

6 FAH-2 H-560 ADMINISTERING OBLIGATIONS OF THE U.S. GOVERNMENT UNDER THE CONTRACT

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

6 FAH-2 H-561 GENERAL

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

The contracting officer depends on the COR to see that U.S. Government obligations to the contractor are fulfilled. A person appointed as COR should take the time at the outset to go through the contract to identify actions the U.S. Government must take to discharge its obligations to the contractor.

6 FAH-2 H-562 PROCESSING VOUCHERS AND INVOICES

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

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

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

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

6 FAH-2 H-563 U.S. GOVERNMENT PROMISES TO FURNISH INFORMATION OR PROPERTY

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

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

(1) The property is not furnished to the contractor by the date agreed to in the contract, or, if no such time was specified, by a sufficiently early date to permit the contractor to finish the contract work by the agreed completion date;

(2) The property is not furnished in a condition suitable for the intended use of the property (e.g., poor copies where data is only partly legible); or

(3) If proper use of the property depends on knowledge or possession of related information concerning techniques or conditions of its use, and the U.S. Government fails to provide such related information as the contractor requests and it is reasonably required to enable the contractor to use the property effectively for its intended purpose.

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

c. **Steps the COR should take.** The COR should examine the contract at the outset to see what, if any, data, equipment, or other property the U.S. Government has agreed to furnish the contractor. If property is to be furnished, the COR should:

(1) Find out what date, if any, is specified in the contract for delivering the property to the contractor; and, if no date is specified, find out when the contractor will need it in order not to impair his or her ability to meet the contract completion date;

(2) Find out where the property is and see that arrangements are made to get it to the contractor on time;

(3) Find out whether the property is in proper condition for use as intended. The sooner this is ascertained, the sooner repair, correction, or other action can be initiated on an informed basis rather than discovering

the problem later when it is too late to avoid delaying contract completion;
and

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

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

6 FAH-2 H-564 THE U.S. GOVERNMENT'S OBLIGATION NOT TO INTERFERE WITH THE CONTRACTOR'S PERFORMANCE

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

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

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

c. To some extent, standard contract clauses recognize this basic principle. For example, the "Inspection" clause expressly states that all U.S. Government inspections and tests shall be so conducted as not to

"unduly" delay the work. The "Excusable Delays" clause for cost-reimbursement type contracts provides for revision of the delivery schedule if the contracting officer finds that any failure in performance was due to causes beyond the control and without the fault or negligence of the contractor. One of those causes is identified as "acts of the Government in either its sovereign or contractual capacity."

6 FAH-2 H-565 IDENTIFICATION/BUILDING PASSES FOR ON-SITE CONTRACTORS

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

a. Every contractor employee working on-site must have an identification/building pass. The contractor must submit an application to the Bureau of Diplomatic Security, Office of Procedural Security, Domestic Facilities Division (for access to DOS buildings in the United States), or to the post security officer (for access to DOS buildings abroad), as prescribed by DOSAR clause 652.237-71, Form DS-1838, *Request for Building Pass/Identification Card*.

b. DS/ISP/INB or the post security officer will conduct a preliminary background check. If the background check is favorable, a letter is sent to the contractor notifying them that the individual may proceed to the building pass office (or appropriate office at posts abroad) to continue the badging process. The COR must provide the contractor with a letter of sponsorship.

c. The COR must maintain a list of building passes issued, by contract employee name, social security number or employee identification number, and building pass expiration date. The COR must ensure that the contractor returns to him or her all building passes upon expiration of the contract, when employment of the contract employee is terminated, or when the employee no longer has a need for access to the Department facility. The list must also indicate the date on which the pass was returned and the date forwarded to Diplomatic Security or regional security officer. This listing shall be maintained in the COR file. The COR must not approve the final voucher/invoice for payment until all building passes are returned by the contractor.

6 FAH-2 H-566 ADMINISTERING SUBCONTRACTS

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

a. FAR Part 44 contains subcontracting policies and procedures for administering U.S. Government contracts, that is:

- (1) The approval or consent to subcontracts;

(2) The review and approval of a contractor's make or buy programs;
and

(3) The evaluation, review, and approval of contractor purchasing systems.

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

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

d. FAR 44.202 requires that the contracting officer and COR consider the following when contemplating consent for a prime contractor to enter into subcontracts:

(1) Is the decision to subcontract consistent with the contractor's approved make-or-buy program, if any?

(2) Is the subcontract for special test equipment or facilities that are available from U.S. Government sources?

(3) Is the selection of the particular supplies, equipment, or services technically justified?

(4) Has the contractor complied with the prime contract requirements regarding small business subcontracting, including, if applicable, its plan for subcontracting with small, small disadvantaged, women-owned small, HUBZone small, veteran-owned small, and service-disabled veteran-owned small business concerns?

(5) Was adequate price competition obtained or its absence properly justified?

(6) Did the contractor adequately assess and dispose of subcontractors' alternate proposals, if offered?

(7) Does the contractor have a sound basis for selecting and determining the responsibility of the particular subcontractor?

(8) Has the contractor performed adequate cost or price analysis or price comparisons and obtained accurate, complete, and current cost or pricing data, including any required certifications?

(9) Is the proposed subcontract type appropriate for the risks involved and consistent with current policy?

(10) Has adequate consideration been obtained for any proposed subcontract that will involve the use of U.S. Government-furnished facilities?

(11) Has the contractor adequately and reasonably translated prime contract technical requirements into subcontract requirements?

(12) Does the prime contractor comply with applicable cost accounting standards for awarding the subcontract?

(13) Is the proposed subcontractor on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs?

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

6 FAH-2 H-567 THROUGH H-569 UNASSIGNED