim.”
- f. **Appeal** Contractors may appeal this decision to a court of competent jurisdiction. The contractor must comply with the final determination of the CO unless such determination is overturned by a court of competent jurisdiction. If the contractor fails to continue contract performance while the claim is being settled or fails to comply with the final determination of the CO, the CO may terminate the contract for default or impose other available remedies.

## **Part 7.10. Contract Termination**

### **7.10.1. General**

- a. Contracts may be terminated for default or convenience only when such action is in the interest of the judiciary. If applicable, the CO may also consider a no-cost termination of the contract. The potentially high price to pay for a wrongful termination requires the CO to carefully review the clauses and surrounding circumstances prior to making a decision to recommend termination.
- b. **Applicability** This section applies to contracts that contain clauses permitting termination for the convenience of the judiciary or for contractor default. It establishes uniform procedures for the complete or partial termination of such contracts.
- c. The provisions of this section must be used by the CO as a guide in evaluating settlement of a subcontract terminated for the convenience of a contractor whenever the settlement could be the basis of a contractor claim for reimbursement by the judiciary.
- d. **Review and Approval** The PE must review and approve, in writing, all proposed contract terminations whether for convenience or default.

### **7.10.2. Notice of Termination**

- a. The CO may terminate contracts only by written notice to the contractor. Notice must be by certified mail, return receipt requested.
- b. The notice must state:



- (1) the type of termination contemplated and the contract clause authorizing the termination;
  - (2) the effective date of termination;
  - (3) the extent of the termination and, if a partial termination, the portion of the contract to be continued; and
  - (4) any special instructions.
- c. Distribution** When the termination notice is sent to the contractor, the CO must distribute the notice to any known assignee, guarantor, or surety of the contractor.
- d. Amendment** The CO may amend a termination notice to:
- (1) correct nonsubstantive mistakes in the notice;
  - (2) add supplemental data or instructions;
  - (3) rescind the notice if the items of work terminated have been completed or shipped before the contractor receives the notice; and/or
  - (4) reinstate the terminated portion of a contract.
- e. Reinstatement** The CO may, with the consent of the contractor, reinstate the terminated portion of a contract in whole or in part by amending the notice of termination when:
- (1) circumstances clearly indicate a requirement for the terminated items; or
  - (2) reinstatement is otherwise advantageous to the judiciary.

### 7.10.3. Termination for Convenience

- a. General** Termination for convenience is appropriate when the judiciary no longer requires the contracted products or services.
- b. Applicability** The provisions of this part apply to all contracts containing [Clause 7-220](#), “Termination for Convenience of the Judiciary (Fixed Price)” or [Clause 7-225](#), “Termination (Cost-Reimbursement).”
- c.** The CO may settle contracts terminated for convenience by:
- (1) negotiated agreement;
  - (2) CO determination;
  - (3) costing vouchers, if the contract is a cost-reimbursement contract; or
  - (4) a combination of these methods.
- d.** When possible, the CO must negotiate a fair and prompt settlement with the contractor in accordance with the applicable clause and within the appropriate allocable, allowable, and reasonable amounts (see [Chapter 4](#)).
- e. Contractor's Duties** After receiving a termination notice and, except as otherwise directed by the CO, the contractor must comply with the clause and the termination notice, which generally require the contractor to:
- (1) stop work immediately on the terminated portion of the contract and stop placing subcontracts under that portion;
  - (2) terminate all subcontracts related to the terminated portion of the contract;
  - (3) immediately advise the CO of any special circumstances precluding the stoppage of work;

- (4) perform the continued portion of the contract, if any, and promptly submit any request for an equitable adjustment of price with respect to the continued portion, supported by evidence of any increase in the cost;
  - (5) take necessary actions to protect and preserve property in which the judiciary has or may acquire an interest, and, as directed by the CO:
    - (a) deliver the property to the judiciary; or
    - (b) otherwise dispose of it;
  - (6) promptly notify the CO in writing of any legal proceedings growing out of a subcontract or other commitment related to the terminated portion of the contract;
  - (7) settle outstanding liabilities and claims arising out of subcontract terminations, with prior written approval or ratification as required by the CO;
  - (8) promptly submit a settlement offer, supported by appropriate schedules; and
  - (9) dispose of any termination inventory, as the CO directs or authorizes.
- f. Settlement of Subcontractor Claims**
- (1) **Subcontractor Rights** A subcontractor has no contractual rights against the judiciary. This is known as privity of contract. However, the subcontractor may have rights against the prime contractor or the immediate subcontractor with which it has contracted. Upon termination of a judiciary contract, or a change that necessitates subcontract termination, the contractor is responsible for prompt settlement of the termination claims of all their immediate subcontractors. The subcontractors have responsibility for settlement of any of their next lower tier subcontractors.
  - (2) **Prime Contractor Rights and Obligations** The termination clauses provide that, upon contract termination, the contractor must, except as otherwise directed by the CO, terminate all subcontracts to the extent that they relate to performance of the work terminated.
- g.** The reasonableness of the contractor's settlement with a subcontractor must be measured by the aggregate amount that would be due under an equivalent judiciary termination clause. The CO may allow reimbursement in excess of that amount only in unusual cases, and then only when satisfied that the subcontract terms were negotiated in good faith and did not unreasonably increase the subcontractor's rights.
- h. Delay in Settlement of Subcontractor Claims** When a contractor's inability to reach settlement with a subcontractor delays the settlement of the judiciary contract, the CO may settle with the contractor for all amounts except the subcontractor settlement offer, and reserve judiciary and contractor rights as to the subcontractor settlement offer.
- i. Assistance in Subcontract Settlements** In unusual cases, the CO may determine that it is in the interest of the judiciary to offer to assist the contractor in the settlement of a particular subcontract. The judiciary, the contractor, and the subcontractor may then enter into an agreement covering settlement of the subcontract. In such case, the subcontractor must be paid through the contractor as part of the overall settlement.
- j. Direct Settlement by the Judiciary** [Clause 7-220](#), "Termination for Convenience (Fixed Price)" clause gives the judiciary the right, but not the obligation, to settle and pay any

claims arising out of subcontract terminations. Direct settlements with subcontractors are not encouraged, since the judiciary contractor is obligated to settle and pay subcontractor termination claims. However, when the CO determines that it is in the interest of the judiciary to settle a subcontractor claim directly, the CO may, after notifying the contractor, direct the assignment of all contractor rights to the judiciary, and settle the subcontractor claim using the termination procedures for settlement of judiciary contracts. An example in which the interest of the judiciary would be served is when a subcontractor is the sole source of a product and it appears that a delay by the contractor in settling the subcontractor's claim will jeopardize the subcontractor's financial position.

**k.** Clauses

- (1) [Clause 7-220](#), “Termination for Convenience of the Judiciary (Fixed-Price)” is included in solicitations and contracts when a fixed-price contract is contemplated and the contract amount is expected to be over the judiciary’s small purchase threshold, except in contracts for architect-engineer services.
- (2) [Clause 7-223](#), “Termination for Convenience of the Judiciary (Short Form)” This clause is included in solicitations and contracts when the contract is expected to be at or less than the judiciary’s small purchase threshold, except when the contracting officer has determined that another termination for convenience clause is appropriate (i.e., [Clause 3-3](#) for small purchases, [Clause 5-70](#) for architect and engineer contracts, or [Clause 7-220](#) for situations when a CO believes the longer form is more appropriate, or [Clause 7-225](#) for cost reimbursement contracts).
- (3) [Clause 7-225](#), “Termination for Convenience (Cost-Reimbursement)” is included in solicitations and contracts when a cost-reimbursement contract is contemplated. For time-and-material and labor-hour contracts, use Alternate I.

#### **7.10.4. Failure to Make Timely Delivery**

- a.** When a contractor fails to make timely delivery, the CO has a reasonable time after the delivery date to determine whether the contract must be terminated for default. When the contractor is continuing performance of the contract, a reasonable time for the CO to make a decision is 30 working days. Delay beyond that date may result in a waiver of the right of the judiciary to terminate for default.
- b.** When the CO determines that termination for default is proper, the CO must issue a termination notice at once, following the procedures in [7.10.6](#). No demand for adequate assurances must be issued. However, the CO may allow the contractor to assert any alleged excusable delay.
- c.** If CO delay in issuing a notice of termination for default results in a waiver of that right, a new delivery date must be established by bilateral or unilateral modification of the contract. The new delivery date must be reasonable considering all the circumstances of contract performance. When the new date is established, the right to terminate for default is reinstated.

- d. Notice of Impending Termination - Causes Other Than Failure to Make Timely Delivery** When the CO makes a preliminary determination that termination for default is appropriate in cases other than failure to make timely delivery, the CO must, if practicable, notify the contractor in writing of the possibility of termination. This notice (a “show cause” letter) may:
- (1) call the contractor's attention to its liabilities in the event that the contract is terminated for default;
  - (2) request the contractor to show cause why the contract must not be terminated for default;
  - (3) state that failure of the contractor to explain why the contract must not be terminated may be taken as an admission that no valid explanation exists; and/or
  - (4) when appropriate, invite the contractor to discuss the matter at a conference.
- e. Demand for Adequate Assurance for Causes Other Than Failure to Make Timely Delivery** A written “cure notice” must be issued when the CO determines that the contractor is failing to make satisfactory progress to a degree that this failure endangers contract performance, or determines that some other failure, under the contract or otherwise (other than failure to make timely delivery) is cause for concern.
- (1) The demand must specify the failure and give the contractor ten days (or longer, if necessary) to assure the judiciary of steps that will be taken to cure the failure.
  - (2) When the time remaining in the contract delivery schedule does not permit a response period of ten days or longer, a demand may be made part of the notice described in [7.10.6](#).

### 7.10.5. Issuing a Delinquency Notice

- a.** Contractors must be notified of the possibility of being terminated for failing to perform its contractual obligations. Notification will take one of two forms: Cure Notice and Show Cause letter.
- b.** Cure Notice is used when:
- (1) the contractor has failed to make progress and contract performance is endangered; or
  - (2) at least ten days remain for contract performance and correction of the problem can reasonably be expected to take place within the time remaining.
- c.** At a minimum, a Cure Notice must:
- (1) specifically state the failure endangering performance as it relates to the corresponding requirement in the contract;
  - (2) allow the contractor at least ten days to “cure” the failure;
  - (3) be in writing and sufficient to support a default termination; and
  - (4) The “Cure Notice” must be in the following format:

Cure Notice

You are notified that the judiciary considers your \_\_\_\_\_(*contracting officer specifies the contractor's failure or failures*) a condition that is endangering performance of the contract. Therefore, unless this condition

is cured within ten days after receipt of this notice (*or the CO inserts any longer time that may be considered reasonably necessary*), the judiciary may terminate for default under the terms and conditions of the \_\_\_\_\_ (*insert clause title*) clause of this contract.

- d. After a Cure Notice has been issued, the contract cannot be terminated until the ten day period (or other specified time) has elapsed unless there is evidence of wrongful conduct, failure to cure the problem, or repudiation by the contractor.
- e. (1) A Show Cause notice is used after a Cure Notice time elapses or when there is insufficient time remaining in the contract delivery schedule for the contractor to cure or correct the delinquency. Prior to being issued, a Show Cause notice must be approved in writing by the PE. Usually a Show Cause notice is issued when there is less than ten days remaining. However, it can be used at any time when it is determined there is an “insufficient amount of time left.” s beyond its control.
- (2) At a minimum, a Show Cause notice must:
  - (a) request the contractor to show cause why the contract must not be terminated for default;
  - (b) inform the contractor that failure to explain the cause of the deficiency may be taken as admission that no valid explanation exists;
  - (c) invite the contractor to discuss the matter at a conference, when appropriate; and
  - (d) inform the contractor of its liabilities in the event of contract default.
- (3) A “Show Cause” notice must be in the following 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 judiciary’ s letter of \_\_\_\_\_ (date),”* the judiciary 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 of 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 CO*), within ten 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 judiciary 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 judiciary of delinquent products or services will be solely for the purpose of mitigating damages, and it is not the intention of the judiciary to

condone any delinquency or to waive any right the judiciary has under the contract.

- f. Evaluate Contractor's Response** A contractor's response to delinquency notices can take several forms:
- (1) **Cure Notice Response** A contractor is not necessarily required to respond to a Cure Notice since the contractor is told to correct the problem before the contract becomes delinquent. Often, however, the contractor will respond in writing with its detailed plans to cure performance. Such a response does not absolve the contractor of actually curing the delinquency within the period specified in the cure notice. However, unless the problem is actually cured, the judiciary, upon expiration of the delivery period, has the option of issuing either a Show Cause or termination notice.
  - (2) **Show Cause Notice Response** If the CO chooses to issue a Show Cause (either with or without a prior Cure Notice), the contractor has ten days to respond.
  - (3) **Actions after Evaluation** Depending on the response the CO receives, action may be taken to:
    - (a) defer termination action;
    - (b) modify the contract; or
    - (c) begin default proceedings (see [7.10.7.](#)), as required. The PE must review and approve all proposed terminations for default.

#### 7.10.6. Termination for Default Notice

- a. Unless it is determined that the nonperformance will be cured, immediately upon determination that termination is proper under [7.10.](#), or upon expiration of the ten day, or longer period allowed by a notice, the CO may issue a notice of termination for default.
- b. When a demand for adequate assurance has been issued, the notice of termination must be coordinated with the PE, who will consult with OGC before issuance.
- c. The notice of termination for default must meet all the general requirements set forth in [7.10.2.](#) as well as:
  - (1) set forth the contract number and date;
  - (2) describe the acts or omissions constituting the default;
  - (3) state that the contractor's right to proceed with performance of the contract (or a specified portion of the contract) is terminated;
  - (4) state that the products or services terminated may be procured against the contractor's account, and that the contractor will be held liable for any excess repurchase costs;
  - (5) state that the judiciary reserves all rights and remedies provided by law or under contract, in addition to charging excess costs; and
  - (6) inform the contractor that the termination is subject to [Clause 7-235](#), "Disputes."

- d. When the CO has determined that the failure to perform is not excusable, the termination notice must also state that it reflects that decision, and that the contractor has the right to appeal as specified in [Clause 7-235](#), “Disputes.”
- e. The CO must make the same distribution of the termination notice as was made of the contract, and any surety must be furnished a copy and asked to advise whether it desires to arrange for completion of the work.
- f. The CO must notify the payment office to withhold further payments under the terminated contract.
- g. **Procedure in Lieu of Termination for Default** When the CO determines that the contractor's failure to perform arose from causes beyond its control and without its fault or negligence, the CO may not terminate the contract for default. When it is in the interest of the judiciary to do so, the CO may, in lieu of termination for default:
  - (1) terminate the contract for convenience;
  - (2) permit the contractor, its surety, or its guarantor to continue performance of the contract under a revised delivery schedule;
  - (3) permit the contractor to continue performance of the contract by means of a subcontract or other business arrangement with an acceptable third party, if the rights of the judiciary are adequately preserved; or
  - (4) execute a no-cost termination settlement agreement (or terminate on notice if allowed under the contract), if the requirement for the products and services specified in the contract no longer exists and the contractor is not liable to the judiciary for damages, as provided below.
- h. **Determination Following Termination Notice** When the CO is unable to determine, before issuing the notice of termination, whether the contractor's failure to perform arose from causes beyond its control and without its fault or negligence, the CO must make a written decision on that point as soon as practicable after issuing the notice. This decision must be delivered promptly to the contractor, with a notification of the right to appeal as specified in [Clause 7-235](#), “Disputes.”
- i. **Contracting Officer Memorandum** When a contract is terminated for default, the CO must prepare for the contract file a memorandum that fully explains the action taken. This memorandum must be submitted to the PE for written concurrence.

#### 7.10.7. Termination for Default

- a. Termination for default is the exercise of the judiciary’s contractual right to completely or partially terminate a contract by reason of the contractor's actual or anticipated failure to perform its contractual obligations. When the CO has the right to terminate a contract for default, the total undelivered contract quantity, whether delinquent or not, may be terminated for default.
- b. If the contractor can establish that its failure to perform arose out of causes beyond its control and without its fault or negligence, the default termination clause provides that a termination for default will be deemed a termination for the convenience of the judiciary, and the rights and obligations of the parties will be governed accordingly.

- c. The CO must take all reasonable steps to mitigate liquidated damages. If the contract contains a liquidated damages clause and the CO is considering terminating the contract for default, the CO must seek expeditiously to obtain performance by the contractor or terminate the contract.
- d. When the CO determines in writing that the products or services are still required and that reinstatement is advantageous to the judiciary, the CO may reinstate the terminated portion of a contract, but only with the contractor's written consent.
- e. **Judiciary Rights and Obligations** Under the Termination for Default clause, the judiciary has the right, subject to the notice requirements of the clause, to terminate all or any part of a contract without regard to severability of contract obligations when the contractor fails to:
  - (1) complete any material requirement of the contract within the time specified in the contract (including any extensions);
  - (2) make progress to a degree that this failure endangers performance of the contract;
  - (3) perform any other contract provision; or
  - (4) give adequate assurances of performance.
- f. The judiciary is not liable for the contractor's costs on undelivered work and is entitled to repayment of any advance payments for undelivered work.
- g. The CO may direct the contractor to transfer title and deliver to the judiciary completed products and manufacturing materials. The completed products and manufacturing materials may be acquired for use in continuing the terminated contract work or for use under another contract.
- h. Subject to the provisions of [7.10.8.b.\(4\)](#), the judiciary must pay the contractor the contract price for any products completed and delivered, and the amount agreed upon by the CO and the contractor for any manufacturing materials acquired by the judiciary.
- i. The judiciary must be protected from failure to make provision for the judiciary's potential liability to laborers and material suppliers for lien rights. The CO must take one or more of the following measures before making the payment referred to in the section above:
  - (1) ascertain whether the payment bonds, if any, furnished by the contractor are adequate to satisfy all claims, or whether it is feasible to obtain similar bonds to cover outstanding liens;
  - (2) require the contractor to furnish appropriate statements from laborers and material suppliers disclaiming any lien rights they may have in the products and materials;
  - (3) obtain appropriate agreement between the judiciary, the contractor, and any claimants to ensure release of the judiciary from any potential liability to the contractor or claimants;
  - (4) withhold from the amount otherwise due for the products or materials an amount the CO determines necessary to protect the judiciary's interest, in accordance with [7.7.4.](#); or
  - (5) take any other action that is appropriate in view of the contractor's degree of solvency and other circumstances.



- j. The contractor is liable to the judiciary for any excess costs the judiciary incurs in acquiring products and services similar to those terminated for default, and any other damages, whether or not the repurchase is made.
- k. **Determination of Appropriateness** When a default termination is being considered, the CO must ensure that termination for default rather than for convenience is appropriate. The CO must consult with program officials, technical personnel, and the PE, and will consider the following factors:
  - (1) the specific failure of the contractor and, unless time does not permit, the excuses for the failure;
  - (2) the availability of the products or services from other sources;
  - (3) the urgency of the need for the products or services, and whether or not they can be obtained sooner from sources other than the delinquent contractor;
  - (4) the degree to which the contractor is essential to the judiciary, and the effect of a termination for default on the contractor's capability as a supplier under other contracts;
  - (5) the effect of a termination for default on the ability of the contractor to liquidate progress payments; and
  - (6) any other pertinent facts and circumstances.
- l. **Surety Notification and Arrangements** When a termination for default appears imminent, the CO must send a written notification of that fact (not an actual notice of default) to any surety, at both its main and local offices (see [6.2.](#)).
- m. If requested by the surety, and agreed to by the contractor and any assignees, arrangements may be made to have future checks mailed to the contractor in care of the surety. In this case, the contractor must forward a written request to the designated disbursing officer, specifically directing a change in address for mailing of checks.
- n. **Clauses**
  - (1) [Clause 7-230](#), "Termination for Default (Fixed-Price - Products and Services)" is included in solicitations and contracts when a fixed-price procurement is contemplated and the contract amount is expected to exceed the judiciary's small purchase threshold.
  - (2) [Clause 7-235](#), "Disputes" is included in all solicitations and contracts.

#### 7.10.8. Remedies and Damages

- a. **Remedies** On rightful rejection or justifiable revocation of acceptance, the judiciary has a security interest in products delivered under the contract for any payments and expenses reasonably incurred in inspection, receipt, transportation, care, and custody.
- b. **Repurchase Against Contractor's Account**
  - (1) When products or services are still required after termination for default, the CO may repurchase the same or similar products or services against the contractor's account as soon as practicable. The repurchase must be at a reasonable price, considering the quality required by the judiciary and the time within which the

- products or services are required. Whenever practicable, the CO must make necessary repurchase decisions before issuing the termination notice.
- (2) The CO may repurchase a quantity larger than the quantity terminated for default when needed, but the defaulting contractor may be charged for no more than the terminated quantity (including any variations in quantity permitted by the terminated contract).
  - (3) If the repurchase is for a quantity not larger than the terminated quantity, the CO may use any terms and contract methods deemed appropriate for the repurchase, following normal written approval or deviation procedures. If the repurchase is for a quantity larger than the terminated quantity, the entire quantity must be treated as a new purchase, adhering to all applicable procedures.
  - (4) If repurchase is made at a price higher than the price of the terminated products or services, the CO must, after final payment of the repurchase contract, make a written demand on the contractor for the excess amount, taking into account any increases or decreases in cost due to transportation charges, discounts, and other factors.

**c. Damages**

- (1) **Default** If a contract is terminated for default or if a procedure in lieu of termination for default is followed, the CO must ascertain and demand any damages to which the judiciary may be entitled. These damages are in addition to any excess repurchase cost.
- (2) When the CO has accepted defective products, the judiciary may recover as damages for any nonconformity the loss resulting in the ordinary course of events from the contractor's breach as determined in any reasonable manner.
- (3) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the products or services accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

### 7.10.9. Incidental and Consequential Damages

- a. Incidental Damages** may be chargeable against the contract. Incidental damages include those resulting from the contractor's breach, include expenses reasonably incurred in inspection, receipt, transportation, and care and custody of products rightfully rejected; any commercially reasonable charges; expenses in connection with repurchase; and any other reasonable expense incident to the delay or other breach.
- b. Consequential Damages** may be chargeable against the contract. Consequential damages include those resulting from the contractor's breach and include:
  - (1) any loss resulting from general or particular requirements and needs of which the contractor at the time of contracting had reason to know and which could not reasonably be prevented; and
  - (2) injury to person or property proximately resulting from any breach of warranty.

- c. **Deduction of Damages from the Price** The CO, on notifying the contractor, may deduct all or any part of the damages resulting from any breach of the contract, or from late delivery or delay not subject to liquidated damages, from any part of the price still due.
- d. **Damages for Non-delivery or Repudiation** The measure of damages for non-delivery or repudiation by the contractor when repurchase is not possible is the difference between the market price at the time when the CO learned of the breach and the price, together with any incidental and consequential damages, but less expenses as a consequence of the contractor's breach.
- e. Market price is to be determined as of the place of acceptance or, in cases of rejection after arrival or revocation of acceptance, as the place of arrival.

## **Part 7.11. Contract Closeout**

### **7.11.1. Closeout of Contract Files**

- a. Contract closeout refers to the procedure of verifying that all administrative matters have been concluded on a contract that is physically complete. That is, the contractor has delivered the required products or performed the required services and the judiciary has inspected and accepted the products or services.
- b. Standard times for closing out a contract vary depending on the contract type:
  - (1) files for orders using small purchase procedures must be considered closed after receipt of property or services when the CO receives evidence of final payment;
  - (2) files for firm-fixed-price contracts, other than those using small purchase procedures, must be closed within six months after the date on which the CO receives evidence of physical completion;
  - (3) files for contracts requiring settlement of indirect cost rates must be closed within 36 months of the month in which the CO receives evidence of physical completion;
  - (4) Files for all other contracts must be closed within 20 months of the month in which the CO receives evidence of physical completion;
  - (5) when closing out the contract files at [7.11.1.](#), the CO must use the closeout procedures at [7.11.2.](#) However, these closeout actions may be modified to reflect the extent of administration that has been performed; and
  - (6) a contract file must not be closed if:
    - (a) the contract is in litigation or under appeal;
    - (b) all termination actions have not been completed; or
    - (c) warranties or guarantees provided under the contract are still in effect.
- c. **Physically Completed Contracts**
  - (1) Except as provided in paragraph (2) below, a contract is physically complete when one of two events has occurred:

- (a) all required products or services have been delivered or performed; inspected and accepted; and all existing options have been exercised or have expired; or
- (b) a contract termination notice has been issued to the contractor.
- (2) Facilities contracts and rental, use, and storage agreements are considered to be physically completed when:
  - (a) the judiciary has given the contractor a notice of complete contract termination; or
  - (b) the contract period has expired.

### 7.11.2. Contract Closeout Procedures

- a. The CO is responsible for initiating administrative closeout of the contract after receiving evidence of its physical completion. At the outset of this process, the CO must review the contract funds status and determine whether or not there are payments to be made, claims to be settled, or excess funds to be deobligated. When complete, the administrative closeout procedures must ensure that, as appropriate:
  - (1) there is no outstanding value engineering change offer;
  - (2) a property clearance is received;
  - (3) all interim or disallowed costs are settled;
  - (4) a price revision is completed;
  - (5) subcontracts are settled by the prime contractor;
  - (6) all indirect cost rates are settled;
  - (7) the termination is settled;
  - (8) contractor's closing statement is completed;
  - (9) contractor's final invoice has been submitted;
  - (10) a contract funds review is completed;
  - (11) excess funds are deobligated; and
  - (12) a bilateral modification has been completed to effect the final closeout with the contractor's statement of release as follows:
 

“This modification is intended to and does constitute a full and final settlement and disposition of all matters relating to this contract (including all of its modifications) and is a full release, accord and satisfaction of any and all claims, demands or causes of action that the contractor has against the judiciary arising out of or related to this contract.”
- b. When the actions in the above section have been completed, the CO administering the contract must ensure that a contract completion statement, containing the following information, is prepared:
  - (1) contract administration office name and address (if different from the purchasing office);
  - (2) purchasing office name and address;
  - (3) contract number;
  - (4) last modification number;

- (5) last order number;
  - (6) contractor name and address;
  - (7) dollar amount of excess funds, if any;
  - (8) voucher number and date, if final payment has been made;
  - (9) invoice number and date, if the final written approved invoice has been forwarded to a disbursing office and the status of the payment is unknown;
  - (10) a statement that all required contract administration actions have been fully and satisfactorily accomplished;
  - (11) name and signature of the CO; and
  - (12) date.
- c.** When the statement is completed, the CO must ensure that:
- (1) the signed statement is placed in the purchasing office contract file; and
  - (2) a signed copy is placed in the appropriate contract administration file if administration is performed by a contract administration office.
- d. Storage, Handling, and Disposal of Contract Files** The process used to create and store records must record and reproduce the document, including signatures and other written and graphic images completely, accurately, and clearly. Data transfer, storage, and retrieval procedures must protect the data from alteration. Unless law or other regulations require signed documents to be kept, they may be destroyed after the responsible judiciary official verifies that record copies on alternate media and copies reproduced from the record copy are accurate, complete, and clear representations of the originals. See [7.1.1](#) for contents of contract files and [7.11.3](#) for destruction of records after closeout.

### 7.11.3. Disposition of Contract Files

- a.** Contract files, requisitions, and purchase/delivery/task orders, including correspondence and related papers pertaining to award, administration, receipt, inspection, acceptance, claims, disputes and payment must be destroyed using the following instructions:
- (1) transactions that use small purchase procedures; destroy three years after final payment, or until the judiciary audit, whichever is later; and
  - (2) transactions that use other than small purchase procedures; destroy six years and three months after final payment, or until the judiciary audit, whichever is later.
- b.** Solicited and Unsolicited Offers:
- (1) successful offers - destroy with related contract files; and
  - (2) solicited and unsolicited unsuccessful offers:
    - (a) relating to awards below the small purchases threshold; destroy one year after date of award or final payment, whichever is later;
    - (b) relating to transactions above the judiciary's small purchase threshold; destroy with related contract case files;
    - (c) relating to unsuccessful offers whereby no award is made, destroy one year after final decision of not awarding.

- c.** Formal solicitations of offers to provide products or services may be canceled prior to award of a contract. The files include presolicitation documentation on the requirement, any offers that were opened prior to the cancellation, documentation on any judiciary action up to the time of cancellation, and evidence of the cancellation.

  - (1) Canceled solicitation files must be destroyed five years after date of cancellation;  
and
  - (2) unopened offers must be returned to the offeror.

## Exhibit 7-1 Novation Agreement

The \_\_\_\_\_ (i.e. ABC Corporation (Transferor)), a corporation duly organized and existing under the laws of \_\_\_\_\_ [insert State] with its principal office in \_\_\_\_\_ [insert city]; the \_\_\_\_\_ (i.e. XYZ Corporation (Transferee) 0, [if appropriate add "formerly known as the EFG Corporation"]) a corporation duly organized and existing under the laws of \_\_\_\_\_ [insert State] with its principal office in \_\_\_\_\_ [insert city]; and the United States Of America (judiciary) enter into this Agreement as of \_\_\_\_\_ [insert the date transfer of assets became effective under applicable State law].

(a) The parties agree to the following facts:

- (1) The judiciary, represented by various contracting officers has entered into certain contracts with the Transferor, namely: \_\_\_\_\_ [insert contract or purchase order identifications]; [~~or delete "namely" and insert "as shown in the attached list marked `Exhibit A' and incorporated in this Agreement by reference."~~]. The term "the contracts," as used in this Agreement, means the above contracts and purchase orders and all other contracts and purchase orders, including all modifications, made between the judiciary and the Transferor before the effective date of this Agreement (whether or not performance and payment have been completed and releases executed if the judiciary or the Transferor has any remaining rights, duties, or obligations under these contracts and purchase orders). Included in the term "the contracts" are also all modifications made under the terms and conditions of these contracts and purchase orders between the judiciary and the Transferee, on or after the effective date of this Agreement.
- (2) As of \_\_\_\_\_, 20\_\_\_\_, the Transferor has transferred to the Transferee all the assets of the Transferor by virtue of a \_\_\_\_\_ [insert term descriptive of the legal transaction involved] between the Transferor and the Transferee.
- (3) The Transferee has acquired all the assets of the Transferor by virtue of the above transfer.
- (4) The Transferee has assumed all obligations and liabilities of the Transferor under the contracts by virtue of the above transfer.
- (5) The Transferee is in a position to fully perform all obligations that may exist under the contracts.
- (6) It is consistent with the judiciary's interest to recognize the Transferee as the successor party to the contracts.
- (7) Evidence of the above transfer has been filed with the judiciary. [*When a change of name is also involved; e.g., a prior or concurrent change of the Transferee's name, an appropriate statement must be inserted (see example in paragraph (8) of this Agreement)*].
- (8) A certificate dated \_\_\_\_\_, 20\_\_\_\_, signed by the Secretary of State of \_\_\_\_\_ [insert State], to the effect that the corporate name of \_\_\_\_\_ (EFG Corporation) was changed to \_\_\_\_\_ (XYZ Corporation) on \_\_\_\_\_, 20\_\_\_\_, has been filed with the judiciary.

(b) In consideration of these facts, the parties agree that by this Agreement:

- (1) The Transferor confirms the transfer to the Transferee, and waives any claims and rights against the judiciary that it now has or may have in the future in connection with the contracts.
- (2) The Transferee agrees to be bound by and to perform each contract in accordance with the conditions contained in the contracts. The Transferee also assumes all obligations and liabilities of, and all claims against, the Transferor under the contracts as if the Transferee were the original party to the contracts.
- (3) The Transferee ratifies all previous actions taken by the Transferor with respect to the contracts, with the same force and effect as if the action had been taken by the Transferee.
- (4) The judiciary recognizes the Transferee as the Transferor's successor in interest in and to the contracts. The Transferee by this Agreement becomes entitled to all rights, titles, and interests of the Transferor in and to the contracts as if the Transferee were the original party to the contracts. Following the effective date of this Agreement, the term "Contractor," as used in the contracts, must refer to the Transferee.
- (5) Except as expressly provided in this Agreement, nothing in it must be construed as a waiver of any rights of the judiciary against the Transferor.
- (6) All payments and reimbursements previously made by the judiciary to the Transferor, and all other

previous actions taken by the judiciary under the contracts, must be considered to have discharged those parts of the judiciary's obligations under the contracts. All payments and reimbursements made by the judiciary after the date of this Agreement in the name of or to the Transferor must have the same force and effect as if made to the Transferee, and must constitute a complete discharge of the judiciary's obligations under the contracts, to the extent of the amounts paid or reimbursed.

- (7) The Transferor and the Transferee agree that the judiciary is not obligated to pay or reimburse either of them for, or otherwise give effect to, any costs, taxes, or other expenses, or any related increases, directly or indirectly arising out of or resulting from the transfer or this Agreement, other than those that the judiciary in the absence of this transfer or Agreement would have been obligated to pay or reimburse under the terms of the contracts.
- (8) The Transferor guarantees payment of all liabilities and the performance of all obligations that the Transferee:
- (i) assumes under this Agreement; or
  - (ii) may undertake in the future if these contracts be modified under their terms and conditions. The Transferor waives notice of, and consents to, any such future modifications.
- (9) The contracts must remain in full force and effect, except as modified by this Agreement. Each party has executed this Agreement as of the day and year first above written.

Judiciary,

By \_\_\_\_\_

Title \_\_\_\_\_

\_\_\_\_\_(ABC Corporation),

By \_\_\_\_\_

Title \_\_\_\_\_

[Corporate Seal]

\_\_\_\_\_  
XYZ Corporation,

By \_\_\_\_\_

Title \_\_\_\_\_

[Corporate Seal]

Certificate

I, \_\_\_\_\_, certify that I am the Secretary of \_\_\_\_\_ (ABC Corporation), that \_\_\_\_\_, who signed this Agreement for this corporation, was then \_\_\_\_\_ of this corporation; and that this Agreement was duly signed for and on behalf of this corporation by authority of its governing body and within the scope of its corporate powers. Witness my hand and the seal of this corporation this day of \_\_\_\_\_ 20 \_\_\_\_.

By \_\_\_\_\_

[Corporate Seal]

Certificate

I, \_\_\_\_\_, certify that I am the Secretary of \_\_\_\_\_ (XYZ Corporation), that \_\_\_\_\_, who signed this Agreement for this corporation, was then \_\_\_\_\_ of this corporation; and that this Agreement was duly signed for and on behalf of this corporation by authority of its governing body and within the scope of its corporate powers. Witness my hand and the seal of this corporation this day of \_\_\_\_\_ 20 \_\_\_\_.

By \_\_\_\_\_

[Corporate Seal]



## Exhibit 7-2 Change-of-Name Agreement

The \_\_\_\_\_ (i.e. ABC Corporation) (*contractor*), a corporation duly organized and existing under the laws of \_\_\_\_\_ [*insert State*], and the United States Of America (*judiciary*), enter into this Agreement as of \_\_\_\_\_ [*insert date when the change of name became effective under applicable State law*].

(a) The parties agree to the following facts:

- (1) The judiciary, represented by various contracting officers has entered into certain contracts and purchase orders with the \_\_\_\_\_ (i.e.. XYZ Corporation), namely: \_\_\_\_\_ [*insert contract or purchase order identifications*]; [*or delete "namely" and insert "as shown in the attached list marked "Exhibit A" and incorporated in this Agreement by reference."*]. The term "the contracts," as used in this Agreement, means the above contracts and purchase orders and all other contracts and purchase orders, including all modifications, made by the judiciary and the contractor before the effective date of this Agreement (whether or not performance and payment have been completed and releases executed if the judiciary or the contractor has any remaining rights, duties, or obligations under these contracts and purchase orders).
- (2) The \_\_\_\_\_ (XYZ Corporation), by an amendment to its certificate of incorporation, dated \_\_\_\_\_ 20\_\_\_\_, has changed its corporate name to \_\_\_\_\_ (ABC Corporation).
- (3) This amendment accomplishes a change of corporate name only and all rights and obligations of the judiciary and of the contractor under the contracts are unaffected by this change.
- (4) Documentary evidence of this change of corporate name has been filed with the judiciary.

(b) In consideration of these facts, the parties agree that:

- (1) the contracts covered by this Agreement are amended by substituting the name \_\_\_\_\_ ("ABC Corporation") for the name \_\_\_\_\_ ("XYZ Corporation") wherever it appears in the contracts; and
- (2) each party has executed this Agreement as of the day and year first above written.

Judiciary,

By \_\_\_\_\_

Title \_\_\_\_\_

\_\_\_\_\_ ABC Corporation,

By \_\_\_\_\_

Title \_\_\_\_\_

[Corporate Seal]

Certificate

I, \_\_\_\_\_, certify that I am the Secretary of \_\_\_\_\_ (ABC Corporation); that \_\_\_\_\_, who signed this Agreement for this corporation, was then \_\_\_\_\_ of this corporation; and that this Agreement was duly signed for and on behalf of this corporation by authority of its governing body and within the scope of its corporate powers. Witness my hand and the seal of this corporation this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_.

By \_\_\_\_\_

[Corporate Seal]

**Exhibit 7-3  
Notice of Assignment**

To: \_\_\_\_\_  
*(name and address of the addressees specified in 7.7.7.f(1), (2), and (3))*

This has reference to contract number \_\_\_\_\_ dated \_\_\_\_\_, entered into between \_\_\_\_\_  
*(contractor's name and address) and \_\_\_\_\_ (judiciary organization: Administrative Office of the  
US Courts, court unit, or federal public defender organization, and address),*  
for \_\_\_\_\_ *(Describe nature of the contract).*

Moneys due or to become due under the contract described above have been assigned to the undersigned.

A true copy of the instrument of assignment executed by the contractor on \_\_\_\_\_ *(date)*, is attached to the original notice.

Payments due, or to become due, under this contract should be made to the undersigned assignee.

Please return to the undersigned the three enclosed copies of this notice with appropriate notations showing the date and hour of receipt, and signed by the person acknowledging receipt on behalf of the addressee.

Very truly yours,

\_\_\_\_\_  
*(Name of Assignee)*

By \_\_\_\_\_  
*(Signature of Signing Officer)*

\_\_\_\_\_  
*(Title of Signing Officer)*

\_\_\_\_\_  
*(Address of Assignee)*

**ACKNOWLEDGMENT**

Receipt is acknowledged of the above notice and of a copy of the instrument of assignment.

They were received \_\_\_\_\_ *(time - include a.m. or p.m.)* on \_\_\_\_\_ *(Date)*.

\_\_\_\_\_  
*(Signature)*

\_\_\_\_\_  
*(Title)*

On behalf of \_\_\_\_\_

\_\_\_\_\_  
*(Name of addressee of this notice)*