

PART D -- POST AWARD PROVISIONS

Article 40. AFFIRMATIVE ACTION FOR SPECIAL DISABLED AND VIETNAM ERA VETERANS

(Applicable to contracts and subcontracts of \$10,000 or more.)

(a) Definitions. "Appropriate office of the State employment service system," as used in this article, means the local office of the Federal-State national system of public employment offices assigned to serve the area where the employment opening is to be filled, including the District of Columbia, Guam, Puerto Rico, Virgin Islands, American Samoa, and the Trust Territory of the Pacific Islands.

"Openings that the Contractor proposes to fill from within its own organization," as used in this article, means employment openings for which no one outside the Contractor's organization (including any affiliates, subsidiaries, and the parent companies) will be considered and includes any openings that the Contractor proposes to fill from regularly established "recall" lists.

"Openings that the Contractor proposes to fill under a customary and traditional employer-union hiring arrangement," as used in this article, means employment openings that the Contractor proposes to fill from union halls, under their customary and traditional employer-union hiring relationship.

"Suitable employment openings," as used in this article--

(1) Includes, but is not limited to, openings that occur in jobs categorized as--

- (i) Production and nonproduction;
- (ii) Plant and office;
- (iii) Laborers and mechanics;
- (iv) Supervisory and nonsupervisory;
- (v) Technical; and
- (vi) Executive, administrative, and professional positions

compensated on a salary basis of less than \$25,000 a year; and

(2) Includes full-time employment, temporary employment of over 3 days, and part-time employment, but not openings that the Contractor proposes to fill from within its own organization or under a customary and traditional employer-union hiring arrangement, nor openings in an educational institution that are restricted to students of that institution.

(b) General. (1) Regarding any position for which the employee or applicant for employment is qualified, the Contractor shall not discriminate against the individual because the individual is a special disabled or Vietnam Era veteran. The Contractor agrees to take affirmative action to employ, advance in employment, and otherwise treat

qualified special disabled and Vietnam Era veterans without discrimination based upon their disability or veterans' status in all employment practices such as--

- (i) Employment;
- (ii) Upgrading;
- (iii) Demotion or transfer;
- (iv) Recruitment;
- (v) Advertising;
- (vi) Layoff or termination;
- (vii) Rates of pay or other forms of compensation; and
- (viii) Selection for training, including apprenticeship.

(2) The Contractor agrees to comply with the rules, regulations, and relevant orders of the Secretary of Labor (Secretary) issued under the Vietnam Era Veterans' Readjustment Assistance Act of 1972 (the Act), as amended.

(c) **Listing openings.** (1) The Contractor agrees to list all suitable employment openings existing at contract award or occurring during contract performance, at an appropriate office of the State employment service system in the locality where the opening occurs. These openings include those occurring at any Contractor facility, including one not connected with performing this contract. An independent corporate affiliate is exempt from this requirement.

(2) State and local government agencies holding Federal contracts of \$10,000 or more shall also list all their suitable openings with the appropriate office of the State employment service.

(3) The listing of suitable employment openings with the State employment service system is required at least concurrently with using any other recruitment source or effort and involves the obligations of placing a bona fide job order, including accepting referrals of veterans and nonveterans. This listing does not require hiring any particular job applicant or hiring from any particular group of job applicants and is not intended to relieve the Contractor from any requirements of Executive orders or regulations concerning nondiscrimination in employment.

(4) Whenever the Contractor becomes contractually bound to the listing terms of this article, it shall advise the State employment service system, in each State where it has establishments, of the name and location of each hiring location in the State. As long as the Contractor is contractually bound to these terms and has so advised the State system, it need not advise the State system of subsequent contracts. The Contractor may advise the State system when it is no longer bound by this contract article.

(5) Under the most compelling circumstances, an employment opening may not be suitable for listing, including situations when (i) the Government's needs cannot reasonably be supplied, (ii) listing would be contrary to national security, or (iii) the requirement of listing would not be in the Government's interest.

(d) **Applicability.** (1) This article does not apply to the listing of employment openings which occur and are filled outside the 50 states, the District of Columbia, Puerto Rico, Guam, Virgin Islands, American Samoa, and the Trust Territory of the Pacific Islands.

(2) The terms of paragraph (c) above of this article do not apply to openings that the Contractor proposes to fill from within its own organization or under a customary and traditional employer-union hiring arrangement. This exclusion does not apply to a particular opening once an employer decides to consider applicants outside of its own organization or employer-union arrangement for that opening.

(e) **Postings.** (1) The Contractor agrees to post employment notices stating (i) the Contractor's obligation under the law to take affirmative action to employ and advance in employment qualified special disabled veterans and veterans of the Vietnam era, and (ii) the rights of applicants and employees.

(2) These notices shall be posted in conspicuous places that are available to employees and applicants for employment. They shall be in a form prescribed by the Director, Office of Federal Contract Compliance Programs, Department of Labor (Director), and provided by or through the Contracting Officer.

(3) The Contractor shall notify each labor union or representative of workers with which it has a collective bargaining agreement or other contract understanding, that the Contractor is bound by the terms of the Act, and is committed to take affirmative action to employ, and advance in employment, qualified special disabled and Vietnam Era veterans.

(f) **Noncompliance.** If the Contractor does not comply with the requirements of this article, appropriate actions may be taken under the rules, regulations, and relevant orders of the Secretary issued pursuant to the Act.

(g) **Subcontracts.** The Contractor shall include the terms of this article in every subcontract or purchase order of \$10,000 or more unless exempted by rules, regulations, or orders of the Secretary. The Contractor shall act as specified by the Director to enforce the terms, including action for noncompliance.

#### **Article 41. EQUAL OPPORTUNITY**

(a) If, during any 12-month period (including the 12 months preceding the award of this contract), the Contractor has been or is awarded nonexempt Federal contracts and/or subcontracts that have an aggregate value in excess of \$10,000, the Contractor shall comply with subparagraphs (b)(1) through (11) below. Upon request, the Contractor shall provide information necessary to determine the applicability of this article.

(b) During the performance of this contract, the Contractor agrees as follows:

(1) The Contractor shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin.

(2) The Contractor shall take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. This shall include, but not be limited to, (i) employment, (ii) upgrading, (iii) demotion, (iv) transfer, (v) recruitment or recruitment advertising, (vi) layoff or termination, (vii) rates of pay or other forms of compensation, and (viii) selection for training, including apprenticeship.

(3) The Contractor shall post in conspicuous places available to employees and applicants for employment the notices to be provided by the Contracting Officer that explain this article.

(4) The Contractor shall, in all solicitations or advertisement for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

(5) The Contractor shall send, to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, the notice to be provided by the Contracting Officer advising the labor union or workers' representative of the Contractor's commitments under this article, and post copies of the notice in conspicuous places available to employees and applicants for employment.

(6) The Contractor shall comply with Executive Order 11246, as amended, and the rules, regulations, and orders of the Secretary of Labor.

(7) The Contractor shall furnish all information required by Executive Order 11246, as amended, and by the rules, regulations, and orders of the Secretary of Labor. Standard Form 100 (EEO-1), or any successor form, is the prescribed form to be filed within 30 days following the award, unless filed within 12 months preceding the date of award.

(8) The Contractor shall permit access to its books, records, and accounts by the contracting agency or the Office of Federal Contract Compliance Programs (OFCCP) for the purposes of investigation to ascertain the Contractor's compliance with the applicable rules, regulations, and orders.

(9) If the OFCCP determines that the Contractor is not in compliance with this article or any rule, regulation, or order of the Secretary of Labor, this contract may be canceled, terminated, or suspended in whole or in part and the Contractor may be declared ineligible for further Government contracts, under the procedures authorized in Executive Order 11246, as amended. In addition, sanctions may be imposed and remedies invoked against the Contractor as provided in Executive Order 11246, as amended, the rules, regulations, and orders of the Secretary of Labor, or as otherwise provided by law.

(10) The Contractor shall include the terms and conditions of subparagraph (b)(1) through (11) of this article in every subcontract or purchase order that is not exempted by the rules, regulations, or orders of the Secretary of Labor issued under Executive Order 11246, as amended, so that these terms and conditions will be binding upon each subcontractor or vendor.

(11) The Contractor shall take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing these terms and conditions, including sanctions for noncompliance; provided, that if the Contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of any direction, the Contractor may request the United States to enter into the litigation to protect the interests of the United States.

(c) Notwithstanding any other article in this contract, disputes relative to this article will be governed by the procedures in 41 CFR 60-1.1.

**Article 42. UTILIZATION OF WOMEN-OWNED SMALL BUSINESSES**

(a) "Women-owned small businesses," as used in this article, means businesses that are at least 51 percent owned by women who are United States citizens and who also control and operate the business.

"Control," as used in this article, means exercising the power to make policy decisions.

"Operate," as used in this article, means being actively involved in the day-to-day management of the business.

"Small business concern," as used in this provision, means a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the criteria and size standards in 13 CFR 121.

(b) It is the policy of the United States that women-owned small businesses shall have the maximum practicable opportunity to participate in performing contracts awarded by any Federal agency.

(c) The Contractor agrees to use its best efforts to give women-owned small businesses the maximum practicable opportunity to participate in the subcontracts it awards to the fullest extent consistent with the efficient performance of its contract.

**Article 43. AFFIRMATIVE ACTION FOR HANDICAPPED WORKERS**

(Applicable to contracts and subcontracts that exceed \$2,500.)

(a) General. (1) Regarding any position for which the employee or applicant for employment is qualified, the Contractor shall not discriminate against any employee or applicant because of physical or mental handicap. The Contractor agrees to take affirmative action to employ, advance in employment, and otherwise treat qualified handicapped individuals without discrimination based upon their physical or mental handicap in all employment practices such as--

- (i) Employment;
- (ii) Upgrading;
- (iii) Demotion or transfer;
- (iv) Recruitment;
- (v) Advertising;
- (vi) Layoff or termination;
- (vii) Rates of pay or other forms of compensation; and
- (viii) Selection for training, including apprenticeship.

(2) The Contractor agrees to comply with the rules, regulations, and relevant orders of the Secretary of Labor (Secretary) issued under the Rehabilitation Act of 1973 (29 U.S.C. 793) (the Act), as amended.

(b) Postings. (1) The Contractor agrees to post employment notices stating (i) the Contractor's obligation under the law to take affirmative action to employ and advance in employment qualified handicapped individuals and (ii) the rights of applicants and employees.

(2) These notices shall be posted in conspicuous places that are available to employees and applicants for employment. They shall be in a form prescribed by the Director, Office of Federal Contract Compliance Programs, Department of Labor (Director), and provided by or through the Contracting Officer.

(3) The Contractor shall notify each labor union or representative of workers with which it has a collective bargaining agreement or other contract understanding, that the Contractor is bound by the terms of Section 503 of the Act and is committed to take affirmative action to employ, and advance in employment, qualified physically and mentally handicapped individuals.

(c) Noncompliance. If the Contractor does not comply with the requirements of this article, appropriate actions may be taken under the rules, regulations, and relevant orders of the Secretary issued pursuant to the Act.

(d) Subcontracts. The Contractor shall include the terms of this Article in every subcontract or purchase order in excess of \$2,500 unless exempted by rules, regulations, or orders of the Secretary. The Contractor shall act as specified by the Director to enforce the terms, including action for noncompliance.

#### Article 44. UTILIZATION OF LABOR SURPLUS AREA CONCERNS

(Applicable if the contract or subcontract exceeds \$10,000.)

(a) Applicability. This article is applicable if this contract exceeds the appropriate small purchase limitation in the Federal Acquisition Regulation, Title 48, C.F.R. Part 13.

(b) Policy. It is the policy of the Government to award contracts to concerns that agree to perform substantially in labor surplus areas (LSA's) when this can be done consistent with the efficient performance of the contract and at prices no higher than are obtainable elsewhere. The Contractor agrees to use its best efforts to place subcontracts in accordance with this policy.

(c) Order of preference. In complying with paragraph (b) above and with paragraph (c) of the article of this contract entitled Utilization of Small Business Concerns and Small Disadvantaged Business Concerns, the Contractor shall observe the following order of preference in awarding subcontracts: (1) small business concerns that are LSA concerns, (2) other small business concerns, and (3) other LSA concerns.

(d) Definitions. "Labor surplus area," as used in this article, means a geographical area identified by the Department of Labor in accordance with 20 CFR 654, Subpart A, as an area of concentrated unemployment or underemployment or an area of labor surplus.

"Labor surplus area concern," as used in this article, means a concern that together with its first-tier subcontractors will perform substantially in labor surplus areas. Performance is substantially in labor surplus areas if the costs incurred under the contract on account of manufacturing, production, or performance of appropriate services in labor surplus areas exceed 50 percent of the contract price.

Article 45. UTILIZATION OF SMALL BUSINESS CONCERNS AND SMALL DISADVANTAGED BUSINESS CONCERNS

(Applicable to contracts which exceed \$10,000.)

(a) It is the policy of the United States that small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals shall have the maximum practicable opportunity to participate in performing contracts let by any Federal agency.

(b) The Contractor hereby agrees to carry out this policy in the awarding of subcontracts to the fullest extent consistent with efficient contract performance. The Contractor further agrees to cooperate in any studies or surveys as may be conducted by the United States Small Business Administration or the awarding agency of the United States as may be necessary to determine the extent of the Contractor's compliance with this article.

(c) As used in this contract, the term "small business concern" shall mean a small business as defined pursuant to section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto. The term "small business concern owned and controlled by socially and economically disadvantaged individuals" shall mean a small business concern--

(1) Which is at least 51 percent owned by one or more socially and economically disadvantaged individuals; or, in the case of any publicly owned business, at least 51 per centum of the stock of which is owned by one or more socially and economically disadvantaged individuals; and

(2) Whose management and daily business operations are controlled by one or more of such individuals.

The Contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Asian-Indian Americans and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act.

(d) Contractors acting in good faith may rely on written representations by their subcontractors regarding their status as either a small business concern or a small business concern owned and controlled by socially and economically disadvantaged individuals.

(e) "Asian-Indian American," as used in this provision, means a United States citizen whose origins are in India, Pakistan, or Bangladesh.

"Asian-Pacific American," as used in this provision, means a United States citizen whose origins are in Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, the U.S. Trust Territory of the Pacific Islands, the Northern Mariana Islands, Laos, Cambodia, or Taiwan.

"Native Americans," as used in this provision, means American Indians, Eskimos, Aleuts, and native Hawaiians.

"Small business concern," as used in this provision, means a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the criteria and size standards in 13 CFR 121.

"Small disadvantaged business concern," as used in this provision, means a small business concern that (1) is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged, or a publicly owned business having at least 51 percent of its stock owned by one or more socially and economically disadvantaged individuals and (2) has its management and daily business controlled by one or more such individuals.

(f) **Qualified groups.** The offeror shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Asian-Indian Americans, and other individuals found to be qualified by the SBA under 13 CFR 124.1.

#### **Article 46.            CONVICT LABOR**

The Contractor agrees not to employ any person undergoing sentence of imprisonment in performing this contract except as provided by 18 U.S.C. 4082(c)(2) and Executive Order 11755, December 29, 1973.

#### **Article 47.            CLEAN AIR AND WATER**

(a) "Air Act," as used in this article, means the Clean Air Act (42 U.S.C. 7401 et seq.).

"Clean air standards," as used in this article, means--

(1) Any enforceable rules, regulations, guidelines, standards, limitations, orders, controls, prohibitions, work practices, or other requirements contained in, issued under, or otherwise adopted under the Air Act or Executive Order 11738;

(2) An applicable implementation plan as described in section 110(d) of the Air Act (42 U.S.C. 7410(d));

(3) An approved implementation procedure or plan under section 111(c) or section 111(d) of the Air Act (42 U.S.C. 7411(c) or (d)); or

(4) An approved implementation procedure under section 112(d) of the Air Act (42 U.S.C. 7412(d)).



"Clean water standards," as used in this article, means any enforceable limitation, control, condition, prohibition, standard, or other requirement promulgated under the Water Act or contained in a permit issued to a discharger by the Environmental Protection Agency or by a State under an approved program, as authorized by section 402 of the Water Act (33 U.S.C. 1342), or by local government to ensure compliance with pretreatment regulations as required by section 307 of the Water Act (33 U.S.C. 1317).

"Compliance," as used in this article, means compliance with--

- (1) Clean air or water standards; or
- (2) A schedule or plan ordered or approved by a court of competent jurisdiction, the Environmental Protection Agency, or an air or water pollution control agency under the requirements of the Air Act or Water Act and related regulations.

"Facility," as used in this article, means any building, plant, installation, structure, mine, vessel or other floating craft, location, or site of operations, owned, leased, or supervised by a Contractor or subcontractor, used in the performance of a contract or subcontract. When a location or site of operations includes more than one building, plant, installation, or structure, the entire location or site shall be deemed a facility except when the Administrator, or a designee, of the Environmental Protection Agency, determines that independent facilities are collocated in one geographical area.

"Water Act," as used in this article, means Clean Water Act (33 U.S.C. 1251 et seq.).

(b) The Contractor agrees--

- (1) To comply with all the requirements of section 114 of the Clean Air Act (42 U.S.C. 7414) and section 308 of the Clean Water Act (33 U.S.C. 1318) relating to inspection, monitoring, entry, reports, and information, as well as other requirements specified in section 114 and section 308 of the Air Act and the Water Act, and all regulations and guidelines issued to implement those acts before the award of this contract;

- (2) That no portion of the work required by this prime contract will be performed in a facility listed on the Environmental Protection Agency List of Violating Facilities on the date when this contract was awarded unless and until the EPA eliminates the name of the facility from the listing;

- (3) To use best efforts to comply with clean air standards and clean water standards at the facility in which the contract is being performed; and

- (4) To insert the substance of this article into any nonexempt subcontract, including this subparagraph (b)(4).

**Article 48. OFFICIALS NOT TO BENEFIT**

Unless exempted by 41 U.S.C. 22, no member of or delegate to Congress, or resident commissioner, shall be admitted to any share or part of this contract, or to any benefit arising from it. However, this article does not apply to this contract to the extent that this contract is made with a corporation for the corporation's general benefit.

**Article 49. BUY AMERICAN ACT--SUPPLIES**

(a) The Buy American Act (41 U.S.C. 10) provides that the Government give preference to domestic end products.

"Components," as used in this article, means those articles, materials, and supplies incorporated directly into the end products.

"Domestic end product," as used in this article, means (1) an unmanufactured end product mined or produced in the United States, or (2) an end product manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind as the products referred to in subparagraphs (b)(2) or (3) of this article shall be treated as domestic.

"End products," as used in this article, means those articles, materials, and supplies to be acquired for public use under this contract.

(b) The Contractor shall deliver only domestic end products, except those—

- (1) For use outside the United States;
- (2) That the Government determines are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality;
- (3) For which the agency determines that domestic preference would be inconsistent with the public interest; or
- (4) For which the agency determines the cost to be unreasonable.

(The foregoing requirements are administered in accordance with Executive Order No. 10582, dated December 17, 1954, as amended, and Federal Acquisition Regulation, Title 48, C.F.R. 25.1.)

**Article 50. CONTRACT WORK HOURS AND SAFETY STANDARDS ACT--  
OVERTIME COMPENSATION--GENERAL**

This contract, to the extent that it is of a character specified in the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-333) (the Act), is subject to the following terms and all other applicable provisions and exceptions of the Act and the regulations of the Secretary of Labor.

(a) **Overtime requirements.** Contractor or subcontractor shall not require or permit any laborer or mechanic to work in excess of 8 hours in any calendar day, or 40 hours in any workweek, on any part of the contract work subject to the Act; unless, the laborer or mechanic receives compensation at a rate not less than 1 1/2 times the basic rate of pay for all hours worked in excess of 8 hours in any calendar day, or 40 hours in any workweek, whichever produces the greater amount of overtime.

(b) **Violation, liability for unpaid wages, and liquidated damages.** If the terms of paragraph (a) above are violated, the Contractor and any subcontractor responsible for the violation shall be liable to any affected employee for unpaid wages. In addition, the Contractor and subcontractor shall be liable to the United States for liquidated damages. These damages are computed for each individual laborer or mechanic at \$10 for each calendar day on which the employee was required or permitted to be employed in violation of paragraph (a) above.

(c) **Withholding for unpaid wages and liquidated damages.** The Contracting Officer may withhold from the Contractor, from any moneys payable on account of work performed by the Contractor or subcontractor, such amounts as may administratively be determined to be necessary to satisfy any liabilities of the Contractor or subcontractor for unpaid wages and liquidated damages as provided in paragraph (b) above.

(d) **Subcontracts.** The Contractor and subcontractor shall insert paragraphs (a) through (d) of this article in all subcontracts.

(e) **Records.** The Contractor shall maintain payroll records containing the information specified in 29 CFR 516.2(a). These records shall be preserved for 3 years from contract completion. The Contractor will make the records available for inspection by authorized representatives of the Agency and the Department of Labor, and will permit such representatives to interview employees during working hours on the job.

#### **Article 51. ADDITIONAL BOND SECURITY**

The Contractor shall promptly furnish additional security required to protect the Government and persons supplying labor or materials under this contract if--

(a) Any surety upon any bond furnished with this contract becomes unacceptable to the Government;

(b) Any surety fails to furnish reports on its financial condition as required by the Government; or

(c) The contract price is increased so that the penal sum of any bond becomes inadequate in the opinion of the Contracting Officer.

#### **Article 52. SPECIFICATIONS**

The commodity shall meet the specifications prescribed by the contract and shall conform to the applicable provisions of the Federal Food, Drug, and Cosmetic Act, as amended, other applicable statutes, and regulations issued thereunder. Contractor agrees to hold the United States harmless if royalties are due because of the formulation or processing requirements for the commodity, or any requirements of the contract.

Article 53.

SANITATION, PREMISES, AND EQUIPMENT

(a) All equipment, supplies, facilities, storage space, and premises shall be maintained in a clean, sanitary condition in accordance with good commercial practice. The commodity shall be handled by persons in good health and free from any communicable diseases and in such manner as to prevent contamination.

(b) The cars or trucks in which the commodity is loaded by Contractor shall be clean and sanitary and in a condition to protect the commodity during transit so that it arrives at destination free from contamination.

(c) Agency reserves the right to inspect and approve the premises and equipment before acceptance of offers and to inspect at any time, at Agency's expense, during the period of performance under the contract, equipment, supplies, facilities, storage space, and premises used in the manufacturing, processing, or servicing of the commodity. Contractor agrees to permit, during regular business hours, authorized representatives of Agency to enter any of its premises at which the commodity is manufactured, processed, stored, or serviced, and to inspect such equipment, supplies, facilities, storage space, and premises and to observe the manufacturing, processing, or servicing operations. Any such inspection or prior approval of equipment and premises shall not relieve Contractor of its independent obligation to maintain the equipment and premises in a satisfactory and sanitary condition. Failure of Contractor to maintain such equipment and premises in a satisfactory and sanitary condition shall constitute a failure to perform entitling Agency to terminate the contract under Article 68(a)(2). If for any reason Contractor's plant designated in the contract is impeded or prevented from manufacturing, processing, or servicing the commodity, Contractor may, with the approval of Agency, designate another plant for the manufacture, processing or servicing of such commodity: Provided, That if by reason of designation of such other plant additional expenses are incurred by Agency, such additional expenses shall be for the account of Contractor and any savings shall accrue to Agency.

(d) The commodity shall be processed in a plant which, at the time of processing, is operating in accordance with any regulations published by Agency applicable to plants processing the commodity.

Article 54.

INSPECTION OF SUPPLIES—FIXED-PRICE (DEVIATION)

(a) Definition. "Supplies," as used in this article, includes but is not limited to raw materials, components, intermediate assemblies, end products, and lots of supplies.

(b) The Contractor shall provide and maintain an inspection system acceptable to the Government covering supplies under this contract and shall tender to the Government for acceptance only supplies that have been inspected in accordance with the inspection system and have been found by the Contractor to be in conformity with contract requirements. As part of the system, the Contractor shall prepare records evidencing all inspections made under the system and the outcome. These records shall be kept complete and made available to the Government during

contract performance and for as long afterwards as the contract requires. The Government may perform reviews and evaluations as reasonably necessary to ascertain compliance with this paragraph. These reviews and evaluations shall be conducted in a manner that will not unduly delay the contract work. The right of review, whether exercised or not, does not relieve the Contractor of the obligations under the contract.

(c) The Government has the right to inspect and test all supplies called for by the contract, to the extent practicable, at all places and times, including the period of manufacture, and in any event before acceptance. The Government shall perform inspections and tests in a manner that will not unduly delay the work. The Government assumes no contractual obligation to perform any inspection and test for the benefit of the Contractor unless specifically set forth elsewhere in this contract.

(d) If the Government performs inspection or test on the premises of the Contractor or a subcontractor, the Contractor shall furnish, and shall require subcontractors to furnish, without additional charge, all reasonable facilities and assistance for the safe and convenient performance of these duties. The cost of inspection, samples taken for inspection, and any chemical analysis required for testing shall be for the account of the Contractor. Except as otherwise provided in the contract, the Government shall bear the expense of Government inspections or tests made at other than the Contractor's or subcontractor's premises; provided, that in case of rejection, the Government shall not be liable for any reduction in the value of inspection or test samples.

(e) (1) When supplies are not ready at the time specified by the Contractor for inspection or test, the Contracting Officer may charge to the Contractor the additional cost of inspection or test.

(2) The Contracting Officer may also charge the Contractor for any additional cost of inspection or test when prior rejection makes reinspection or retest necessary.

(f) The Government has the right either to reject or to require correction of nonconforming supplies. Supplies are nonconforming when they are defective in material or workmanship or are otherwise not in conformity with contract requirements. The Government may reject nonconforming supplies with or without disposition instructions.

(g) The Contractor shall remove supplies rejected or required to be corrected. However, the Contracting Officer may require or permit correction in place, promptly after notice, by and at the expense of the Contractor. The Contractor shall not tender for acceptance corrected or rejected supplies without disclosing the former rejection or requirement for correction, and, when required, shall disclose the corrective action taken.

(h) If the Contractor fails to promptly remove, replace, or correct rejected supplies that are required to be removed or to be replaced or corrected, the Government may either (1) by contract or otherwise, remove, replace, or correct the supplies and charge the cost to the Contractor or (2) terminate the contract for default. Unless the Contractor corrects or replaces the supplies within the delivery schedule, the Contracting Officer may require their delivery and make an equitable price reduction. Failure to agree to a price reduction shall be a dispute.

(i) (1) If this contract provides for the performance of Government quality assurance at source, and if requested by the Government, the Contractor shall furnish advance notification of the time (i) when Contractor inspection or tests will be performed in accordance with the terms and conditions of the contract and (ii) when the supplies will be ready for Government inspection.

(2) The Government request shall specify the period and method of the advance notification and the Government representative to whom it shall be furnished. Requests shall not require more than 2 workdays of advance notification if the Government representative is in residence in the Contractor's plant, nor more than 7 workdays in other instances.

(j) The Government shall accept or reject supplies as promptly as practicable after delivery, unless otherwise provided in the contract. Government failure to inspect and accept or reject the supplies shall not relieve the Contractor from responsibility, nor impose liability on the Government, for nonconforming supplies.

(k) Inspections and tests by the Government do not relieve the Contractor of responsibility for defects or other failures to meet contract requirements discovered before acceptance. Acceptance shall be conclusive, except for latent defects, fraud, gross mistakes amounting to fraud, or as otherwise provided in the contract.

(1) If acceptance is not conclusive for any of the reasons in paragraph (f) hereof, the Government, in addition to any other rights and remedies provided by law, or under other provisions of this contract, shall have the right to require the Contractor (1) at no increase in contract price, to correct or replace the defective or nonconforming supplies at the original point of delivery or at the Contractor's plant at the Contracting Officer's election, and in accordance with a reasonable delivery schedule as may be agreed upon between the Contractor and the Contracting Officer; provided, that the Contracting Officer may require a reduction in contract price if the Contractor fails to meet such delivery schedule, or (2) within a reasonable time after receipt by the Contractor of notice of defects or nonconformance, to repay such portion of the contract as is equitable under the circumstances if the Contracting Officer elects not to require correction or replacement. When supplies are returned to the Contractor, the Contractor shall bear the transportation cost from the original point of delivery to the Contractor's plant and return to the original point when that point is not the Contractor's plant. If the Contractor fails to perform or act as required in (1) or (2) above and does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure, the Government shall have the right to contract or otherwise to replace or correct such supplies and charge to the Contractor the cost occasioned the Government thereby.

(m) Inspectors and graders have no authority to prescribe any changes in the contract or to order contractor to perform contrary to any manner prescribed in the contract. Furthermore, inspector and grader authority is limited to determining acceptability of commodities tendered or serviced under the contract.

(n) Inspection shall include checkweighing of a representative number of containers of the commodity.

(o) Inspection shall not relieve Contractor of the responsibility to furnish a commodity (including packages and containers) meeting specifications or to otherwise fulfill the terms of the contract. An inspection certificate is only prima facie evidence of the matters therein stated at the time and place of inspection.

(p) If any reinspection is performed by Agency at destination points, the costs thereof shall be borne by Agency if the product is found to be in compliance with the contract provisions, otherwise the cost shall be borne by Contractor.

#### Article 55. CHECKLOADING

(a) Contractor shall not load the commodity for shipment or transfer the commodity in store unless, at the time of such loading or transferring, the commodity is checkloaded by Agency or by a person of the inspection or grading service designated by Agency. Contractor is responsible for giving notice in sufficient time for a checkloader to be present. The cost of checkloading shall be for the account of Contractor. Checkloading refers to identifying the commodity which was previously inspected and found to meet contract requirements, examining the commodity at the time of loading or transferring for condition of containers and for compliance with labeling and container marking requirements, and determining the number of containers per car, truck, or lot.

(b) Checkloading by persons licensed or authorized by Agency shall not relieve Contractor of the obligation to effect a delivery of the commodity meeting contract requirements or constitute a waiver of any of Agency's rights under the contract. The certificates issued as a result of such official checkloading shall be only prima facie evidence of the number and condition of containers.

(c) Contractor shall be liable for all shortages which occur before delivery, except that if shipment is by common carrier, Contractor shall not be liable for a shortage reported at destination unless it can be established, notwithstanding the checkloading certificate, that there was an actual shortage at the time of loading for shipment.

(d) This paragraph (d) is not applicable to purchases delivered f.o.b. origin. If the shipment is by truck and Agency specifically requests "Exclusive Use of Vehicle", Agency will reimburse Contractor for any additional transportation costs due to shipment under "Exclusive Use of Vehicle." The sealing of trucks as part of the checkloading procedure shall not be construed as such a request. In the absence of such a request by Agency, any additional cost of transportation and related services due to shipment under "Exclusive Use of Vehicle" shall be for Contractor's account. Contractor shall be responsible for making such arrangements as may be necessary to prevent the application of "Exclusive Use of Vehicle" charges when such charges result in higher transportation costs. The arrangements to be made by Contractor may include an instruction to the checkloader not to seal the truck when the sealing will result in "Exclusive Use of Vehicle" charges. If, notwithstanding such arrangements, the checkloader seals the truck, Contractor shall have the responsibility for removing the seals.

Article 56.

SHIPMENT AND DELIVERY

(a) The ASCS Commodity Office shall issue a Notice(s) to Deliver at least seven days prior to the first day of each period scheduled in the contract for the shipment from origin of a specified quantity of the commodity. Any modification of such period must be made by agreement with the applicable Contracting Office. Such period or any modification thereof is hereinafter called "the contract shipping period." The date on which the Notice to Deliver is issued shall be shown thereon. Contractor shall ship in accordance with instructions in the Notice(s) to Deliver, except that (1) if a Notice to Deliver is issued less than seven days prior to the first day of the contract shipping period, such shipping period and each subsequent consecutive shipping period under the contract directly affected by the delay shall be extended by the number of days such Notice is issued late; and (2) in any event, Contractor shall be allowed the number of business days contained in the period specified in the contract for shipment of the contract quantity, beginning with seven days after the Notice to Deliver is issued. Notwithstanding the foregoing, Contractor shall not be entitled to any extension of the contract shipping period under this Article 56(a) unless it furnishes evidence satisfactory to Agency that it was prepared to ship during the contract shipping period.

(b) The commodity shall be delivered by Contractor in the manner (f.a.s. vessel, f.o.b. cars, etc.) and at the point(s) of delivery, as required by the contract, pursuant to shipping instructions issued by Agency. Shipment shall not be made before receipt from Agency of shipping instructions, or before the time the commodity has been inspected and found to meet contract specifications.

(c) Immediately on shipment, Contractor shall, in accordance with instructions from Agency, notify Agency, or consignee, or both, of the shipment.

(d) Title to supplies furnished under this contract shall pass to the Government upon formal acceptance, regardless of when or where the Government takes physical possession, unless the contract specifically provides for earlier passage of title.

(e) Unless the contract specifically provides otherwise, risk of loss or damage to supplies shall remain with the Contractor until, and shall pass to the Government upon--

(1) Delivery of the commodity to a carrier, if contract delivery terms are f.o.b. origin; or

(2) Acceptance by the Government or delivery of the commodities to the Government at the destination specified in the contract, whichever is later, if contract delivery terms are f.o.b. destination.

(3) If delivery is f.a.s. vessel, title and risk of loss and damage shall pass to Agency when the commodity is placed:

(i) Alongside vessel within reach of its loading tackle, or

(ii) On the dock designated by Agency if the vessel is not available, unless Contractor failed to ship pursuant to the shipping instructions and Agency determines that such failure caused the commodity to arrive too late to be loaded aboard the vessel.



(4) If delivery is made f.a.s. vessel at the designated port, Contractor shall pay all costs, including but not limited to wharfage, tollage, checking and handling charges necessary to place the commodity free alongside vessel within reach of its loading tackle, and shall furnish a dock receipt, ship's receipt, or other similar document as evidence of delivery. If, after arrival of commodity at the designated port, Contractor is delayed in delivering the commodity f.a.s. vessel at such port, the Contractor establishes that such delay is due to causes beyond the control and without the fault or negligence of Contractor and any of its subcontractors including but not limited to failure of Agency to make a vessel or dock available, Agency shall reimburse Contractor on presentation of paid bills for charges incurred in connection with storage in cars and for other charges resulting from such delay, unless Contractor failed to ship pursuant to shipping instructions and Agency determines that such failure caused the delay in delivering the commodity f.a.s. vessel.

(f) Paragraph (e) above shall not apply to commodities that so fail to conform to contract requirements as to give a right of rejection. The risk of loss of or damage to such nonconforming commodities remains with the Contractor until cure or acceptance. After cure or acceptance, paragraph (e) above shall apply.

(g) Under paragraph (e) above, the Contractor shall not be liable for loss of or damage to commodities caused by the negligence of officers, agents, or employees of the Government acting within the scope of their employment.

#### Article 57.                   LOADING TRUCK AND RAIL SHIPMENTS (DEVIATION)

(a) Truck shipments shall be loaded and (when necessary) braced to ensure that there will be no shifting of the commodity in transit and that it will arrive at destination in damage-free condition.

(b) (1) Upon receipt of shipping instructions, as provided in this contract, the supplies to be included in any carload shipment by rail shall be loaded, blocked, and braced by the Contractor in accordance with the standards published by the Association of American Railroads and effective at the time of shipment.

(2) Shipments, for which the Association of American Railroads has published no such standards, shall be loaded, blocked, and braced in accordance with standards established by the shipper as evidenced by written acceptance of an authorized representative of the carrier.

(3) The Contractor shall be liable for payment of any damage to any supplies caused by the failure to load, block, and brace in accordance with acceptable standards set forth herein.

(4) A copy of the appropriate pamphlet of the Association of American Railroads may be obtained from that Association.

(c) The cost of all loading and bracing shall be borne by the Contractor.

**Article 58. PROTECTIVE SERVICES**

(a) If the contract specifies that delivery is to be made f.o.b. cars or trucks at origin, Contractor shall order protective services as specified in the shipping instructions issued by Agency.

(b) If the contract provides for delivery at point(s) other than f.o.b. cars or truck at origin, Contractor shall provide protective services when, and to the extent necessary to adequately protect the commodity while in transit, including allowable free time for unloading at intermediate or final destination(s), or both.

**Article 59. VARIATION IN QUANTITY**

No variation in the quantity of any item called for by the contract will be accepted unless such variation has been caused by conditions of loading, shipping, or packing, or allowances in manufacturing processes, and then only to the extent, if any, specified elsewhere in the announcement.

**Article 60. FAILURE OF THE COMMODITY TO MEET CONTRACT REQUIREMENTS AND SPECIFICATIONS**

(a) Contractor shall be liable for failure of the commodity to meet all of the contract requirements and specifications, including those with respect to packages and containers, subject to the other provisions of this Article.

(b) If Agency discovers on or after delivery that all or any part of the commodity (including packages and containers) did not meet contract requirements and specifications at time of delivery, Agency shall have the right:

(1) to accept or retain the entire quantity and hold Contractor liable for the damages sustained, as determined by Agency, or

(2) to reject the entire quantity or to reject a portion thereof and accept or retain the remainder. Agency may at its discretion terminate the contract with respect to the quantity rejected or permit Contractor to replace all or part of the quantity rejected with a quantity of the commodity that does conform to all contract requirements and specifications and, in either circumstance, hold Contractor liable for damages sustained, as determined by Agency. To "reject" means to refuse to accept on delivery or, after delivery and acceptance, to notify Contractor of revocation of the acceptance, in whole or in part. In either event, Contractor shall be held liable for all damages sustained, as determined by Agency.

(c) Any quantity rejected may be returned to Contractor, destroyed (if unfit for human consumption), or disposed of for the account of Contractor in accordance with applicable health and sanitation laws and regulations. Any rejection of a quantity of the commodity delivered by common carrier shall be made by the office of Agency which issued the

shipping instructions. Consignee may inform the carrier or Contractor of rejection of a quantity of the commodity delivered by contract carrier or by Contractor's own trucks. Contractor will be advised of Agency's election under (b)(2) of this Article either at the time of rejection or within a reasonable time thereafter.

(d) Inspection, checkloading, issuance of inspection or checkloading certificates, shipping instructions, or bills of lading, any payment by Agency, or the receipt of a commodity shall not constitute a waiver of Agency's rights under this Article.

(e) The rights and remedies of Agency provided in this Article are not exclusive or in derogation of any other rights and remedies provided by law or contract.

**Article 61. LOSS DUE TO DETERIORATION OR SPOILAGE**

Contractor shall reimburse Agency for all losses due to deterioration or spoilage sustained by Agency for which Contractor is responsible, but only if such losses are discovered by such date as may be stated in the announcement, or a reasonable time, as determined by Agency, after delivery if no such date is stated. Contractor agrees to reimburse Agency for such losses within 10 days after date of billing by Agency. That part of the commodity as to which Agency makes a claim based on deterioration or spoilage shall be held by Agency subject to disposition instructions of Contractor (unless the nature of the deterioration or spoilage is such as to require condemnation and destruction as determined by Agency or its authorized representative) but need not be held by Agency in excess of 30 days after Agency sends notice of such claim to Contractor. In lieu of reimbursing Agency, Contractor may replace the deteriorated or spoiled commodity with an equal quantity of commodity which conforms to all contract requirements and specifications, if such replacement is agreed to by Agency.

**Article 62. OBLITERATION OF MARKINGS**

The appearance in commercial or other channels of any labels, bags, cans, can lids, cases, or any other type of packaging, either filled or unfilled (hereinafter referred to as "containers and container materials") bearing markings required under the contract may cause Agency expense in determining whether commodities have been diverted from authorized use and in answering inquiries. Contractor agrees to take necessary action to prevent the appearance in commercial or other channels of containers and container materials bearing markings required under the contract, including those held by Contractor or others, e.g., overruns. The following actions with respect to all inner and outer containers and container materials will constitute compliance with the intent of this Article: (a) complete obliteration of all markings

required under the contract with a permanent opaque paint, or removal of labels which bear such markings, and overlaying or replacing markings so obliterated or removed with commercial labelings; (b) placing a transparent pressure-sensitive sticker on all containers and container materials bearing USDA markings, which shall state in lettering of a prominent size "SALVAGE BY (insert firm's name)" directly on the "NOT TO BE SOLD OR EXCHANGED" legend wherever it appears on the containers and container materials; (c) drawing one or more x's completely through the markings and with a permanent stamp conspicuously placing thereon the following legend: "This container has not been used and shall not be used for shipment of Government commodities."; or (d) any other actions, approved by the Contracting Officer, which accomplish the intent of the foregoing.

**Article 63. CHANGES--FIXED-PRICE**

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

(1) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for the Government in accordance with the drawings, designs, or specifications.

(2) Method of shipment or packing.

(3) Place of delivery.

(b) If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.

(c) The Contractor must submit any "proposal for adjustment" (hereafter referred to as proposal) under this article within 30 days from the date of receipt of the written order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.

(d) If the Contractor's proposal includes the cost of property made obsolete or excess by the change, the Contracting Officer shall have the right to prescribe the manner of the disposition of the property.

(e) Failure to agree to any adjustment shall be a dispute under the Disputes article. However, nothing in this article shall excuse the Contractor from proceeding with the contract as changed.

**Article 64. CHANGE IN PLACE OR MANNER OF SHIPMENT OR DELIVERY (DEVIATION)**

(a) If the commodity price is on the basis of delivery f.o.b. cars or trucks at origin and Contractor requests a change in the shipping point named in the contract and such request is approved by Agency, any additional cost of transportation and related services shall be deducted from payments otherwise due Contractor and any savings shall accrue to Agency.

(b) If the commodity price is on the basis of delivery f.o.b. cars or trucks at destination or f.a.s. vessel at designated ports and if Agency orders delivery of the commodity in a manner or to destinations other than those stated in the contract, any additional cost of transportation and related services shall be for the account of Agency and any savings will accrue to Agency.

(c) **Diversion of Shipment under f.o.b. Destination Contracts.**

When a place of delivery is changed in accordance with the Changes article of this contract, the contract price shall be adjusted pursuant to that article for any resulting increase or decrease in the cost of performance in accordance with best available information as determined by Agency. No adjustment shall be made for changes in transportation costs when commodities are identically priced for delivery regionally or nationally and the place of delivery is changed within the area to which the identical price applies. In all other cases, price adjustments due to changes in transportation costs shall be determined by the agency prior to shipment.

(d) If (1) shipments to the new destination are made by the Contractor's owned or leased trucks and/or (2) shipments to the original destination were made or would have been made by the Contractor's owned or leased trucks, the Contractor shall so certify. The Government shall make an appropriate adjustment in contract prices for payment purposes at the rate and in the manner specified in the Announcement.

(e) If any or all of the following data are not clearly shown on, or available from, copies of paid freight bills for each diverted shipment, the Contractor shall supply a statement showing the--

- (1) Full name of the carrier or carriers in the routing;
- (2) Number of containers;
- (3) Gross shipping weight;
- (4) Actual date of shipment; and
- (5) Freight description for the supplies as indicated in the

"National Motor Freight Classification" or the "Uniform Freight Classification" (Rail).

**Article 65. COMPENSATION FOR LATE MAILING OF NOTICE TO DELIVER**

Failure to mail a Notice to Deliver in accordance with the terms of the contract may result in delays in shipment and damages to contractor. Because it will be difficult to prove the amount of such damage, Agency shall pay to Contractor as liquidated damages for causing delay in shipment by late mailing of a Notice to Deliver an amount to be specified in the announcement for each day of such delay in shipment not to exceed the number of days by which the Notice to Deliver was mailed late. It is mutually agreed that such damages are a reasonable estimate of the

probable actual damages that may be caused by late mailing of such Notice(s). Contractor's claim for payment of damages for delays with respect to the shipping period for which a Notice to Deliver was mailed late must be supported by evidence satisfactory to Agency that Contractor was prepared to ship in accordance with the contract shipping schedule.

If the delay in shipment caused by the late mailing of a Notice to Deliver causes delays in other shipments in later shipping periods under the same contract, Contractor may claim liquidated damages for delays in the other shipments occurring during the later shipping period if it furnishes evidence satisfactory to Agency that it could not, without disruption of normal business operations, complete shipments as required under the contract shipping schedule or any extension thereof by Agency. Agency shall not be liable for liquidated damages under this section if Agency determines that, at the time the Notice to Deliver is to be mailed, such mailing would be impracticable because a condition specified in Article 2(j) of this document exists, or is likely to exist, which could prevent either shipment by Contractor or acceptance by consignee. In such cases, the period for mailing of the Notice to Deliver and shipment of the commodity shall be extended for the number of days that Agency determines such condition exists.

**Article 66.                   TERMINATION FOR CONVENIENCE OF THE GOVERNMENT  
(FIXED-PRICE) (SHORT FORM).**

The Contracting Officer, by written notice, may terminate this contract, in whole or in part, when it is in the Government's interest. If this contract is terminated, the rights, duties, and obligations of the parties, including compensation to the Contractor, shall be in accordance with the Federal Acquisition Regulation, Title 48, C.F.R. Part 49 in effect on the date of this contract.

**Article 67.                   LATE SHIPMENT/LIQUIDATED DAMAGES**

(a) If Contractor determines that it will not be able to make shipment of a quantity of the commodity by the final shipment date under the contract, or if it does not make shipment of a quantity of the commodity by the final shipment date, contractor shall inform Contracting Officer as soon as feasible, indicating how soon it expects to be able to make shipments. Each week thereafter until all late shipments have been made, contractor shall inform Contracting Officer how soon it expects to be able to make shipments.

(b) The following shall apply to late shipments:

(1) Late shipment of the commodity by Contractor will cause serious and substantial damages to Agency because of its urgent need for timely performance, but it will be difficult to prove the amount of such damages.

(2) In the event the contract is not terminated because of delay in shipment, Contractor shall continue performance and be liable to Agency for liquidated damages, at the daily rate specified in the

announcement, with respect to the quantity of the commodity which is not shipped by the final shipment date under the contract as fixed and agreed, and liquidated damages for each day of delay, until such time as the commodity is shipped.

(3) In the event Agency exercises its right of termination in whole or in part as provided in paragraph (a) of Article 68 Contractor shall be liable to Agency for excess costs as provided in paragraph (b) of Article 68 and, in addition, for liquidated damages. Liquidated damages are assessed at the daily rate specified in the announcement against the quantity of commodity not shipped by the final shipment date under the contract as fixed and agreed. Liquidated damages are payable for each day of delay, until such time as Agency obtains or could have obtained shipment of a similar commodity elsewhere.

(4) It is mutually agreed that such damages are a reasonable estimate of the probable actual damages for delay in shipment. In no event shall liquidated damages be imposed for more than 45 days of delay except where mutually agreed upon between Contractor and Agency.

(5) The foregoing provisions for liquidated damages shall also apply to replacement shipments, if such shipments are not made within the agreed time for such replacements.

(6) Shipment made by Contractor at its risk prior to receipt of results of inspection shall not be considered to be shipment under the contract if results of inspection indicate the commodity does not meet contract specifications and the commodity is not accepted by Agency.

(7) Contractor shall not be liable for liquidated damages for delays due to causes which would relieve the contractor from liability for excess costs as provided in paragraph (c) of Article 68.

Article 68.

**DEFAULT (FIXED-PRICE SUPPLY AND SERVICE)  
(DEVIATION)**

(a) (1) The Government may, subject to paragraphs (c) and (d) below, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to--

(i) Deliver the supplies or to perform the services within the time specified in this contract or any extension;

(ii) Make progress, so as to endanger performance of this contract (but see subparagraph (a)(2) below); or

(iii) Perform any of the other provisions of this contract (but see subparagraph (a)(2) below).

(2) The Government's right to terminate this contract under subdivisions (1)(ii) and (1)(iii) above, may be exercised if the Contractor does not cure such failure within 10 days (or more if authorized in writing by the Contracting Officer) after receipt of the notice from the Contracting Officer specifying the failure.

(b) If the Government terminates this contract in whole or in part, it may acquire, under the terms and in the manner the Contracting Officer considers appropriate, supplies or services similar to those terminated, and the Contractor will be liable to the Government for any excess costs for those supplies or services. However, the Contractor shall continue the work not terminated.

(c) Except for defaults of subcontractors at any tier, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions (7) strikes, (8) freight embargoes, and (9) unusually severe weather. However, if Contractor's plant was on strike at the time it submitted the offer resulting in the contract, and if Contractor's failure to perform the contract was because of such strike, Contractor shall not be excused from liability under this paragraph. In each instance the failure to perform must be beyond the control and without the fault or negligence of the Contractor. Contractor has the burden of proof to show that its failure to perform is excusable under this paragraph and must submit documentary evidence sufficient to show its freedom from fault or negligence.

(d) If the failure to perform is caused by the default of a subcontractor at any tier, and if the cause of the default is beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either, the Contractor shall not be liable for any excess costs for failure to perform, unless the subcontracted supplies or services were obtainable from other sources in sufficient time for the Contractor to meet the required delivery schedule.

(e) If this contract is terminated for default, the Government may require the Contractor to transfer title and deliver to the Government, as directed by the Contracting Officer, any (1) completed supplies, and (2) partially completed supplies and materials, and contract rights (collectively referred to as "manufacturing materials" in this Article) that the Contractor has specifically produced or acquired for the terminated portion of this contract. Upon direction of the Contracting Officer, the Contractor shall also protect and preserve property in its possession in which the Government has an interest.

(f) The Government shall pay contract price for completed supplies delivered and accepted. The Contractor and Contracting Officer shall agree on the amount of payment for manufacturing materials delivered and accepted and for the protection and preservation of the property. Failure to agree will be a dispute under the Disputes Article. The Government may withhold from these amounts any sum the Contracting Officer determines to be necessary to protect the Government against loss because of outstanding liens or claims of former lien holders.

(g) If, after termination, it is determined that the Contractor was not in default, or that the default was excusable, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the Government.

(h) The rights and remedies of the Government in this Article are in addition to any other rights and remedies provided by law or under this contract.



Article 69.

ASSIGNMENT OF CLAIMS (DEVIATION)

(a) If USDA is the Agency named in the contract, the Contractor, under the Assignment of Claims Act, as amended, 31 U.S.C. 3727, 41 U.S.C. 15 (hereafter referred to as the "the Act"), may assign its rights to be paid amounts due or to become due as a result of the performance of this contract to a bank, trust company, or other financing institution, including any Federal lending agency. The assignee under such an assignment may thereafter further assign or reassign its right under the original assignment to any type of financing institution described in the preceding sentence. Any such assignment shall be recognized only if and when the assignee thereof files with the Agency written notice of the assignment, together with a signed copy of the instrument of assignment, in accordance with the instructions on Form ASCS-66, Notice of Assignment. Any assignment or reassignment authorized under the Act and this article shall cover all unpaid amounts payable under this contract, and shall not be made to more than one party, except that an assignment or reassignment may be made to one party as agent or trustee for two or more parties participating in the financing of this contract. The instrument of assignment may be executed on Form ASCS-347, Instrument of Assignment.

(b) If CCC is the Agency named in the contract, no assignment by Contractor shall be made of the contract, or of any right thereunder, except that Contractor may assign the proceeds of the contract to a bank, trust company, or other financing institution, including any Federal lending agency, or to a person or firm that holds a lien or encumbrance at the time of assignment, and, subject to the prior approval of the Contracting Officer, assignment may be made to any other person or firm: Provided, That such assignment shall be recognized only if and when the assignee thereof files with Agency written notice of the assignment together with a signed copy of the instrument of assignment, in accordance with the instructions on Form CCC-251, Notice of Assignment: And provided further, That any such assignment shall cover all amounts payable and not already paid under the contract, shall not be made to more than one party and shall not be subject to further assignment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing. The instrument of assignment may be executed on Form CCC-252, Instrument of Assignment.

(c) The Contractor shall not furnish or disclose to any assignee under this contract any classified document (including this contract) or information related to work under this contract until the Contracting Officer authorizes such action in writing.

(d) Forms relating to assignments may be obtained from the Contracting Officer or the Commodity Office, ASCS. Contractor may use the forms mentioned in (a) or (b) or may use his own forms providing they are in a format basically consistent with the prescribed form and contain essentially the same provisions.

**Article 70.****INVOICES AND PAYMENT (DEVIATION)**

Invoices for payment for the commodity, and for reimbursement of transportation and protective service charges, if any, shall be submitted separately by Contractor to the Management Office, ASCS. Invoices for payment for the commodity shall be made on the invoice portion of the Notice to Deliver or on a commercial type invoice and be supported by the original (official) inspection and checkloading certificate(s), if applicable, and either a copy of commercial bill of lading signed by carrier's agent or, in lieu thereof, a copy of a consignee's receipt evidencing delivery. Invoices for reimbursement of transportation and protective service charges, if any, shall be supported by the original or a copy of carrier's receipted freight bill or invoice. If shipment is by contract carrier, Contractor's invoice shall also be supported by a copy of the contract between Contractor and the truck line showing the schedule of rates, or a copy of the truck line's published rates.

When the total quantity to be invoiced includes a fraction of a pound, the fraction should be omitted if less than one-half pound and raised to the next full pound if one-half pound or more. Only whole pounds should be shown on the invoice.

It is mutually agreed and understood that in submitting an invoice, the Contractor thereby certifies that all requirements of the contract have been satisfied and Contractor has complied fully with the representations, certifications, and warranties set forth in Part C of this document. Submission of an invoice when all contract terms and conditions have not been satisfied will subject Contractor to punishment as provided in Title 15, 18, and 31 United States Code. Agency shall make payment to Contractor (or the assignee if an assignment is made pursuant to Article 69) of any amounts due with respect to each shipment within 30 days (10 days if the purchased product is meat or a meat food product or edible fresh or frozen poultry meat, perishable poultry meat products, fresh eggs, or perishable egg products) after receipt by the Management Office, ASCS of a properly prepared invoice with the required supporting documents. Contractor may include more than one shipment on any invoice.

If a gross billing weight is shown in the offer and is to be considered in determining which offers are most advantageous to Agency, and if the gross billing weight as shown in the offer differs from that shown on the carrier's bill of lading, Agency will require payment by Contractor for any excess transportation charges based upon the weight differences. Any savings shall accrue to Agency.

**Article 71.****PROGRESS PAYMENTS NOT INCLUDED**

A progress payments article is not included. Bids conditioned upon inclusion of a progress payment clause in the resulting contract will be rejected as nonresponsive.

Article 72.

EXTRAS

Except as otherwise provided in the contract, no payment for extras shall be made unless such extras and the price therefor have been authorized in writing by the Contracting Officer.

Article 73.

SETOFF

(a) Subject to the provisions of paragraphs (b) respecting assignments and (c) respecting liens, if Contractor is indebted to Agency, the amount of such indebtedness may be set off against the proceeds of the contract. If Contractor is indebted to the United States for taxes and notice of lien has been filed in accordance with the provisions of the Internal Revenue Code of 1954 (26 U.S.C. 6323) or any amendments thereof or modifications thereof or Notice of Levy has been served on USDA in accordance with the provisions of the Internal Revenue Code (26 U.S.C. 6331) against money payable to Contractor, or if Contractor is indebted to any other agency of the United States, the amount of such taxes or debt may likewise be set off; and, if Agency is CCC, such setoff shall be in accordance with 7 CFR Part 1408.

(b) Where an assignment has been made as provided in Article 69, the following provisions with respect to setoff shall apply:

(1) Notwithstanding the assignment, Agency may set off:

(i) Any amounts due Agency under the contract;

(ii) Any amounts for which Contractor is indebted to the United States for taxes for which a notice of lien was filed or a Notice of Levy was served in accordance with the provisions of the Internal Revenue Code of 1954 (26 U.S.C. 6323), or any amendments thereto or modifications thereof, before acknowledgement by Agency or receipt of the notice of assignment; and

(iii) Any amounts, other than amounts specified in (i) and (ii) of this paragraph (1) due Agency or any other agency of the United States, if Agency notified the assignee of such amounts to be set off at the time acknowledgement was made of receipt of notice of such assignment.

(2) Any indebtedness of Contractor to any agency of the United States which cannot be set off under subparagraph (1) of this paragraph may be set off against any amount payable under the contract which remains after deduction of amounts (including interest and other charges) owing by Contractor to the assignee for which the assignment was made.

(c) Any amount due prior lien holders who have not executed a waiver shall be deducted prior to setoff of any indebtedness referred to in paragraph (a) of this Article. If a waiver of lien has been executed, and if the holder of the lien is named by Contractor as payee on invoices or as assignee of claims for monies due under the contract to Contractor, any indebtedness to any agency of the Government under any transaction not under the contract may be set off against any amount due and payable under the contract which is in excess of the amount of such invoices or assignment.

(d) Setoff as provided in the Article shall not deprive Contractor of any right it might otherwise have to contest the justness of the indebtedness involved in the setoff action either by administrative appeal or by legal action.

Article 74.                   DISPUTES

(a) This contract is subject to the Contract Disputes Act of 1978 (41 U.S.C. 601-613) (the Act).

(b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved under this Article.

(c) "Claim," as used in this article, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. A claim arising under a contract, unlike a claim relating to that contract, is a claim that can be resolved under a contract Article that provides for the relief sought by the claimant. However, a written demand or written assertion by the Contractor seeking the payment of money exceeding \$50,000 is not a claim under the Act until certified as required by subparagraph (d)(2) below. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the Act. The submission may be converted to a claim under the Act, by complying with the submission and certification requirements of this article, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

(d) (1) A claim by the Contractor shall be made in writing and submitted to the Contracting Officer for a written decision. A claim by the Government against the Contractor shall be subject to a written decision by the Contracting Officer.

(2) For Contractor claims exceeding \$50,000, the Contractor shall submit with the claim a certification that--

(i) The claim is made in good faith;

(ii) Supporting data are accurate and complete to the best of the Contractor's knowledge and belief; and

(iii) The amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable.

(3) (i) If the Contractor is an individual, the certification shall be executed by that individual.

(ii) If the Contractor is not an individual, the certification shall be executed by--

(A) A senior company official in charge at the Contractor's plant or location involved; or

(B) An officer or general partner of the Contractor having overall responsibility for the conduct of the Contractor's affairs.

(e) For Contractor claims of \$50,000 or less, the Contracting Officer must, if requested in writing by the Contractor, render a decision within 60 days of the request. For Contractor-certified claims over \$50,000, the Contracting Officer must, within 60 days, decide the claim or notify the Contractor of the date by which the decision will be made.

(f) The Contracting Officer's decision shall be final unless the Contractor appeals or files a suit as provided in the Act.

(g) The Government shall pay interest on the amount found due and unpaid from (1) the date the Contracting Officer receives the claim (properly certified if required), or (2) the date payment otherwise would be due, if that date is later, until the date of payment. Simple interest on claims shall be paid at the rate, fixed by the Secretary of the Treasury as provided in the Act, which is applicable to the period during which the Contracting Officer receives the claim and then at the rate applicable for each 6-month period as fixed by the Treasury Secretary during the pendency of the claim.

(h) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under or relating to the contract, and comply with any decision of the Contracting Officer.

#### **Article 75. FRAUDULENT CLAIMS**

(a) Section 5 of the Contract Disputes Act of 1978 (41 U.S.C. 601, 604) provides that if a Contractor is unable to support any part of its claim under the contract and such inability is attributable to misrepresentation of fact or fraud on the part of the Contractor, it shall be liable to the Government for:

- (1) an amount equal to the unsupported part of the claim; and
- (2) costs to the Government attributable to reviewing that part of the claim.

(b) "Misrepresentation of fact" is defined by the Contract Disputes Act of 1978 as a false statement of substantive fact, or any conduct which leads to a belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead.

(c) All instances of suspected fraudulent claims shall be reported, through channels, to the Attorney General.

#### **Article 76. AUDIT OF RECORDS AND ACCESS TO PREMISES (DEVIATION)**

(a) Contractor agrees that Agency and the Comptroller General of the United States through their duly authorized representatives shall, until the expiration of three years after final payment under the contract, have access to and the right to examine any directly pertinent books, documents, papers and records on Contractor involving transactions relating to the contract.

(b) **Availability.** The Contractor shall make available at its office at all reasonable times the materials described in paragraph (a) above, for examination, audit, or reproduction, until 3 years after final payment under this contract, or for any other period specified in the Federal Acquisition Regulation (FAR), Title 48, C.F.R. Subpart 4.7. FAR Subpart 4.7, Contractor Records Retention, in effect on the date of this contract, is incorporated by reference in its entirety and made a part of this contract.

(1) If this contract is completely or partially terminated, the records relating to the work terminated shall be made available for 3 years after any resulting final termination settlement.

(2) Records pertaining to appeals under the Disputes article or to litigation or the settlement of claims arising under or relating to the performance of this contract shall be made available until disposition of such appeals, litigation, or claims.

(c) The Contractor shall insert a article containing all the provisions of this article, including this paragraph (c), in all subcontracts over \$10,000 under this contract, altering the article only as necessary to identify properly the contracting parties and the contracting office under the Government prime contract.

#### Article 77. GRATUITIES

(a) The right of the Contractor to proceed may be terminated by written notice if, after notice and hearing, the agency head or a designee determines that the Contractor, its agent, or another representative--

(1) Offered or gave a gratuity (e.g., an entertainment or gift) to an officer, official, or employee of the Government; and

(2) Intended, by the gratuity, to obtain a contract or favorable treatment under a contract.

(b) The facts supporting this determination may be reviewed by any court having lawful jurisdiction.

(c) If this contract is terminated under paragraph (a) above, the Government is entitled to pursue the same remedies as in a breach of the contract.

(d) The rights and remedies of the Government provided in this article shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

#### Article 78. INTEREST

(a) Notwithstanding any other article of this contract, all amounts that become payable by the Contractor to the Government under this contract (net of any applicable tax credit under the Internal Revenue Code (26 U.S.C. 1481)) shall bear simple interest from the date due until paid unless paid within 30 days of becoming due. The interest rate shall be the interest rate established by the Secretary of the Treasury as provided in Section 12 of the Contract Disputes Act of 1978 (Public Law 95-563), which is applicable to the period in which the amount becomes due, as provided in paragraph (b) of this Article, and then at the rate applicable for each six-month period as fixed by the Secretary until the amount is paid.

(b) Amounts shall be due at the earliest of the following dates:

(1) The date fixed under this contract.

(2) The date of the first written demand for payment consistent with this contract, including any demand resulting from a default termination.

(3) The date the Government transmits to the Contractor a proposed supplemental agreement to confirm completed negotiations establishing the amount of debt.

(4) If this contract provides for revision of prices, the date of written notice to the Contractor stating the amount of refund payable in connection with a pricing proposal or a negotiated pricing agreement not confirmed by contract modification.

(c) The interest charge made under this article may be reduced under the procedures prescribed in the Federal Acquisition Regulation, Title 48, C.F.R. 32.614-2 in effect on the date of this contract.

**Article 79.**

**NOTICE TO THE GOVERNMENT OF LABOR DISPUTES**

(a) If the Contractor has knowledge that any actual or potential labor dispute is delaying or threatens to delay the timely performance of this contract, the Contractor shall immediately give notice, including all relevant information, to the Contracting Officer.

(b) The Contractor agrees to insert the substance of this article, including this paragraph (b), in any subcontract to which a labor dispute may delay the timely performance of this contract; except that each subcontract shall provide that in the event its timely performance is delayed or threatened by delay by any actual or potential labor dispute, the subcontractor shall immediately notify the next higher tier subcontractor or the prime Contractor, as the case may be, of all relevant information concerning the dispute.

**Articles 80-84. [RESERVED]**