

6 FAH-2 H-540 HANDLING UNSATISFACTORY PERFORMANCE

*(TL:CORH-2; 11-19-2003)
(Office of Origin: A/OPE)*

6 FAH-2 H-541 GENERAL

(TL:CORH-2; 11-19-2003)

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

b. Two principles govern conduct in these situations. First, when a delinquency appears imminent, the U.S. Government must take prompt action to protect its rights; and second, in administering a delinquent contract, Department personnel should do nothing which might waive the U.S. Government's rights.

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

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

e. Unsatisfactory performance is often a matter of degree and the U.S. Government's actions can be directed toward correcting the unsatisfactory performance or protecting the U.S. Government's interest in the event of the contractor's default.

6 FAH-2 H-542 INITIATING CORRECTIVE ACTION

(TL:CORH-2; 11-19-2003)

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

(1) Call the contractor's attention to the discrepancy and seek the contractor's voluntary commitment to remedy the failure. Then follow up later to see if remedial action was taken;

(2) If the contractor disagrees that contract requirements are not being met, discuss the matter with the contractor to determine the basis for the contractor's position. Also, discuss the matter with the contracting officer to see what course of action should be taken to resolve whether or not the contractor is complying with the contract. If it is clear that the contractor's position has no reasonable basis, direct the contractor to take corrective or other action necessary to meet the requirements of the contract;

(3) Such directions, if oral, must be confirmed in writing, with a copy provided to the contracting officer. The giving of such directions is representative of the COR's primary responsibility of seeing that the contractor does what he or she promised to do in the contract. By the same token, the COR must not direct the contractor to do anything more than, or different from, what the contractor agreed to do. Such a direction would violate the limitation placed on the COR's authority;

(4) If, however, the contractor fails to comply with a contract requirement within a reasonable time after having been directed to do so, then the COR may recommend that the contracting officer send a letter pointing out the failure of performance and its importance to the Department, and directing that the deficiency be "cured" within a specified time period—usually ten days. This letter is called a "cure notice." Such a letter can be beneficial in assuring that top management in the contractor's organization is aware of the problem and in enlisting their support for corrective action; and

(5) If the departure from contract requirements continues, **and** if it appears that the contractor will not remedy his or her failure to do what the contract requires, then the COR should consider recommending that the contracting officer terminate the contract for default.

6 FAH-2 H-542.1 Dealing with Delays

(TL:CORH-2; 11-19-2003)

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

- (1) Promptly notify the contracting officer;
- (2) Determine the reason for the delay, and discuss it with the contracting officer. Based on the facts, the contracting officer will decide if the delay is excusable, and will determine an appropriate course of action;
- (3) If it is decided that the delay is excusable, the COR should request that the contracting officer issue a modification to change the contract period of performance/delivery schedule; and
- (4) If the delay is not excusable, is attributable to the contractor, **and** there is no other recourse, the COR may request the contracting officer to terminate the contract for default.

6 FAH-2 H-542.2 Dealing with a Cost Overrun

(TL:CORH-2; 11-19-2003)

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

b. When the COR becomes aware of an overrun situation, he or she should:

- (1) **Not request** or **encourage** the contractor to continue work. Boards of contract appeals have held that such action will legally obligate the U.S. Government to reimburse the contractor for keeping on with the work, notwithstanding the Limitation of Cost clause limiting the U.S. Government's obligation to the stated estimated amount. This constitutes an improper obligation of appropriated funds, i.e., an unauthorized commitment;
- (2) Promptly **notify** the contracting officer and the requirements office;
- (3) **Decide** with the contracting officer and the requirements office on one of the following actions:

(a) Terminate the contract for the convenience of the U.S. Government before the overrun occurs;

(b) Modify the contract to decrease the technical effort in order to eliminate the need for additional funding; or

(c) Increase the contract funding to permit completion of the work;

(4) If the U.S. Government determines to complete the work and if additional funding is available, the COR must initiate the Procurement Request Package and submit it to the contracting officer for action.

6 FAH-2 H-543 REMEDIES AVAILABLE TO THE U.S. GOVERNMENT

6 FAH-2 H-543.1 Withholding Payments

(TL:CORH-2; 11-19-2003)

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

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

6 FAH-2 H-543.2 Terminations

(TL:CORH-2; 11-19-2003)

a. Situations may arise when the work contracted for does not run to completion. Two standard contract clauses are designed to cover this eventuality: the Termination for Convenience of the Government clause and the Default clause. No matter which type of termination is issued, or the extent of the terminated portion of the work, the decision to terminate is a unilateral right of the U.S. Government.

b. Both types of terminations can be either partial or complete; that is, all or any part of the work can be terminated. The portion that is not terminated must be completed by the contractor. The contractor has no contractual right not to continue with the remaining work.

6 FAH-2 H-543.2-1 Termination for Convenience

(TL:CORH-2; 11-19-2003)

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

b. A termination for convenience requires that a financial settlement be made for the work that has been accomplished under the contract up to the effective date of the termination. The contractor is paid for his or her work on the terminated part of the contract as well as a reasonable allowance for profit on work done and reasonable settlement expenses without profit or fee. The contractor is not paid any profit or fee on work that was not performed before the effective date of termination.

c. Once it is determined that a contract is to be terminated, the contracting officer initiates the termination immediately to preclude the further incurrence of cost.

6 FAH-2 H-543.2-2 Termination for Default

(TL:CORH-2; 11-19-2003)

a. The Termination for Default clause allows the U.S. Government to terminate the contract when the contractor fails to make progress or to perform any other contract requirements within the period specified by the "cure notice." Terminations for default usually occur in fixed-price contracts.

b. Handling terminations for fixed-price contracts:

(1) Fixed-price contracts may be terminated for default if the contractor fails to:

(a) Make delivery of the supplies, or to perform the services within the time specified in the contract;

(b) Perform any other provision of the contract including public policy provisions (such as equal employment opportunity standards); or

(c) Make sufficient progress to ensure timely or successful performance of the contract;

(2) In the first instance, the Notice of Termination for Default may be issued immediately. In the latter two cases, however, the contracting officer issues a "show cause" or "cure notice" to the contractor, citing the failure

and allowing at least 10 days for the contractor to submit a plan to cure the problem. If the contractor's plan does not offer a reasonable solution to the problem, the contractor may then be defaulted for failure to perform. FAR Part 49 describes the procedures, factors, and contents of notices to be considered when such actions are taken;

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

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

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

(6) Terminations on commercial item contracts: Under commercial item contracts, the term "termination for default" is not used. Rather, the procedure is called a "termination for cause." The U.S. Government may terminate a commercial item contract for the same reasons as any other contract. However, the contracting officer must send the contractor a cure notice before terminating for any reason other than a late delivery.

c. Handling terminations on cost-reimbursement type contracts:

(1) The provisions for default termination contained in cost-reimbursement type contracts are part of the general Termination clause, which covers both convenience and default terminations. Excusable contractor delays are described in a separate clause entitled Excusable Delays;

(2) The distinction between a default and a convenience termination is not so great under a cost-reimbursement contract as it is in the fixed-price situation. When a cost-type contract is terminated for convenience or for default, the contractor receives all allowable costs incurred up to the time of termination, and he or she is not liable for reprocurement costs if the U.S. Government purchases replacement supplies or services.

6 FAH-2 H-544 THROUGH H-549 UNASSIGNED