

# Guide to Judiciary Policy

Vol. 14: Procurement

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## § 710 Maintaining Records

### § 710.10 Procurement Files (Purchase/Delivery/Task Order or Contract Files)

#### § 710.10.10 In General

- (a) A file must be established and maintained for every purchase action, solicitation, and contract.
  - (1) Procurement files may be retained in any medium (paper, electronic, microfilm, etc.) or any combination of media, as long as the requirements of this chapter are satisfied.
  - (2) When the original medium is changed to facilitate storage, the process used to create and store records must record and reproduce the original document, including signatures and other written and graphic images completely, accurately, and clearly. Data transfer, storage, and retrieval procedures must protect the original data from alteration. Signed originals may be destroyed after verification by the Procurement Liaison Officer (PLO) (or designee) that record copies on alternate media and copies reproduced from the record copy are accurate, complete, and clear representations of the originals.
  - (3) Procedures for contract file disposal must ensure that the documents specified in this chapter may not be destroyed before the times indicated in § 760.30 (Disposition of Contract Files), and may be retained longer if the PLO determines that the files have future value to the judiciary. When original documents have been converted to alternate media for storage, the requirements of § 760.30 (Disposition of Contract Files) also apply to the record copies in the alternate media.
- (b) Procurement file content deemed to be sensitive information, e.g., proposal information or proposal evaluation information, must be maintained in a secured area and otherwise not left unattended nor in open view when personnel without a need-to-know are present.
- (c) Access to procurement file content deemed to be sensitive, e.g., proposal information or proposal evaluation information, must be limited to authorized judiciary procurement and audit personnel. For a discussion on obtaining and disclosing procurement documents according to the Procurement Integrity Act, **see:** Guide, Vol. 14, § 150.20 (Procurement Integrity Act).

- (d) Proprietary data furnished by contractors or offerors must be secured at all times and made available on a need-to-know basis only.
- (e) Purchases made with the purchase card are exempt from the requirement to establish files for each individual transaction, since there is generally minimal documentation — either pre-award or post-award — associated with these procurements. However, each purchase must be recorded as an obligation in JIFMS and records maintained consistent with the Judiciary Purchase Card Program Manual.
- (f) Files for each procurement must contain the documentation identified below in § 710.10.20 (Required Documentation). **See also:** Guide, Vol. 11, § 340.30 (Appropriate Records and Documentation).
- (g) Access to the purchase card and related documents and information (e.g., monthly billing statements, summary statements of accounts) must be restricted to authorized individuals, including audit personnel.

#### **§ 710.10.20 Required Documentation**

- (a) Purchases Below the Applicable Competition Threshold (Judiciary open market, GSA Schedule, etc.), require the following documentation:
  - (1) Requisition (electronic or hard copy) or statement of need with the authorizing official's signature or reference to the judiciary organization's approved spending plan for certain types of purchases such as office supplies;
  - (2) Signed purchase/delivery/task order and any signed modifications;
  - (3) Supporting documentation for each purchase/delivery/task order modification (**see:** § 745 (Contract Modifications));
  - (4) Documentation that products or services have been received and accepted, e.g., copies of receiving reports for products with annotation indicating inspection and acceptance, or contracting officer's representative (COR) signature on invoices signifying services were performed satisfactorily;
  - (5) Copies of all invoices or vouchers;
  - (6) Any other pertinent information, e.g., documented phone conversations with offerors/contractors, evaluation worksheets, correspondence to and from offerors, commercial agreements, documentation of follow-up on late deliveries or unsatisfactory performance, etc.; and

- (7) Copies of any applicable one-time delegations of procurement authority from the Procurement Management Division (PMD) of the AO's Finance and Procurement Office (FPO).
- (b) Purchases Greater than the Applicable Competition Threshold (Judiciary, GSA Schedule, etc.) require the following documentation:
  - (1) Requisition (electronic or hard copy) or statement of need with the authorizing official's signature or reference to the judiciary organization's approved spending plan for certain types of purchases, such as office supplies;
  - (2) Rationale for selection of the source of supply (low price/technically acceptable or best value, including documentation of evaluation process);
  - (3) For competitively awarded delivery orders or task orders under judiciary or non-judiciary contracts, including GSA schedule contracts or other executive branch contracts, such as NASA's Solutions for Enterprise-Wide Procurement (SEWP) contracts, evidence of the level of competition required for use of the specific contract;
  - (4) Where competition was not obtained, a copy of the approved:
    - (A) Form AO 370A (Justification for Limiting Open Market Competition (JLOC)), including copy of the one-time delegation from PMD (**see:** Guide, Vol. 14, § 335 (Justifications and Approvals for Limiting Competition));
    - (B) Form AO 370B (Justification for an Exception to Fair Opportunity (JEFO)), including copy of the one-time delegation from PMD, when required (**see:** Guide, Vol. 14, § 410.30.73 (Documenting Exceptions to Fair Opportunity Requirement)); or
    - (C) Form AO 370C (Limited Sources Justification (LSJ)) (**see:** Guide, Vol. 14, § 310.50.63 (Limiting Sources on Orders Placed under Federal Supply Schedules) and § 310.50.66 (Limiting Sources Based on Items Particular to One Manufacturer (Brand Name))).
  - (5) Copy of any other applicable one-time delegation of procurement authority from PMD;

- (6) Copies of the advertisement of the requirement and/or documentation that the requirement was advertised locally or on SAM.gov (or the approved exception from advertising);
- (7) Copies of any written solicitation, amendments, questions, clarifications, all correspondence with prospective offerors and their replies;
- (8) Copies of unsuccessful offers, or, where award is based on oral quotes, a record of each quote obtained and who provided it;
- (9) Determination of fair and reasonable price and basis of selection. **Note:** If price is not the basis of selection, the required PMD written approvals — the pre-solicitation approval to use best value source selection as well as the one-time delegation granted after review of the evaluation of offers — must be included.
- (10) Signed award (contract or purchase/delivery/task order) and any signed modifications with the supporting documentation (**see:** § 745 (Contract Modifications));
- (11) For Blanket Purchase Agreements (BPAs), indefinite delivery/indefinite-quantity (IDIQ) or requirements contracts, copies of all BPA calls or delivery/task orders and all other documents supporting them (e.g., copies of task order solicitations, competitive range determinations, memo of negotiations, pre-negotiation positions, post-performance assessment, contractor reports and copies of deliverables, as applicable);
- (12) Documentation that products or services have been received and accepted, e.g., copies of receiving reports for products with annotation indicating inspection and acceptance, or COR signature on invoices signifying services were performed satisfactorily;
- (13) Copies of all invoices or vouchers;
- (14) Any other pertinent information (e.g., documented phone conversations with offerors, evaluation worksheets, commercial agreements, records of site visits by or to prospective offerors, post-award correspondence, documentation of follow-up on late deliveries or unsatisfactory performance);
- (15) Copies of debriefing requests and documentation of debriefing, if any; and

- (16) Documentation of protests, if any, and of required coordination with the PE (**see:** Guide, Vol. 14, § 350 (Judiciary Protest Procedures)).

## § 715 Responsibilities

### § 715.10 Contract Administration Process

#### § 715.10.10 In General

Once a contract is awarded, the contract administration process begins. Every contract-related issue that arises after the contract is awarded becomes part of the contract administration process. Contract administration encompasses a broad range of functions that, together, ensure that the judiciary obtains exactly what it has contracted to purchase. For contract administration involving sureties, **see:** Guide, Vol. 14, § 620.30 (Irrevocable Letter of Credit). The contract administration process includes:

- (a) receiving, inspecting, and either accepting or rejecting contractor deliverables in a timely manner;
- (b) monitoring the contractor's progress, making sure contractual delivery dates are met and that products and services are of acceptable quality;
- (c) ensuring that the judiciary is meeting its own contractual obligations, such as timely review of deliverables or providing the contractor data that it may need;
- (d) placing orders under indefinite-delivery contract types and treating those orders as contracts that must be separately administered (**see:** Guide, Vol. 14, § 410.30 (Indefinite-Delivery Contracts));
- (e) answering questions and addressing contractor issues;
- (f) changing or modifying the contract as necessary;
- (g) ensuring that the contractor is paid only the amount to which it is entitled, but is not paid before delivery and fulfillment of acceptance criteria of each procurement, unless advance payment terms have been included in the contract;
- (h) obtaining assistance from other offices in addressing unusual contract actions when necessary, such as protests, disputes or terminations; and
- (i) closing out the contract and orders (for closing out purchase orders, **see:** § 760 (Contract Closeout)).

## § 715.15 Participants in the Contract Administration Process

There are many individuals involved in the contract administration process. Each of these individuals or groups has specific functions, responsibilities, and accountability.

### § 715.15.10 Contracting Officer

- (a) The contracting officer (CO) is the only judiciary employee who is delegated authority to legally commit the judiciary to the purchase of products and services.
- (b) The CO is supported by other individuals in the judiciary. One of the support individuals is the COR.
- (c) CO appointments are evidenced by a signed Form AO 375 (Procurement Liaison Officer's Appointment of Contracting Officer) or a signed certificate (applicable to PMD).
- (d) COCP Level 3 appointments are subject to continuing education training requirements and are valid until rescinded or until a new PLO is appointed. **See:** Guide, Vol. 14, § 120.20.60(c) (When Delegations Must be Re-Issued).

### § 715.15.20 Designation of COR

- (a) The CO delegates specific contract administration responsibilities to the COR through a written designation. Through this memo of designation, the COR is empowered to fulfill the delegated responsibilities on a specific contract and/or delivery or task order, as appropriate. For a sample COR designation memo, **see:** Appx. 7E (Sample Contracting Officer Representative Appointment Memo). For more detail on the respective roles of the CO and COR, **see:** § 715.25 (Functions of the CO and COR).
- (b) To be eligible for designation as a COR by the CO, prospective CORs must complete, at a minimum, the online COR training available through CourtsLearn University.
- (c) For routine purchases of non-complex, off-the-shelf products, e.g., office supplies, formal appointment of a COR is not required and acceptance may consist of merely confirming receipt of the ordered items in undamaged condition. Formal appointment of a COR is recommended for more complex purchases, such as IT hardware or software that must be tested before acceptance, or installation of furniture, or complex, non-routine types of services performed on a labor-hour or time-and-materials basis, where there may be extended communications between the

contractor and the judiciary during installation, testing, or over the period of performance.

- (d) The contractor must be provided a copy of any formal appointment of a COR to ensure the contractor understands the limits of the COR's authority.

#### **§ 715.15.30 Other Participants**

- (a) AO's Office of the General Counsel (OGC) staff provides requested essential legal reviews and guidance.
- (b) Financial and budget officials establish budgets and reprogram funds when necessary to exercise options, make changes, and settle claims.
- (c) The CO, or the COR when authorized, tracks expenditures against contracts/orders, determines the adequacy and accuracy of vouchers and invoices, and ultimately approves payments to the contractor.
- (d) Other financial officials ultimately process payments to the contractor after written approval from the CO or COR. They may also track expenditures against contracts/orders and provide advice to the CO as to the adequacy and accuracy of vouchers and invoices.

#### **§ 715.15.40 Authority of Other Participants**

With the single exception of the COR, all support personnel operate under their own authorities derived through their organizations. It is only the COR who, through formal appointment and designation, shares authorities otherwise reserved exclusively for the CO.

#### **§ 715.20 Distinctions between Contracting Officer (CO) and Contracting Officer's Representative (COR)**

- (a) The CO is the only person with the legal authority to commit the judiciary to a legally binding contract and obligate appropriated funds for that purpose. This legal authority cannot be delegated to the COR. Although certain contract administration functions may be delegated to the COR, the CO remains ultimately responsible for the administration of each contract.
- (b) The COR assists the CO by providing specific services as directed by the CO. However, the CO makes the final decisions and retains signature authority in the contracting matter.
- (c) The CO and the COR are the primary members of a team that provides proper contract administration and oversight. This team's efforts ensure

that tax dollars are being wisely and efficiently expended, and that the judiciary and, in particular, the customer organization that generates each requirement, are receiving the full measure of the products and/or services purchased.

## **§ 715.25 Functions of the CO and COR**

### **§ 715.25.10 Monitoring Progress**

Monitoring the progress of a contractor and making sure contractual due dates are met are shared responsibilities. However, the CO and the COR often look at different aspects of the contractor's performance.

- (a) The CO will examine delivery and reporting due dates and consult with the COR to determine if the contractor is making all deliveries according to the contract delivery schedule.
- (b) Since the COR is more closely involved in the contractor's day-to-day activities, the COR acts as the eyes and ears of the CO and customer. The COR is, in effect, an early-warning system. For instance, the COR will be the first one to know when a contractor does not understand or meet a contract requirement, is making inaccurate assumptions, or is asking questions that suggest that it is not making adequate contract performance progress.

### **§ 715.25.15 Ensuring Judiciary Contractual Commitments Are Met**

- (a) Making sure that the judiciary is meeting its contractual commitments is a shared responsibility. For example, when performance of the work requires the use of judiciary property, or access to judiciary data or information technology, etc., such property or access must be provided within the time frame provided in the contract. This is generally a COR responsibility.
- (b) If the judiciary is failing to meet its responsibilities in making data, property, physical or virtual access, etc. available within the contractually required time frames, the contractor may be entitled to an equitable adjustment. The CO is responsible for negotiating any such adjustment with the contractor, which may ultimately cause the expenditure of further judiciary funds and/or a delay in delivery or other contract performance.

### **§ 715.25.20 Placing Orders**

The CO is responsible for the placement of orders, since it normally involves a binding contract and obligating judiciary funds. Administering each of these orders requires

similar actions as the administration for the contracts under which the orders were issued. **See:** Guide, Vol. 14, § 410.30.60 (Delivery Orders or Task Orders).

#### **§ 715.25.25 Receipt, Inspection, and Acceptance of Performance**

The COR accepts or rejects performance of services, including any deliverables required. If applicable, the COR will normally consult with customer organizations to confirm the contractor has performed consistent with the contract before accepting or rejecting performance. The COR performs this function because he or she is generally on-site and either observes the performance of services first-hand or is the delivery point for material deliveries.

#### **§ 715.25.30 Providing Technical Direction**

- (a) The COR provides technical direction, including answering questions, and addressing other issues that the contractor may have.
- (b) The COR may provide technical direction only within the general scope of the contract and only if the direction does **not** alter any of the contract specifications or the statement of work, or terms and conditions of the contract.
- (c) Only the CO can change a contract. This is a vital area for both the CO and the COR to understand, since open communication between the contractor and the judiciary can mean the difference between success and failure.
- (d) Requesting changes that are outside the scope of the contract or that alter the specifications, terms, or conditions would be considered new work, and subject to competition and advertising requirements.
- (e) Only the CO is empowered to change a contract, whether any adjustment in the contract price will result or not.
- (f) The CO and COR must work together closely in this area as it is often quite difficult to distinguish between “technical direction” and “changes.”

#### **§ 715.25.35 Changing or Modifying the Contract**

As discussed above, this is a function strictly reserved for the CO and it may not be delegated. However, the COR may be asked to support this process in, for example, evaluating change order price proposals or technical aspects of proposed changes.

#### **§ 715.25.40 Ensuring that the Contractor Is Paid**

This is primarily a COR function, which requires the COR to work closely with accounting/disbursement personnel to ensure that payments are made in proper

amounts and within reasonable or contract specified time frames for services or products that have been delivered and accepted. If it is appropriate to refuse payment of an invoice, in whole or in part, the COR must notify the CO promptly of the reasons, and CO must provide appropriate notification to the contractor. For additional guidance on withholding payment, **see**: § 740.40 (Withholding Payments).

#### **§ 715.25.45 Maintaining Procurement Files**

- (a) Both the CO and the COR must maintain files for every purchase action, solicitation, and contract. For file requirements for the CO, **see**: § 710.10 (Procurement Files (Purchase Delivery/Task Order or Contract Files)). The COR must maintain a contract work file.
- (b) Any procurement documents relating to offer evaluation, including the offers themselves, must be maintained in a secured area and otherwise not left unattended nor in open view when personnel without a need-to-know are present. Access to pre-award procurement files and related documents, as well any post-award documents that contain confidential contractor information (e.g., invoices that include indirect rates), must be limited to authorized judiciary procurement and audit personnel. Pre-award disclosure of offeror information can result in penalties under the Procurement Integrity Act. For additional information, **see**: Guide, Vol. 14, § 150.20 (Procurement Integrity Act) and Guide, Vol. 14, § 170 (Release of Information).
- (c) The contract work file must contain all relevant documentation, such as notes of conversations with the contractor, written instructions given to the contractor and similar items, as called for by the CO. The COR must document all significant actions, including any technical directions given to the contractor, in an action file. This file must contain enough detail so that if a contract dispute or claim occurs, the CO can reconstruct what the COR did or did not do. Because it is often difficult to determine what might be the subject of a dispute or claim, the COR must adequately document significant actions that might develop into a problem later.
- (d) The file must also contain copies of the contract, all modifications, the COR delegation letter, and all correspondence between the COR and the contractor or the CO.
- (e) The file must be maintained intact and updated by each successor COR until the contract ends.

#### **§ 715.25.50 Closing out Contracts and Orders**

- (a) This is a shared function. First, the COR confirms final receipt and acceptance of all products and services, ensures the return of contractor

employee badges and judiciary property, if applicable, and recommends that the contractor be relieved of any further performance responsibilities under the contract.

- (b) Fixed-price awards under the small purchase threshold are considered closed following the CO's receipt of confirmation of acceptance of the products or services and issuance of final payment.
- (c) For awards over the small purchase threshold or awards made on a basis other than fixed-price, the CO must determine if a release of claims is required before final payment.
- (d) The CO negotiates any final payment issues or actions for the closeout of the contract. **See:** § 740.30.40 (Final Payment) and § 760 (Contract Closeout).

### **§ 715.25.55 Supporting Contract Actions Such As Disputes or Terminations**

These types of contract actions are always a joint function of the CO and COR, but with a clear separation of responsibilities. The COR plays a major part in the program related aspects of the action, including providing supporting information that relates to the specifications or statement of work. The CO has sole responsibility for any negotiations and the business and financial aspects of the transaction, such as deciding whether any payments will be made to the contractor. The CO also has responsibility for ensuring any required coordination with the PE on such matters is done.

### **§ 715.30 COR Responsibilities to the Judiciary End User**

#### **§ 715.30.10 In General**

- (a) Aside from the COR responsibilities to the CO, the COR also has concurrent responsibilities to the judiciary end user, if the COR is not the end user. The COR must work closely with end users during contract delivery or performance to ensure that the end user is receiving satisfactory products and services according to the contract.
- (b) Moreover, the COR needs to be involved closely enough with the project to anticipate newly evolving requirements that may result in the need to change the contract.
- (c) Under certain types of contracts, the COR will also be responsible to draft work requirements, which will be awarded by the CO through task orders.
- (d) As requested by the CO, the COR may review and approve technical offers and quotations and participate in negotiations.

### **§ 715.30.20 Acceptance Responsibilities**

The COR also has the critical responsibility to recommend acceptance or rejection of contract/order deliverables and/or performance. If there is premature acceptance of the performance or deliverables, the judiciary may inadvertently waive many of its rights to require the contractor to perform remedial activities or modify the deliverables. Thus, the COR must closely observe the contractor's performance or delivery and consult often with management within the customer organization and with the CO before deciding whether or not to accept performance or deliverables.

### **§ 715.35 Role of COR Supervisor**

- (a) The COR's direct supervisor must provide as much of the individual's time and resources as needed to allow the COR to fulfill all of the delegated COR responsibilities.
- (b) Formal COR appointment and designation comes from the CO. Therefore, the COR will have contract responsibilities to the CO, as well as having contract and non-contract responsibilities to the COR's direct supervisor.
- (c) If a COR's work conflicts in fulfilling these concurrent responsibilities, the COR's direct supervisor must confer with the CO to resolve the conflict.
- (d) Finally, in evaluating job performance, the COR's direct supervisor must take into account performance as a COR by gathering input from the CO before issuing a rating.

### **§ 715.40 Becoming a COR**

#### **§ 715.40.10 Nomination**

Judiciary employees are normally nominated in writing by the customer organizations. Provided that the individual has completed the required training and is otherwise capable, the CO may appoint the employee as a COR. For information on the required COR training, **see:** JNet Procurement page.

#### **§ 715.40.20 Designation is for Specific Contracts**

- (a) The CO designates a COR for specific contracts, delivery orders, and task orders. Formal designation to act as a COR on a specific contract, delivery order, and/or task order is evidenced by a letter of designation, signed by the CO. A copy of this designation will be furnished to the COR's immediate supervisor, and to the contractor.
- (b) The designation letter will describe the exact functions the COR will be required to perform on the particular contract or order. Separate letters of

designation are required for each contract, delivery order, or task order assigned to the COR. COR designations expire automatically at the conclusion of the specific contract, delivery order, or task order for which the COR was appointed.

**§ 715.45 Use of Contractors to Monitor Contract Performance**

The judiciary may contract with third parties to perform contract administration responsibilities such as testing for contract conformance (but not acceptance); reviewing contractor submittals, construction shop drawings, written requests for design approval; developing negotiation positions; reviewing offers; advising panels; drafting modifications. However, the CO remains as the signature authority for any contract actions.

**§ 715.50 Relationship Between Judiciary and Contractor Representatives**

**§ 715.50.10 Objective of Purchase Actions**

- (a) The objective of any purchase action is performance or delivery of the contract requirements, not control of the contractor's business. Judiciary personnel must devote their efforts to tasks associated with that requirement, such as:
  - quality assurance,
  - cost monitoring, and
  - other activities intended to ensure compliance with contract terms.
  
- (b) Judiciary personnel may not:
  - direct the contractor's activities, or
  - intervene to supervise, train, or discipline contractor personnel (**see:** Guide, Vol. 14, § 510 (Personal Services Contracts)).

**§ 715.50.20 Disputes with Contractors**

Disputes with contractors are an obstacle to contract performance or delivery. CO's and their supporting staffs must seek to resolve contract disputes through businesslike approaches that promote efficiency and cost-effectiveness and enforce the judiciary's interests.

<b>§ 715.55 Clauses/Provisions</b>	
<b>Clause or Provision</b>	<b>Include in ...</b>
(a) Clause 7-1, Contract Administration	all formal solicitations and contracts. (The CO will provide the CO's name, business address, e-mail address and telephone number in a cover letter accompanying the

	solicitation or contract or by incorporating this information at the end of the clause.)
(b) Clause 7-5, Contracting Officer's Representative	all formal solicitations and contracts.
(c) Clause 7-10, Contractor Representative	all formal solicitations and contracts.
(d) Clause 7-15, Observance of Regulations/Standards of Conduct	all formal solicitations and contracts.
(e) Clause 7-20, Security Requirements	all solicitations and contracts that require unescorted access to judiciary buildings or access to the judiciary IT network. (For additional information on the types of background checks, procedures for obtaining background checks, and appropriate forms to use, <b>see:</b> Guide, Vol. 12, § 570 (Background Checks and Investigations).)
(f) Clause 7-25, Indemnification	all solicitations and contracts.
(g) Clause 7-30, Public Use of the Name of the Federal Judiciary	all solicitations and contracts.
(h) Clause 7-35, Disclosure or Use of Information	all solicitations and contracts.
(i) Clause 7-40, Judiciary-Contractor Relationships	all solicitations and contracts for non-personal services. (The CO will not include this clause in PE-authorized personal services contracts using judiciary information technology funds.)
(j) Clause 7-45, Travel	all solicitations and contracts when travel is reimbursable either as a separate line item in an award that is otherwise fixed-price or as part of cost-reimbursement or labor-hour contract.
(k) Clause 7-50, Parking	all solicitations and contracts when performance will be at the Thurgood Marshall Federal Judiciary Building.
(l) Clause 7-55, Contractor Use of Judiciary Networks	all solicitations and contracts when the contractor will use judiciary computer networks during performance.

## **§ 720 Judiciary Property**

### **§ 720.10 In General**

#### **§ 720.10.10 Policy**

- (a) Contractors are ordinarily required to furnish all property necessary to the performance of judiciary contracts. The CO will provide property to contractors only when it is clearly demonstrated:
- to be in the judiciary's best interest;
  - that the overall benefit to the procurement significantly outweighs the increased cost of administration, including ultimate property disposal;
  - that providing the property does not substantially increase the judiciary's assumption of risk; and
  - that judiciary requirements cannot otherwise be met.
- (b) The contractor's inability or unwillingness to supply its own resources is not sufficient reason for the furnishing of judiciary property.

#### **§ 720.10.20 Property Liability and Contract Type**

Generally, contractors are not held liable for loss, damage, destruction or theft of judiciary property under the following contract types, absent evidence of gross negligence on the part of the contractor:

- cost-reimbursement contracts
- time-and-material contracts
- labor-hour contracts

#### **§ 720.10.30 Judiciary Property Used Outside Judiciary Facilities**

- (a) The CO must obtain approval from the PE before the award of any contract that authorizes judiciary property to be provided for contractor to use in performance of a contract outside of judiciary facilities. The CO must obtain and provide to the PE information on the contractor's property control system to ensure compliance with the contract's property clauses.
- (b) In the event that the PE finds deficiencies in the contractor's property control system, the CO must notify the contractor in writing, requesting prompt correction of deficiencies. If the contractor does not correct the deficiencies within a reasonable period, the CO may, subject to PE approval:

- (1) notify the contractor in writing of any required corrections and establish a schedule for completion,
  - (2) caution the contractor that failure to take the required corrective action within the time specified will result in withholding or withdrawing system approval, and
  - (3) advise the contractor that its liability for loss of or damage to judiciary property may increase if approval is withheld or withdrawn.
- (c) Where judiciary property is authorized for removal from and use outside judiciary facilities, the contractor’s records of the property, established and maintained under the terms of the contract, constitute the judiciary’s official property records.

<b>§ 720.10.40 Clauses</b>	
<b>Clause or Provision</b>	<b>Include in ...</b>
(a) Provision 7-60, Judiciary Furnished Property or Services	all solicitations.
(b) Clause 7-65, Protection of Judiciary Buildings, Equipment, and Vegetation	solicitations and contracts for services to be performed in judiciary buildings.
(c) Clause 7-70, Judiciary Property Furnished “As Is”	solicitations and contracts when judiciary property is to be furnished "as is."

**§ 720.20 Property Records**

**§ 720.20.20 Judiciary Maintenance of Official Records**

The judiciary will maintain the official property records when judiciary property is furnished to a contractor:

- (a) for repair or servicing and return to the judiciary;
- (b) for use at a judiciary facility/office;
- (c) under a contract with a short performance period or involving judiciary property having a contract cost of \$50,000 or less; or
- (d) when otherwise determined by the CO to be in the judiciary’s interest.

**§ 720.20.30 Inventory**

A detailed inventory list of judiciary-furnished products, material or services must be maintained in the contract file and kept current at all times, specifying, as applicable:

- quantity
- nomenclature
- serial number
- model number
- general condition

## **§ 725 Subcontracting**

### **§ 725.10 In General**

#### **§ 725.10.10 Notification Requirement**

When a contract contains Clause 7-75, Subcontracts, the contractor must give the CO advance notice of its intent to subcontract. The clause authorizes the contractor to proceed to enter into a subcontract unless notice of disapproval is received from the CO within 15 days from the date the CO was notified. The CO must:

- (a) promptly evaluate contractor notices of intent to subcontract;
- (b) obtain assistance in this evaluation, as necessary, from audit, technical, or other specialists; and
- (c) notify the contractor in writing if the subcontract is disapproved.

#### **§ 725.10.20 Subcontract Review Considerations**

The CO must review the notice of intent to subcontract with any supporting data and consider the following:

- (a) whether the subcontract is for the purchase of equipment or facilities that are available from judiciary sources;
- (b) whether the contractor's selection of the particular products, equipment, or services being purchased under the subcontract is technically justified;
- (c) whether adequate price competition was obtained for the subcontract or its absence is justified;
- (d) whether the contractor adequately assessed alternate subcontractor offers;
- (e) whether the contractor had a sound basis for selecting and determining the responsibility of the subcontractor;
- (f) whether the contractor performed adequate price or cost analysis;

- (g) whether the contract type (**see:** Guide, Vol. 14, § 410 (Contract Types)) for the proposed subcontract is appropriate;
- (h) whether the contractor has adequately and reasonably translated prime contract technical requirements into subcontract requirements;
- (i) whether the proposed subcontractor is on the list of debarred, suspended, and ineligible contractors; and
- (j) whether the contractor has incorporated terms and conditions contained in the prime contract that are expressly applicable to subcontracts.

**§ 725.10.30 Subcontracting Situations Requiring Special Care**

Particularly careful and thorough consideration is necessary when:

- (a) the prime contractor's purchasing system or performance is inadequate;
- (b) close working relationships or ownership affiliation between the prime and subcontractor may preclude competition or result in higher prices;
- (c) subcontracts are proposed on a noncompetitive basis, at prices that appear unreasonable, or at prices higher than those offered the judiciary in comparable circumstances; or
- (d) subcontracts are proposed on other than a fixed-price basis.

<b>§ 725.10.40 Clauses</b>	
<b>Clause or Provision</b>	<b>Include in ...</b>
(a) Clause 7-75, Subcontracts	solicitations and contracts when awarding: <ul style="list-style-type: none"> <li>(1) a cost-reimbursement contract;</li> <li>(2) a letter contract that exceeds the judiciary's small purchase threshold;</li> <li>(3) a fixed-price contract that exceeds the judiciary's small purchase threshold under which unpriced contract actions (including unpriced modifications or unpriced delivery orders) are anticipated;</li> <li>(4) a time-and-materials contract that exceeds the judiciary's small purchase threshold; or</li> <li>(5) a labor-hour contract that exceeds the judiciary's small purchase threshold.</li> </ul> The CO will fill in the clause's blank spaces as appropriate.

<b>§ 725.10.40 Clauses</b>	
<b>Clause or Provision</b>	<b>Include in ...</b>
(b) Clause 7-80, Competition in Subcontracting	<p>solicitations and contracts when the contract amount is expected to exceed the judiciary's small purchase threshold, except when awarding:</p> <p>(1) a firm-fixed-price contract awarded on the basis of adequate price competition or whose prices are set by law or regulation, or</p> <p>(2) a time-and-materials, labor-hour, or architect-engineer contract.</p>

## **§ 730 Contract Performance**

### **§ 730.10 Postaward Orientation**

#### **§ 730.10.10 In General**

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

- (a) introducing judiciary and contractor representatives;
- (b) ensuring mutual understanding of the technical aspects of the contract;
- (c) discussing judiciary oversight approach;
- (d) preventing problems;
- (e) averting misunderstandings;
- (f) establishing a methodology to solve problems that may occur later; and
- (g) reaching agreement on communication issues.

#### **§ 730.10.20 When to Schedule a Postaward Orientation**

The CO decides whether postaward orientation is necessary. The CO must consider the following factors:

- (a) contract type, value, and complexity;
- (b) procurement history of the required products or services;
- (c) requirements for judiciary-provided property, if applicable;

- (d) urgency of the contract delivery schedule and relationship of the products or services to critical judiciary programs;
- (e) extent of subcontracting;
- (f) contractor's performance history and experience with the products or services;
- (g) safety precautions required for hazardous materials or operations; and
- (h) any financing arrangements contemplated.

#### **§ 730.10.30 Timing of Postaward Orientation**

When the CO decides a postaward orientation is appropriate, it must be held promptly after award. The CO must prepare an agenda before the orientation, provide copies to all appropriate parties, and summarize by memorandum the actual topics covered in the orientation session. The CO and the contractor, and, whenever possible, all other principal parties, for example, CORs, project officers, program managers, and other appropriate subject matter experts, must attend any postaward orientation.

#### **§ 730.10.40 Contract Changes**

A postaward orientation may not be used to change the contract. However, if any changes are identified in a postaward orientation, and are determined by the CO to be necessary, they must be confirmed by the CO by issuance of a contract modification.

### **§ 730.20 Performance Record Keeping**

Maintenance of complete records on contract performance is essential in monitoring contractor performance.

#### **§ 730.20.10 In General**

##### **§ 730.20.20 Contractor Record Retention**

The contractor must maintain records for three years after final payment on the contract. Clause 7-85, Examination of Records, is required to be included in all solicitations and contracts.

##### **§ 730.20.30 Judiciary Contract Files**

The CO and COR both maintain records on each contract assigned to them. Records must be maintained by the CO in a separate official contract file (**see:** § 710.10 (Procurement Files (Purchase/Delivery/Task Order or Contract Files))) and by the COR in a contract work file (**see:** § 715.25.45 (Maintaining Procurement Files)).

## **§ 730.30 Performance Monitoring**

### **§ 730.30.10 In General**

Performance monitoring involves those contract administration activities that COs, CORs, and support personnel use to ensure that the products and services received conform to the contract requirements in quality, quantity, and all other specifics.

### **§ 730.30.20 Judiciary Policy on Performance Monitoring**

Judiciary policy requires that the CO ensure that:

- (a) procured products or services meet contract requirements and are delivered/performed according to contract delivery schedules;
- (b) procedures for assuring that the contract requirements are fulfilled are followed before acceptance of products or services under the contract; and
- (c) no contract clause or term precludes the judiciary from performing inspection.

### **§ 730.30.30 CO Responsibilities**

The CO is responsible for the actions of all other personnel involved in the administration of the contract. The CO must instruct judiciary officials not to require the contractor to do anything that is not specified in the contract.

### **§ 730.30.40 Monitoring and Inspection Objectives**

When a contract is signed, it is the intent of both parties to perform their respective obligations. Poor performance or late deliveries may cause costly delays in the program that the contract supports. The judiciary monitors contract performance closely to ensure that required end items are delivered on time. Monitoring and inspection supports many objectives, including:

- (a) identifying potential delinquencies;
- (b) isolating specific performance problems;
- (c) supporting contractor requests;
- (d) pointing out the need for judiciary assistance;
- (e) revealing actual or anticipated default; and
- (f) identifying judiciary-caused delays.

### **§ 730.30.50 Review of Contractor Deliverables**

- (a) Review of contractor deliverables is an important method of enforcing contract requirements. Contract terms that require submission and written approval of interim deliverables before proceeding with subsequent performance, for example, a requirement for approval of a design before proceeding with installation of equipment for a courtroom technology project, must be strictly enforced.
- (b) The CO will ensure that contractor deliverables are disapproved only for failure to meet a material requirement of the contract.
- (c) If a contractor deliverable fails to meet judiciary expectations because the contract specifications are inadequate, the CO must determine the appropriate correction to the specifications with the assistance of technical personnel and modify the contract to reflect those revised specifications.

### **§ 730.30.60 Approval Process**

- (a) COs and their representatives will approve, conditionally approve, or disapprove contractor deliveries promptly and according to any time limits provided in the contract.
- (b) Disapprovals and conditional approvals will clearly indicate what the contractor must do to comply with the contract requirements.
- (c) Approval of late deliveries or deliveries of less than fully conforming products or services may constitute relaxation of contract performance or delivery requirements.
- (d) When such relaxation occurs for reasons other than conditions caused by the judiciary, they constitute changes to the contract that require the negotiation of consideration. For types of contract remedies, **see**: § 735.20 (Types of Remedies).

## **§ 735 Quality Assurance**

### **§ 735.10 In General**

The CO is responsible for ensuring that products and services received under each contract conform to the quality and quantity requirements of the contract, including inspection, acceptance, warranty, and any other measures associated with quality assurance. The COR assists the CO by performing this function because the COR is generally on-site and either observes the performance of services first-hand or is the delivery point for material deliveries.

## § 735.15 Contract Remedies

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

## § 735.20 Types of Remedies

### § 735.20.10 Remedies Other than Termination

The judiciary has several methods at its disposal to remedy a given situation without resorting to terminating the contract. Remedies include:

- (a) rejecting nonconforming products and services;
- (b) invoking written warranties, if provided for in the contract;
- (c) invoking implied warranties;
- (d) proving the existence of latent defects, fraud, or gross mistakes amounting to fraud;
- (e) imposing liquidated damages if provided for in the contract (**see:** Guide, Vol. 14, § 220.30 (Liquidated Damages) and § 735.25 (Assessing Liquidated Damages)); and
- (f) modifying contracts to relax or delete requirements provided that consideration is obtained from the contractor.

### § 735.20.20 Remedies Involving Cure Notice or Show Cause

The PE must review all proposed application of remedies involving a cure notice or show cause letter. The PE may seek the advice of OGC. For further guidance on the use of cure notices or show cause letters, **see:** § 755 (Contract Termination).

## § 735.25 Assessing Liquidated Damages

### § 735.25.10 In General

When the contract includes a liquidated damages clause, such as Clause 2-75, Liquidated Damages, assessment of liquidated damages must be reasonable and considered in light of contract requirements and done on a case-by-case basis. Any amount established without reference to probable actual damages may be interpreted as punitive and thus unenforceable. Before making any assessment of liquidated damages, the CO must obtain PE approval of the action.

### **§ 735.25.15 Documentation Required**

The CO must document any evidence of the contractor's failure to deliver the products or perform the services within the time specified in the contract. This documentation will focus on the:

- (a) stage of completion;
- (b) probable amount of damages sustained by the judiciary;
- (c) reason and excusability for a delay; and
- (d) contractor's ability to complete the contract.

### **§ 735.25.20 Computation of Assessment Amount**

When assessment of liquidated damages is appropriate, the CO must withhold payment based on an accurate computation of the amount due. The actual computation will depend on the specific amount or specific formula in the contract.

### **§ 735.25.25 Discussion with the Contractor**

After the CO has determined the judiciary is entitled to assess liquidated damages, the CO must discuss the situation with the contractor. Before the actual assessment of liquidated damages, the CO will advise the contractor of the:

- (a) judiciary's intention to assess liquidated damages unless the contractor provides evidence to the judiciary by a specified date that such an assessment would be improper;
- (b) basis or bases for the judiciary's assessment of these damages; and
- (c) amount of the planned liquidated damages assessment, including the reasons for any reduction in the specified amount for liquidated damages stated in the contract.

### **§ 735.25.30 Liquidated Damages Notice**

A liquidated damages notice must indicate:

- (a) the specific reason for assessing the damages provided in the clause;
- (b) the dollar amount of the damages; and
- (c) any steps the contractor may be able to take to avoid further assessment of liquidated damages.

**§ 735.25.35 Waiver of Liquidated Damages**

Liquidated damages may occasionally be waived by the CO. A decision to grant a waiver should be based on one of the following reasons:

- (a) the contractor documents a reasonable case for an excusable delay;
- (b) the contractor claims impossibility of performance; or
- (c) the contractor claims the work is substantially complete.

**§ 735.25.40 Determination of “Substantial Completion”**

Assessment of liquidated damages is generally not appropriate after the work can be considered substantially complete.

**§ 735.25.45 CO Actions**

Based on the evidence, the CO, with approval from the PE, may:

- (a) forego or waive assessing liquidated damages (**see:** § 735.25.35 (Waiver of Liquidated Damages));
- (b) assess a reduced amount; or
- (c) assess maximum allowable liquidated damages.

**§ 735.25.55 Alternative Actions**

The CO also may consider terminating for default (**see:** § 755 (Contract Termination)) or taking other appropriate action in lieu of or following an earlier assessment of liquidated damages.

**§ 735.30 Nonconforming Products or Services****§ 735.30.10 In General**

COs must normally reject products or services not conforming in all respects to contract requirements. Rejection is mandatory when nonconformance adversely affects safety, health, reliability, durability, performance, or any other basic objective of the specification. In addition, products or services that do not conform to the terms of the contract must be rejected before any acceptance takes place. Products or services that have been accepted cannot be rejected later, except for:

- (a) latent defects;
- (b) fraud; and

- (c) gross mistakes amounting to fraud.

**See:** § 735.55 (Fraud, Gross Mistake, or Latent Defects)

### **§ 735.30.20 Opportunity to Correct or Replace**

Contractors may be given an opportunity to correct or replace nonconforming products or to re-perform non-conforming services. Unless the CO specifies otherwise, correction, replacement or re-performance must be at no additional cost to the judiciary. In addition, the CO must reserve the right of the judiciary to charge the contractor the cost of reinspection and retesting needed because of a previous rejection.

#### (a) For Products

- (1) The judiciary's rights when delivered products are defective are provided in Clause 2-5A, Inspection of Products. Similar language appears in paragraph (d) of Clause 3-3, Provisions, Clauses, Terms and Conditions – Small Purchases.
- (2) Notice of rejection of defective products must be provided by the CO in writing, at which time the CO must inform the contractor whether the judiciary requires replacement or correction of the defects; will acquire replacement products from another source and charge the contractor for any excess costs incurred by the judiciary; or will accept the products at a reduced price.
- (3) Corrected or replaced products may not be re-delivered for acceptance unless the contractor discloses the previous rejection and correction action taken.
- (4) If the contractor fails to proceed with reasonable promptness to perform replacement or correction, the CO may, by contract or otherwise, remove, replace, or correct the products and charge the cost to the contractor, or terminate the contract for default.

#### (b) For Services

- (1) The judiciary's rights when services do not meet contract requirements are provided in Clause 2-5B, Inspection of Services. Similar language appears in paragraph (d) of Clause 3-3, Provisions, Clauses, Terms and Conditions – Small Purchases.
- (2) Notice of rejection of defective services must be provided by the CO in writing, at which time the CO may require the contractor to perform the services again in conformity with the requirements at no increase in contract amount.

- (3) When the services are of such a nature that they cannot be corrected by re-performance, the CO may require the contractor to take necessary action to ensure that future performance conforms to contract requirements and reduce the contract price to reflect the reduced value of the services performed.
  - (4) If the services are of a nature that can be corrected by re-performance and the contractor fails to promptly perform the services again, the CO may, by contract or otherwise, obtain performance of the services and charge to the contractor any cost incurred by the judiciary that is directly related to the performance of such service or terminate the contract for default.
- (c) For either products or services, the choice of remedy — replacement or correction of products, re-performance of services, negotiation of a reduced price, or reprocurement from another source — is generally within the discretion of the CO. Where the rejected products or services constitute the majority of the contract's required deliveries, acquiring replacement products or re-performance of services should follow termination of the contract for default, which requires the PE's approval. For additional information about termination procedures, **see:** § 755 (Contract Termination).

### § 735.30.30 Minor Nonconformances

- (a) The CO may accept a nonconforming product or service when the nonconformance is minor. In such instances, when the savings realized by the contractor by not conforming does not exceed the administrative cost to the judiciary for processing a formal modification, the nonconformance may be accepted without consideration. For example, there may be no cost variance based on the color of a product, so the contractor realized no savings in delivering an incorrect color. The incorrect color may be either rejected or accepted, at the discretion of the CO, without requiring consideration for acceptance of the nonconformance. **See:** § 735.30.50 (Consideration for Acceptance of Defective Performance).
- (b) The CO will consult with technical personnel as necessary in making a determination to accept a minor nonconformance. Generally, a minor nonconformance does not adversely affect:
  - (1) safety;
  - (2) health;
  - (3) reliability;

- (4) durability;
- (5) performance;
- (6) interchangeability of parts or assemblies;
- (7) weight (if a contract requirement);
- (8) appearance (if a contract requirement); or
- (9) any other basic requirement of the contract.

**§ 735.30.40 Substantial Nonconformance**

The CO may not accept products or services whose nonconformance is substantial and adversely affects satisfaction of a basic contract requirement, unless acceptance is clearly in the judiciary's interest. The CO's determination to accept the products or services must be in writing and must be based on:

- (a) information on the nature and extent of the nonconformance;
- (b) advice of the technical activity that products or services are safe and will perform or meet the intended purpose;
- (c) the contractor's request for acceptance of the nonconforming products or service;
- (d) a recommendation for acceptance by the organization on whose behalf the products or services are being purchased (i.e., the end user), with supporting rationale; and
- (e) appropriate monetary or other consideration.

**§ 735.30.50 Consideration for Acceptance of Defective Performance**

- (a) COs must discourage the repeated delivery of nonconforming products or services, including those with only minor nonconformances.
- (b) In such cases, the CO must take appropriate action, such as rejection and documentation of the contractor's performance record or acceptance with consideration required from the contractor for the nonconformance.
- (c) A downward price adjustment is the most common form of consideration, though consideration may take many other forms, such as additional quantities of items, accelerated deliveries, etc.

- (d) In all instances where the savings realized by the contractor by a nonconforming delivery exceed the administrative cost to the judiciary for processing a formal modification, the nonconformance may not be accepted without consideration and the CO must modify the contract.

#### **§ 735.30.60 Notice of Rejection**

- (a) Contractors must be given prompt written notice of rejection, including the reasons for rejection when:
  - (1) the products or services have been rejected at a place other than the contractor's facility;
  - (2) the contractor persists in offering nonconforming products or services for acceptance; or
  - (3) delivery or performance was late without excusable cause.
- (b) A rejection notice does not extend the delivery period. The contractor is still required to provide products and services that conform to the contract's delivery schedule.
- (c) Products or services that are otherwise in compliance with the contract are nonconforming when they are late in delivery or performance, and consideration may be required for acceptance of a late delivery.

#### **§ 735.30.70 Contractor Response**

A contractor may respond to a notice of rejection by:

- (a) offering to correct the work;
- (b) offering to provide a downward price adjustment for acceptance;
- (c) offering to negotiate a revised delivery schedule for a conforming product with consideration; or
- (d) alleging the judiciary specifications were ambiguous or defective.

#### **§ 735.35 Acceptance**

##### **§ 735.35.10 Definition**

- (a) Acceptance constitutes acknowledgment that products or services conform with the quality, quantity, and packaging requirements provided in the contract.

- (b) The acceptance of products or services that do not conform with the contract requirements may only be performed by the CO and, if the non-conformance is significant, must be accompanied by a contract modification and negotiation of an equitable price reduction or other consideration from the contractor. **See:** § 735.30 (Nonconforming Products or Services).
- (c) Acceptance may take place at delivery or after delivery, depending on the contract's requirements.

#### **§ 735.35.20 Evidence of Acceptance**

Acceptance may be evidenced by execution of an acceptance certificate on an inspection form, receiving report, or commercial shipping document or packing list, or, in the case of services, by the COR's approval of the contractor's invoice. Electronic receiving reports may also be used.

#### **§ 735.40 Responsibility for Acceptance**

- (a) Product or service acceptance is the responsibility of the CO.
- (b) When this responsibility is delegated to a COR or another judiciary employee, acceptance by that person is binding on the judiciary.

#### **§ 735.45 Place of Acceptance**

- (a) Each contract must specify the time and place of acceptance. Contracts providing for judiciary inspection at source (i.e., contractor's place of business) ordinarily provide for acceptance at source.
- (b) Those providing for inspection at destination (i.e., judiciary's facilities) ordinarily provide for acceptance at destination.
- (c) Products accepted at a place other than destination may not be reinspected at destination for acceptance purposes. However, they must be examined at destination to confirm quantity and that there has been no damage in transit. Destination examination also includes ensuring that there has been no substitution or fraud following acceptance, which would invalidate such acceptance.

#### **§ 735.50 Express Warranties**

##### **§ 735.50.10 Definition**

An express warranty is a written promise or affirmation given by a contractor to the judiciary regarding the nature, usefulness, or conditions of the products or performance of services furnished under the contract.

**§ 735.50.20 Purpose**

- (a) Written warranties can limit the judiciary's risk when relying on the contractor's own inspection methods to ensure the quality of the work. For clauses and other requirements for inclusion of warranties, **see:** Guide, Vol. 14, § 220.20 (Warranties).
- (b) Express warranties are the contractor's way of assuring the judiciary that the product or service:
  - (1) is free from defects in workmanship, and
  - (2) will conform to the requirements of the contract.

**§ 735.50.30 Required Information**

Express warranties must:

- (a) state the duration of the warranty, and
- (b) specify a period during which notice of any defect must be given to the contractor.

**§ 735.50.40 Remedies Provided by Warranties**

The CO must accurately determine the contractor's responsibilities and the judiciary's rights under the terms and conditions of the warranty and must verify that the warranty does not erode nor limit any of the judiciary's rights conferred elsewhere in the contract. Warranties may provide alternate remedies such as:

- (a) repair the defect;
- (b) replace the item;
- (c) reperform the service;
- (d) make an equitable adjustment; or
- (e) pay for repairs, replacements, or reperformance when the judiciary has obtained the products or services from other sources.

**§ 735.55 Fraud, Gross Mistake, or Latent Defects****§ 735.55.10 In General**

The judiciary's acceptance of contractor products and services is final unless:

- (a) the defect is latent;

- (b) it is proven in litigation in a court of law there was fraud involved; or
- (c) it is proven in litigation in a court of law there was a gross mistake amounting to fraud.

**Note:** Any situation involving suspected fraud or gross mistake amounting to fraud must be referred to the PE for review and appropriate action.

#### **§ 735.55.20 Latent Defect**

For a defect to be latent it must:

- (a) not be susceptible to discovery using inspection methods that are reasonable under the circumstances, and
- (b) be in existence at the time of acceptance.

#### **§ 735.55.30 Proving Fraud or Gross Mistake Amounting to Fraud**

- (a) The only difference between fraud and gross mistake is intent.
- (b) To prove a gross mistake, the judiciary need only prove that the mistake was truly irresponsible.
- (c) Proving fraud requires a showing that the misrepresentation or concealment of fact was made with the intent to mislead.

#### **§ 735.55.40 Evidence of Fraud**

To prove fraud, the judiciary must show evidence of:

- (a) a misrepresentation of fact (actual or implied), or a concealment of material fact;
- (b) contractor knowledge of the fact concealed or misrepresented;
- (c) an intent to mislead the judiciary into relying on its misrepresentation or concealment; and
- (d) judiciary injury suffered as a result of the concealment or misrepresentation.

#### **§ 735.55.50 Remedies if Fraud is Proven**

If fraud or gross mistake amounting to fraud is proven in a court of law, the contractor can be forced to repair or replace the product or reperform the service at its own cost any time after acceptance.

## **§ 735.60 Bankruptcy**

### **§ 735.60.10 In General**

Once a contractor declares bankruptcy, the right of the judiciary to take unilateral action with respect to the contractor is limited. COs need to monitor the financial strength of the contractor to anticipate possible problems that could arise in this area and take prompt action to protect the interests of the judiciary following notification of a contractor's bankruptcy.

### **§ 735.60.20 Procedures**

Following notification that a contractor is in bankruptcy proceedings, the CO must:

- (a) furnish the notice of bankruptcy to PMD with a copy to the Procurement Liaison Officer (PLO);
- (b) determine the amount of any claims that the judiciary may have against the contractor on any contracts that have not been closed out;
- (c) take actions necessary to protect the judiciary's financial interests;
- (d) safeguard judiciary property; and
- (e) furnish pertinent contract information to the PE.

### **§ 735.60.30 Consultation with Office of the General Counsel**

The PE will consult with OGC as necessary before taking any action regarding the contractor's bankruptcy proceedings.

### **§ 735.60.40 Clause**

Clause 7-110, Bankruptcy must be included in all solicitations and contracts exceeding the judiciary's small purchase threshold.

## **§ 740 Payments**

### **§ 740.10 In General**

#### **§ 740.10.10 Payment Categories**

Payments fall into two general categories:

- (a) Delivery Payment

A payment made once delivery has been made and the product or service has been accepted;

(b) Partial Payment

A partial payment is a method of payment based on acceptance of a particular individually priced portion of the contract deliverables.

**§ 740.10.20 Partial Payments**

- (a) A partial payment is any payment for accepted products or services that are only a part of the total requirement (e.g., payment for delivery of less than the full quantity of computers ordered, or for completion of one month of 12 in a fixed price service contract). Contractors may be paid for partial delivery of products or performance of services unless the contract specifically prohibits partial payments. Partial payment is a method of payment, not a method of contract financing. Partial payments can assist contractors to participate in judiciary contracts with minimal or no contract financing. For contract financing, **see**: Guide, Vol. 14, § 220.55 (Contract Financing).
- (b) When delivery or performance is authorized in installments or when a number of items of work are called for by the contract, partial payment of a portion of the price may be made for the items delivered or performed and accepted.
- (c) In firm-fixed-price contracts, the pricing section of the contract establishes unit prices for each ordered product or service, and payment may be made for any product or services listed in the pricing section that has been delivered and accepted. However, contracts should generally not authorize payment more often than monthly.
- (d) A payment should reflect the complete value of the product or service accepted, so that if the contract is terminated the CO will know the value of the payments for finished work, as well as the value of the terminated work.
- (e) Contracts should not authorize contractors to invoice partial performance based on the contractor's expenditures, since this may or may not reflect the value of the partial delivery. For example, the contractor may have underestimated the labor required for performance and incur expenditures of 50 percent of the contract price when only 25 percent of the contract work has been performed.

**§ 740.10.30 Advance or Pre-payments**

The judiciary has limited authority to make advance or pre-payments. In addition to commercial advance payment, the judiciary may make payment in advance for the purchase of publications, when making payment to other federal agencies, and when paying state and local governments, where these entities are furnishing products or services that are reasonably available only from the state/local government organization. **See:** Guide, Vol. 14, § 550 (Interagency Agreements, MOAs, and MOUs) and Guide, Vol. 14, § 220.55 (Contract Financing).

**§ 740.10.40 Nonpayment or Payment Delays**

Nonpayment and delays in payment have harmful effects on contractors, especially small businesses. COs and financial personnel must ensure that payments legitimately due are made promptly. If a dispute arises regarding the contractor's entitlement to payment, the CO must pay the contractor any amount not in dispute, except for withholding as allowed under § 740.40 (Withholding Payments).

**§ 740.10.50 Approving Partial Payments**

If partial payments are specified in the payment provisions of the contract, the CO will generally approve requests for partial payment following partial delivery of products or services that fulfill contract requirements. When the contract does not provide unit prices, the CO may determine an appropriate formula for payment.

**§ 740.10.60 Payment Under Cost-Reimbursement Contracts**

Requests for payment under cost-reimbursement type contracts must be reviewed and approved for payment by the CO, with the assistance of technical personnel, to determine that such requests comply with the requirements for allowability, allocability, and reasonableness. **See:** Guide, Vol. 14, § 470 (Cost Allowability).

**§ 740.20 Invoices****§ 740.20.10 In General**

Payment will be made only after receipt of an invoice that complies with the applicable Invoices clause of the contract.

**§ 740.20.20 Submission**

Invoices must be sent to the invoice address specified in the contract. A copy is sent to the CO, if required by the contract. Invoices sent to any other person or office are not considered properly submitted.

### **§ 740.20.30 Clause**

Include Clause 7-125, Invoices in all solicitations and contracts unless another “Invoices” clause is appropriate. The CO will include a schedule of payments in the contract whenever payment is not on a unit price basis (e.g., completion of milestones). For experts and consultant services solicitations and contracts, include the clause with its Alternate I.

### **§ 740.30 Payment**

#### **§ 740.30.10 Means of Payment**

- (a) Payment may be made by check or electronic funds transfer (EFT) (if available). Use of an online payment platform (e.g., PayPal, Venmo) for making contract payments is not authorized.
- (b) An exception may be made where there is only one source of a needed product or service that will not accept payment by any method except the online payment platform. In such cases, the file must be thoroughly documented to show the efforts made to reach agreement with the contractor to pay by other methods before resorting to the online payment platform. Payments made using this method may not exceed the purchase cardholder’s single-purchase limit.

#### **§ 740.30.20 Time of Payment**

As a matter of judiciary policy, payment must be made as close as possible to, but not later than, the 30<sup>th</sup> calendar day after receipt of an invoice or product/service acceptance, whichever occurs later.

#### **§ 740.30.30 Payment of Interest**

The Prompt Payment Act of 1982 is not applicable to the judiciary. Include Clause 7-130, Interest (Prompt Payment) in all solicitations and contracts.

#### **§ 740.30.40 Final Payment**

- (a) Final payment may be made after acceptance of all products or services covered by the contract.
- (b) However, final payment may not be made under any contract involving retainage (e.g., liquidated damages, or withholding pending final audit under certain contracts), or under any contract involving payment or performance guarantees, until the CO receives a release of claims from the contractor discharging the judiciary from any further obligations under the contract.

- (c) Contract closeout may not be finalized until all delivery and payment issues are settled.

<b>§ 740.30.50 Clauses</b>	
<b>Clause</b>	<b>Include in ...</b>
(a) Clause 7-135, Payments	solicitations and contracts for fixed-price products or services, unless another “Payments” clause is appropriate (e.g., Clause 5-1, Payments under Personal and Professional Services Contracts). When the CO uses a “Payments” clause and an “Inspection” clause is not included in the contract, then payment signifies acceptance.
(b) Clause 7-140, Discounts for Prompt Payment	solicitations and contracts for fixed-price products or services
(c) Clause 7-145, Government Purchase Card	solicitations and contracts when the CO determines that a purchase card can be used to make payments on the contract
(d) Clause 7-150, Extras	solicitations and contracts for fixed-price products, services, or transportation
(e) Clause 7-155, Certification of Final Indirect Costs	solicitations and contracts that provide for establishment of final indirect cost rates

## **§ 740.40 Withholding Payments**

### **§ 740.40.10 In General**

The CO may refuse to pay a contractor, may suspend payments until resolution of an issue, may disallow a cost, or may withhold payments otherwise due, in whole or in part, when:

- (a) the contract provides for withholding, such as for cost-plus-fixed-fee or incentive fee contracts when retainage is authorized according to the applicable fee clause;
- (b) the CO determines that elements of the amount invoiced by the contractor under a cost-reimbursement contract are not allowable (**see:** Guide, Vol. 14, § 470.10 (Determining Cost Allowability)), allocable (**see:** § 470.30 (Determining Allocability)), or reasonable (**see:** § 470.20 (Determining Reasonableness));
- (c) the contractor has been overpaid or otherwise owes the judiciary money as a result of the contractor's actions or inactions under the contract;

- (d) the contractor owes the judiciary money for reasons unrelated to the contract under which payment will be withheld; or
- (e) as a result of judicial action or applicable law, parties other than the contractor have made claims against the judiciary, or have not waived rights exercisable against the judiciary. Any time a CO receives a claim from a third party for compensation otherwise due a contractor, the PE must be notified immediately.

#### **§ 740.40.20 Impact of Withholding Payment**

Nonpayment may be damaging to a contractor's business and may jeopardize performance. Therefore, the CO must carefully consider the reasons for withholding or refusing payment and process disputes regarding payment expeditiously.

#### **§ 740.40.30 Notice to Contractor**

- (a) The CO must notify the contractor of any intended withholding or of the CO's intent to disallow specified costs incurred or planned under a cost-reimbursement or fixed-price incentive contract.
- (b) However, before issuing the notice, the CO must make a reasonable effort to reach a satisfactory settlement through discussions with the contractor and must provide an opportunity for the contractor to respond.
- (c) If time permits, notice must be in writing.

#### **§ 740.40.40 Contractor Response**

If the contractor disagrees with the deduction from current payments, the contractor may:

- (a) request in writing that the CO reconsider the deduction; and/or
- (b) file a claim under Clause 7-235, Disputes.

#### **§ 740.40.50 Withholding Under Different Clauses**

Some contract clauses, such as Clause 2-75, Liquidated Damages, provide for withholding payment in certain circumstances. In addition, some clauses provide for withholding a percentage or portion of payments otherwise due to induce continued acceptable performance. The CO must strictly enforce such clauses and maintain a complete record of the amounts withheld under any clause, the basis for withholding, and the disposition of funds withheld.

<b>§ 740.40.50 Clauses</b>	
<b>Clause</b>	<b>Include in ...</b>
(a) Clause 7-160, Limitation on Withholding of Payments	solicitations and contracts for products or services whenever the contract specifies two or more circumstances authorizing the temporary withholding of amounts otherwise payable to the contractor for products delivered or services performed
(b) Clause 7-165, Penalties for Unallowable Costs	all solicitations and contracts over \$500,000, except fixed-price contracts without cost incentives
(c) Clause 7-170, Notice of Intent to Disallow Costs	solicitations and contracts when a cost-reimbursement contract or a fixed-price incentive contract is contemplated

## **§ 740.50 Assignment of Claims**

### **§ 740.50.10 In General**

A contractor may assign monies coming due under a judiciary contract to a bank, trust company or other financial institution with the written approval of the CO. Any other attempted assignment may be treated as a breach of contract.

### **§ 740.50.20 Approval**

COs may approve in writing any authorized assignment that does not jeopardize contract performance.

### **§ 740.50.30 Assignments by Law**

This part does not govern assignments ordered by a court or by operation of law. COs must notify the PE, who will consult with OGC, in such cases.

<b>§ 740.50.40 Clauses</b>	
<b>Clause</b>	<b>Include in ...</b>
(a) Clause 7-175, Assignment of Claims	solicitations and contracts expected to exceed the judiciary's small purchase threshold unless the contract will prohibit the assignment of claims
(b) Clause 7-180, Prohibition of Assignment of Claims	solicitations and contracts for which a determination has been made that the prohibition of assignment of claims is in the judiciary's interest

### **§ 740.50.50 Assignments**

- (a) Assignments by corporations must be:

- (1) executed by an authorized representative;
  - (2) attested by the secretary or the assistant secretary of the corporation; and
  - (3) impressed with the corporate seal or accompanied by a true copy of the resolution of the corporation's board of directors authorizing the signing representative to execute the assignment.
- (b) Assignment by a partnership may be signed by one partner, if the assignment is accompanied by adequate evidence that the signer is a general partner of the partnership and is authorized to execute assignments on behalf of the partnership.
- (c) Assignments by an individual must be signed by that individual and the signature acknowledged before a notary public or other person authorized to administer oaths.

#### **§ 740.50.60 Filing**

- (a) The assignee must file the notice of assignment and copy of the instrument of assignment with:
- (1) the CO; and
  - (2) the surety on any bond applicable to the contract.
- (b) The assignee must forward to each party specified above an original and three copies of the notice of assignment together with one true copy of the instrument of assignment. The true copy must be a certified duplicate or photostat copy of the original assignment. The CO must provide a copy of the notice of assignment to the payment office.

#### **§ 740.50.70 Format for Notice of Assignment**

Appx. 7A (Sample Notice of Assignment) is a suggested format for use by an assignee in providing the notice of assignment.

### **§ 745 Contract Modifications**

#### **§ 745.10 Policy**

##### **§ 745.10.10 In General**

Only COs are authorized to sign contract modifications on behalf of the judiciary. Other judiciary personnel may not:

- (a) sign contract modifications;
- (b) act in such a manner as to cause the contractor to believe that they have authority to bind the judiciary;
- (c) direct or encourage the contractor to perform work that must be the subject of a contract modification but has not yet been executed; or
- (d) accept products and/or services that are in any way dependent on a contract modification that has not been executed.

#### **§ 745.10.20 Pricing of Contract Modifications**

- (a) Contract modifications, including changes that may be issued unilaterally, will be priced before their execution, if doing so can be done without adversely affecting the interest of the judiciary.
- (b) If a significant price increase could result from a contract modification and time does not permit negotiation of a definitive price, at least a maximum cost ceiling must be established in the modification.
- (c) For additional guidance on analyzing contractor requests for price adjustments, **see:** § 745.45 (Equitable Adjustments).

#### **§ 745.10.30 Unpriced Contract Modifications**

If an unpriced contract modification is issued (e.g., a unilateral change order under Clause 7-185, Changes), the CO must justify, in writing, the reasons for the issuance of the unpriced modification.

#### **§ 745.10.40 Funds Availability**

The CO cannot execute a contract modification, including a change order, if doing so will cause an increase in the funding level of the contract without having first ensured that sufficient funds are available in the judiciary's financial system of record. **See also:** § 745.25 (Availability of Funds). The CO may not perform any related reprogramming of funds that must be done in the financial system. **See also:** Guide, Vol. 11, § 320 (Separation of Duties).

#### **§ 745.10.50 Modifications**

Modifications may be:

- (a) initiated by either party;
- (b) bilateral within scope changes;

- (c) a unilateral change (such as an administrative change of the accounting and appropriation data, or a change under Clause 7-185, Changes);
- (d) new work within the scope of the contract; or
- (e) new work outside the scope of the contract (although this requires either competition or a justification for other than full and open competition (**see**: Guide, Vol. 14, § 335 (Justifications and Approvals for Limiting Competition))).

### **§ 745.10.60 Contractor-Requested Modifications**

The contractor may request a contract modification. Examples of reasons for a contractor-requested change include:

- (a) adjustments to the contract based on circumstances or events beyond the contractor's control (e.g., excusable delay, stop work order issued, constructive change, settlement for contract termination for convenience);
- (b) adjustments due to action by the contractor (e.g., name changed, consideration offered for nonexcusable delay, novation agreement); and
- (c) adjustments required by or authorized by the terms of the contract (e.g., economic price adjustment, price redeterminations, Department of Labor wage rate increases for an exercised option).

**Note:** Any contractor request for a price increase must have some legal basis for the requested increase, especially when the contract is firm-fixed-price. A mere notification from the contractor after award that a mistake was made in the price is generally not sufficient legal basis for agreeing to a requested increase.

### **§ 745.10.70 Submission of Modification Requests**

Contractor requests for modification must provide all necessary documentation as required by the CO. The CO will review the request and related documentation, and either process a modification or make a determination that the change is not warranted.

## **§ 745.15 Types of Modifications**

### **§ 745.15.10 Bilateral Modification**

- (a) A bilateral modification (also known as a supplemental agreement) is a modification that is signed by both the contractor and the CO and is the preferred type of modification for accomplishing changes. The contractor should always be asked to execute the modification first, with the CO signature being second. Most supplemental agreements involve negotiation of price and other terms, usually relating to tasks that are

similar to the award of the basic contract. A bilateral agreement is used when:

- (1) the change has an effect on the substantive rights of either party;
  - (2) there is sufficient time to negotiate a supplemental agreement; or
  - (3) there is no basis in the contract's terms for issuing a unilateral modification.
- (b) Bilateral modifications are used to:
- (1) incorporate changes to the contract made under Clause 7-185, Changes;
  - (2) incorporate negotiated equitable adjustments resulting from the issuance of a unilateral change order;
  - (3) reflect other agreements of the parties that modify the original contract terms;
  - (4) definitize a letter contract;
  - (5) approve changes required by or authorized by the contract, such as economic price adjustments;
  - (6) incorporate novation agreements where the judiciary is the responsible agency (**see:** § 745.55 (Novation and Change of Name Agreements));
  - (7) incorporate name-change agreements where the judiciary is the responsible agency (**see:** § 745.55 (Novation and Change of Name Agreements)); or
  - (8) recognize when a sole proprietor originally doing business under a social security number (SSN) changes to a sole proprietor doing business under an Employer Identification Number (EIN).

#### **§ 745.15.20 Unilateral Modification**

- (a) A unilateral modification is a modification that is signed only by the CO as permitted within the operation of an existing contract clause. Unilateral modifications are of three basic types:
- (1) Administrative Changes

These are changes that are minor in nature and do not materially affect contract performance or the substantive rights of the parties. Examples include:

- (A) correcting a fund citation;
- (B) adding a zip code on a delivery address;
- (C) designating a change in COR or other contract administrators;
- (D) recognizing a novation agreement executed by another agency on behalf of the government (**see:** § 745.55 (Novation and Change of Name Agreements)); and
- (E) recognizing name-change agreements executed by another agency on behalf of the government (**see:** § 745.55 (Novation and Change of Name Agreements)).

(2) Change Orders

The term “change order” refers to the actual issuance of a change authorized by Clause 7-185, Changes, usually as a unilateral modification. It directs the contractor to make a change, without the contractor’s earlier consent, within the general scope of the contract. **See:** § 745.20.20 (Determination of “Within Scope”). Clause 7-185, Changes, authorizes the CO to change the following things in this manner:

- (A) drawings, designs, or specifications, when the products to be furnished are to be specially manufactured for the judiciary according to the drawings, designs, or specifications;
- (B) method of shipment or packing;
- (C) place of delivery (e.g., changing the delivery address from one state to another);
- (D) statement of work or description of services to be performed;
- (E) delivery or performance schedule with regard to time (i.e., hours of day, days of the week, etc), or place of performance of services; and
- (F) judiciary-furnished property.

**Note:** A change order is the least preferred method of changing a contract. A supplemental agreement is the preferred method. **See:** § 745.15.10 (Bilateral Modification). The Changes clause is cited as the authority for the modification in Block 13.A of the Standard Form (SF) 30 (Amendment of Solicitation/Modification of Contract). Change orders may be used only when there is not enough time to negotiate with the contractor and/or the change must be put into effect immediately. Clause 7-185, Changes requires that the contractor assert its right to an equitable adjustment within 30 days after receipt of a change order. **See:** § 745.40 (Changes) and § 745.45 (Equitable Adjustments).

(3) Changes Authorized by Other Contract Clauses

Although these are not termed change orders, unilateral modifications may be issued under other contract clauses. Examples are the issuance of a stop work order or termination notice, obligation of additional funding for a contract that is being funded incrementally, or exercise of an option. Clause 7-185, Changes, only authorizes change orders within the scope of the contract and within the conditions specified in the clause. For additional information on contract modifications in general, **see:** § 745.20.10 (In General) and § 745.40 (Changes).

(b) The CO will issue a unilateral modification when:

- (1) the change has no effect on the substantive rights of the contractor or the judiciary;
- (2) the change can be made unilaterally under a specific contract term (e.g., Stop Work, Termination or Option clauses);
- (3) the contractor's agreement with the change is not required; or
- (4) in the case of a change order, the time required to negotiate a bilateral agreement would cause a delay that would adversely affect the judiciary's interest.

## § 745.20 Notification of Contract Changes

### § 745.20.10 In General

Under the "Changes" clause, when a contractor considers that any written or oral order (including direction, interpretation, instruction, or determination) from the CO, or another

judiciary representative, constitutes a change in the contract, the contractor must notify the CO in writing that the contractor regards the order as a change order. The CO must then evaluate the order and:

- (a) confirm that it is a change, in which case the CO will also:
  - (1) direct the mode of further delivery or performance,
  - (2) plan for its funding, and
  - (3) issue a formal change order;
- (b) countermand the alleged change; or
- (c) notify the contractor that no change is considered to have been ordered.

#### **§ 745.20.20 Determination of “Within Scope”**

- (a) Before issuing any contract modification, the CO must determine whether the contract change, initiated by either the judiciary or the contractor, is “within the scope” of the contract. A “within scope” change does not materially change the contract. The types of factors examined when determining whether a modification is “within scope” include:
  - (1) whether there is a change to the type of work required;
  - (2) whether there is a major cost impact to make the change;
  - (3) whether the change impacts the period of performance, and the length of the extension period relative to the original period of performance; and
  - (4) whether the solicitation for the original contract adequately advised offerors of the potential for the type of changes found in the modification, and thus whether the modification would have materially changed the field of competition.
- (b) Another way of analyzing whether a change is within scope is to ask the following questions. If all these questions can be answered in the affirmative, the change can be considered within scope.
  - (1) Is the changed work within what both parties would have reasonably contemplated at the time of award? For example, at the time of award, parties would likely contemplate a change to a component in a courtroom technology upgrade involving many components; however, parties would not reasonably contemplate

adding an upgrade to another courtroom not identified in the solicitation.

- (2) Is the changed work essentially the same as the original agreement?
- (3) Is the nature of the requirement altered by the change?
- (4) Would this type of change normally be expected for this kind of requirement? For example, more changes would be expected for complex requirements, such as development of a software system such as the Jury Management System than would be expected for a requirement for copier maintenance.

### **§ 745.20.30 Out of Scope Changes**

If the CO determines that the contemplated action is not in scope, the change must be regarded as a cardinal change, i.e., new work (possibly subject to further competition). The contractor is not obligated to perform work that constitutes a cardinal change. **See:** § 745.40.30 (Contractor's Obligation to Perform).

### **§ 745.25 Availability of Funds**

#### **§ 745.25.10 In General**

The CO may not execute a modification that causes or will cause an increase in required funds without first ensuring that funds are available in the judiciary's financial system of record, except for modifications to contracts that:

- (a) are conditioned on availability of funds, or
- (b) contain a limitation of cost or funds clause.

**See also:** § 745.10.40 (Funds Availability) and Guide, Vol. 11, § 320 (Separation of Duties).

### **§ 745.30 Exercise of Options**

#### **§ 745.30.10 In General**

- (a) Options provide the judiciary with firm prices for additional quantities or periods of performance. Depending on the terms of the solicitation leading to the contract, certain options may only be exercised at the time of contract award. For example, additional items of furniture identified in a solicitation as optional, to be awarded depending on available funds at the time of award. For additional information on options exercised at the time of award, **see:** Guide, Vol. 14, § 220.40 (Options).

Examples of options that may be exercised after award include:

- (1) options for additional periods of performance for service contracts;
  - (2) options to extend the ordering period for indefinite contracts (**see:** Guide, Vol. 14, § 410.30 (Indefinite-Delivery Contracts)); and
  - (3) options for additional work, such as adding another courtroom to a courtroom technology contract.
- (b) The judiciary is under no legal obligation to exercise an option and the contractor has no recourse against the judiciary when an option is not exercised. Options may be exercised by issuance of a unilateral modification, i.e., without the contractor's signature, but only if the option is exercised exactly consistent with the terms of the contract.

#### **§ 745.30.20 Notice Requirement**

- (a) The option clause to extend service contracts or indefinite delivery ordering contracts requires that the CO provide advance notification of the judiciary's intent to exercise an option no later than a specified time, usually 60 days before the current period of performance expires.
- (b) In the event that the CO fails to provide the notice of intent by the specified time, the judiciary forfeits its right to exercise the option without the contractor's agreement or signature on the modification. The notice requirement is for the benefit of the contractor, and may be waived by the contractor either expressly or by its conduct in performing in response to a unilateral option exercise. However, it is recommended that the CO obtain the contractor's signature on the modification if the notice was late.
- (c) The notification of intent does not bind the judiciary to exercise the option.
- (d) In addition to the required time for providing the advance notice of intent to exercise an option, every option clause must state a "no later than" time by which the judiciary must exercise the option.

#### **§ 745.30.30 Exercising Options**

Options must be exercised exactly as they are stated in the contract. The CO may not change quantities, for instance, unless the option itself authorizes the specific change. Changes to a Statement of Work also cannot be combined with the unilateral exercise of an option. Unilateral exercise of an option is considered to be a best practice, where the CO has provided the advance notice in a timely manner and issues the modification exercising the option within the required time frame.

#### **§ 745.30.40 Written Determinations**

Before exercising an option, the CO must sign and place a written determination in the official contract file. This written determination must show that:

- (a) the judiciary has a need for the products or services covered by the option;
- (b) exercise of the option is the most advantageous alternative, price and other factors considered (e.g., a need for continuity of operations and potential costs to the judiciary of disrupting operations);
- (c) the option exercise complies with the terms of the contract;
- (d) funds are available (or will be available); and
- (e) the contractor remains a responsible source (**see:** Guide, Vol. 14, § 320 (Contractor Qualifications)).

#### **§ 745.30.50 Reviewing Option Prices**

A determination that the option price is fair and reasonable must be based on one of the following:

- (a) an informal investigation of prices, or other examination of the market, indicates that the option pricing is more advantageous than market prices;
- (b) the time between the award of the contract containing the option and the exercise of the option is so short that it indicates the option price is the lowest price obtainable under the conditions. The CO may take into consideration such factors as market stability and a comparison of the time since award with the usual duration of contracts for such products and services; or
- (c) a new solicitation fails to produce a better price than that offered by the option.

#### **§ 745.30.60 Economic Price Adjustments**

If the contract provides for economic price adjustment, the effect of such adjustment on prices under the option must be determined when considering whether or not to exercise the option.

#### **§ 745.30.70 Option Procedures**

When an option is to be exercised, the CO must:

- (a) make a written determination that the option may properly be exercised according to the availability of funds (**see:** § 745.25 (Availability of Funds));
- (b) give written advance notification of intent to the contractor within the time period specified in the contract; and
- (c) give the contractor written notification of the exercise of the option by executing a modification, citing the option clause as authority for the modification.

## **§ 745.35 Correction of Mistakes**

### **§ 745.35.10 In General**

A contract may be modified to correct or mitigate the effect of a mistake such as the following:

- (a) a mistake, ambiguity, or unclear expression in a written contract of the contract terms as both parties understood them;
- (b) a contractor's mistake so obvious that it was or must have been apparent to the CO; and
- (c) a mutual mistake as to a material fact.

### **§ 745.35.20 Procedure**

A claim of mistake asserted by the contractor after award is a claim subject to the procedures of Clause 7-235, Disputes. A decision by the CO to deny, in whole or in part, a claim of mistake asserted after award is a final decision under the clause.

## **§ 745.40 Changes**

### **§ 745.40.10 In General**

The “Changes” clause permits the CO to make unilateral changes, as specified in the clause, within the general scope of the contract. These changes are accomplished by issuing written change orders. **See also:** § 745.15.20(a)(2) (Change Orders).

### **§ 745.40.20 Constructive Change**

A constructive change is an implied change. It occurs when judiciary officials, who are not appointed as a CO, change the contract via verbal or written action. Constructive changes are considered unauthorized commitments. If the unauthorized commitment is ratified, the CO may issue a modification to the contract confirming the change and making an appropriate equitable adjustment.

For procedures concerning ratifying unauthorized acts, **see:** Guide, Vol. 14, § 160 (Ratification).

**§ 745.40.30 Contractor’s Obligation to Perform**

Under a change order issued by the CO under Clause 7-185, Changes, the contractor must continue performance of the contract as changed, except that in cost-reimbursement or incrementally-funded contracts the contractor is not obligated to continue performance or incur costs beyond the amount incrementally funded, or limits established in Clause 4-85, Limitation of Cost or Clause 4-90, Limitation of Funds.

<b>§ 745.40.40 Clauses</b>	
<b>Clause</b>	<b>Include in ...</b>
(a) Clause 7-185, Changes	all firm-fixed-price solicitations and contracts
(b) Clause 7-185, Changes Alternate I	all cost-reimbursement solicitations and contracts
(c) Clause 7-185, Changes Alternate II	all time-and-materials or labor-hour solicitations and contracts
(d) Clause 7-185, Changes Alternate III	all fixed-price architect-engineer contracts
(e) Clause 7-190, Change Order Accounting	solicitations and contracts for products of significant technical complexity if numerous changes are anticipated

**§ 745.45 Equitable Adjustments**

**§ 745.45.10 In General**

Change orders are not required to be priced before performance. They usually require two documents: the change order, and a supplemental agreement reflecting a resulting equitable adjustment.

- (a) If an equitable adjustment in the price or delivery terms, or both, can be agreed on in advance, only a supplemental agreement need be issued.
- (b) If the change order has no effect on price or delivery, no equitable adjustment is needed and there will be no related supplemental agreement.
- (c) Administrative changes (such as a change in an accounting citation) and changes issued under a clause giving the judiciary a unilateral right to make a change (such as an option clause) require only one document, signed only by the CO.

**§ 745.45.15 Judiciary Policy**

COs must promptly negotiate equitable adjustments resulting from change orders and follow up when claims for equitable adjustment are not received within 30 days after issuance of any change order.

**§ 745.45.20 Price and/or Cost Analysis**

Before negotiating an equitable adjustment, the CO must ensure that a price and/or cost analysis, as appropriate, is accomplished to also consider the contractor's segregable costs of the change. **See also:** Guide, Vol. 14, § 440 (Price Analysis) and § 450 (Cost Analysis). If additional funds are required as a result of the change, the funds must be available before the supplemental agreement accomplishing the equitable adjustment is executed. In fixed-price contracts, analysis should include ensuring that the proposed equitable adjustment does not include recovery of overruns on the original work that the contractor is not entitled to recover.

**§ 745.45.25 Settlement of Change Orders**

To avoid controversies that may arise after a supplemental agreement making an equitable adjustment, the CO must ensure:

- (a) that all elements of the equitable adjustment have been presented and resolved, and
- (b) a release of claims is included in the supplemental agreement, similar to the following, stating sufficient information to identify the specific proposals and any exceptions to the settlement. If it is not possible to resolve all issues, the CO should add the statement "This release is final except for \_\_\_\_\_." and list the specific issues that could not be resolved and are excepted from the release.

Contractor's Statement of Release

In consideration of the modification(s) agreed to herein as complete equitable adjustments for the Contractor's "proposal(s) for adjustment" dated \_\_\_\_\_, subject \_\_\_\_\_, the Contractor hereby releases the Government from any and all liability under this contract for further equitable adjustments attributable to such facts or circumstances giving rise to the "proposal(s) for adjustment."

**§ 745.45.30 Equitable Adjustments for Delays**

- (a) The contractor bears the risk of schedule and cost effects for delays it causes or for delays within its control.

- (b) Generally, the contractor is excused from nonperformance due to delays caused by factors for which neither the contractor nor the judiciary is responsible.
- (c) However, the contractor must bear the cost impact of such delays.
- (d) The judiciary is responsible for the schedule and cost effects of delays it causes, delays that are under its control, or delays for which it has agreed to compensate the contractor.

#### **§ 745.45.35 Excusable Delays**

- (a) A contractor may be granted an extension of the delivery or performance schedule for an excusable delay.
- (b) A contractor's failure to perform may be considered due to an excusable delay when it arises out of either of the following types of causes:
  - (1) causes beyond the control and without the negligence of the contractor, including:
    - acts of God or of the public enemy;
    - acts of the judiciary in its sovereign capacity or its contractual capacity; and
    - fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, or unusually severe weather; or
  - (2) a subcontractor default due to causes beyond the control and without the fault or negligence of both the contractor and the subcontractor, unless the products or services were obtainable from other sources in time to permit the contractor to meet the delivery schedule.

#### **§ 745.45.40 Compensable Delays**

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

- (a) delay in issuing a notice to proceed;
- (b) delay in availability of the site;

- (c) differing site conditions;
- (d) actual or constructive changes or delays;
- (e) delay in providing funding;
- (f) delay in inspections;
- (g) delay in issuing changes;
- (h) delay in providing judiciary-furnished equipment; and
- (i) failure of performance of other judiciary contractors.

**§ 745.45.45 Contractor’s Burden of Proof**

The contractor has the burden of proof in establishing the basis for the equitable adjustment to which it is entitled as compensation for the delay, both in terms of a price increase and in terms of a revised delivery date.

**§ 745.45.50 Concurrent Causes**

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

<b>§ 745.45.55 Clauses</b>	
<b>Clause</b>	<b>Include in ...</b>
(a) Clause 7-195, Excusable Delays	all solicitations and contracts for products and services, when using a cost-reimbursement contract, time-and-materials contract or labor-hour contract
(b) Clause 7-200, Judiciary Delay of Work	solicitations and contracts for products. The clause may also be used in solicitations and contracts for fixed-price services
(c) Clause 7-205, Payment for Judiciary Holidays	all solicitations and contracts when awarding a time-and-materials or labor-hour contract
(d) Clause 7-210, Payment for Emergency Closures	all solicitations and contracts

## **§ 745.50 Acceleration of Performance**

### **§ 745.50.10 In General**

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

### **§ 745.50.20 Documentation**

COs must document the specific facts that require acceleration of performance and the estimated impact on price. Whenever possible, the CO must negotiate acceleration actions as supplemental agreements rather than by issuance of change orders.

### **§ 745.50.30 Constructive Acceleration**

COs must be alert to constructive acceleration situations. Constructive acceleration occurs when the judiciary does not agree to a delivery or performance schedule extension to which the contractor is entitled, or is later determined to be entitled. This has the effect of causing the contractor to accelerate performance. Such acceleration may form the basis for a claim against the judiciary for an increase in price.

## **§ 745.55 Novation and Change of Name Agreements**

### **§ 745.55.10 Policy**

- (a) The government, including the judiciary, generally prohibits the transfer of government contracts from the contractor to a third party by contract novation. However, when it is in its interest, the government may recognize a third party as the successor in interest when the third party's interest arises out of the transfer of:
  - (1) all the contractor's assets, or
  - (2) the entire portion of the assets involved in performing the contract.
- (b) If the judiciary agrees to recognize a successor in interest, the procedures of this chapter must be followed to ensure that payments are made to the proper party. Failure to follow the procedures at § 745.55.20 (Recognizing Novation/Change of Name Executed by Another Agency) or § 745.55.30 (Procedures When Judiciary Is Responsible Contracting Officer), may result in making payment to the wrong party, for which the Certifying Officer may be personally liable. **See:** Guide, Vol. 13, § 1310.40(b) (Improper Payment).

- (c) Examples of situations in which novation may be permitted include, but are not limited to:
- (1) sale of the contractor's assets with a provision for assuming liabilities;
  - (2) transfer of assets as part of a merger or corporate consolidation; and
  - (3) incorporation of a sole proprietorship or partnership, or formation of a partnership.

**Note:** The decision of a sole proprietor to obtain a Employer Identification Number (EIN) from the IRS for business purposes instead of using a Social Security Number (SSN) is not considered to require a novation agreement, although it may require a change to the financial system's vendor table record, provided that the business entity remains a sole proprietorship.

- (d) Federal policy is that contractors should deal with a single contracting officer when executing novation and change-of-name agreements, who will execute them on behalf of all affected agencies. The specific agency responsible for processing and executing novation and change-of-name agreements for an individual contractor is determined as follows:
- (1) If administration of any of the contractor's affected contracts — regardless of awarding agency — has been assigned to an Administrative Contracting Officer (ACO), usually in an agency such as the Defense Contract Management Agency, that agency contracting office is responsible for executing novation and change-of-name agreements for the contractor.
  - (2) If none of the contractor's affected contracts have been assigned to an ACO, the contracting office responsible for the largest unsettled (unbilled plus billed but unpaid) dollar balance of contracts will be the responsible contracting office. This will often be an executive agency contracting office, rather than the judiciary CO.

#### **§ 745.55.20 Recognizing Novation/Change of Name Executed by Another Agency**

If, under § 745.55.10(b) (Policy), an executive agency is responsible for executing the novation or change of name agreement, the judiciary CO, following receipt of a copy of the executed agreement signed by the executive agency CO, will recognize such agreement by modification of the judiciary contract incorporating the agreement. This may be accomplished as an administrative change order issued with only the signature of the judiciary CO, and does not require review or approval by the PE.

**§ 745.55.30 Procedures When Judiciary Is Responsible Contracting Officer**

If, under § 745.55.10(b) (Policy), the judiciary CO is determined to be the responsible CO for executing a novation or change of name agreement with a specific contractor, then, following a request by that contractor for novation or change of name recognition, the CO will:

- (a) identify and request from the contractor the information necessary to evaluate the proposed agreement for recognizing a successor in interest or a name change (**see:** § 745.55.40 (Novation Agreements) and § 745.55.50 (Change of Name Agreements));
- (b) notify every other federal contract administration office and contracting office, including non-judiciary offices, affected by a proposed agreement for recognizing a successor in interest, and provide those offices with a list of all affected contracts;
- (c) request submission of any comments or objections to the proposed transfer within 30 days after notification; and
- (d) following receipt of all information above, the CO will determine whether it is in the Government's best interest to recognize the proposed successor in interest on the basis of:
  - (1) the comments received from the other affected federal agencies;
  - (2) the proposed successor's responsibility (**see:** Guide, Vol. 14, § 320.10 (Responsible Prospective Contractors)); and
  - (3) any factor relating to the proposed successor's performance of contracts with the Government that the Government determines would impair the proposed successors' ability to perform the contract satisfactorily.

**§ 745.55.40 Novation Agreements**

- (a) Any contractor's request for recognition of a successor in interest, must include three signed copies of the proposed novation agreement (**see:** Appx. 7B (Sample Novation Agreement)) and one copy each, as applicable, of the following:
  - (1) the document describing the proposed transaction, e.g., purchase/sale agreement or memorandum of understanding;
  - (2) a list of all affected contracts between the transferor and the Government, including non-judiciary contracts, as of the date of sale or transfer of assets, showing for each, as of that date, the:

- contract number and contract type,
  - name and address of the CO,
  - total dollar value, as amended, and
  - approximate remaining unpaid balance;
- (3) evidence of the transferee's capability to perform; and
- (4) any other relevant information requested by the CO.
- (b) Except as provided in § 745.55.40(c), the contractor must submit to the CO one copy of each of the following applicable documents as the documents become available:
- (1) an authenticated copy of the instrument effecting the transfer of assets; e.g., bill of sale, certificate of merger, contract, deed, agreement, or court decree;
  - (2) a certified copy of each resolution of the corporate parties' boards of directors authorizing the transfer of assets;
  - (3) a certified copy of the minutes of each corporate party's stockholder meeting necessary to approve the transfer of assets, or, if no minutes were kept, other certified documentation demonstrating the respective stockholder approval of such transfer;
  - (4) an authenticated copy of the transferee's certificate and articles of incorporation, if a corporation was formed for the purpose of receiving the assets involved in performing the judiciary contracts;
  - (5) the opinion of legal counsel for the transferor and transferee stating that the transfer was properly effected under applicable law and the effective date of transfer;
  - (6) balance sheets of the transferor and transferee as of the dates immediately before and after the transfer of assets, audited by independent accountants;
  - (7) evidence that any security clearance requirements have been met; and
  - (8) the consent of sureties on all contracts listed under § 745.55.40(a)(2) if bonds are required, or a statement from the transferor that none are required.
- (c) If the judiciary CO has acquired the documents listed under § 745.55.40(b) during participation in the pre-merger or pre-contract

review process, or the government's interests are adequately protected with an alternative formulation of the information, the CO may modify the list of documents to be submitted by the contractor.

- (d) When recognizing that a successor in interest to a government contract is consistent with the government's interest, the judiciary CO will execute a novation agreement with the transferor and the transferee. It will ordinarily provide in part that:
  - (1) the transferee assumes all the transferor's obligations under the contract;
  - (2) the transferor waives all rights under the contract against the judiciary;
  - (3) the transferor guarantees performance of the contract by the transferee (a satisfactory performance bond may be accepted instead of the guarantee); and
  - (4) nothing in the agreement will relieve the transferor or transferee from compliance with any federal law.
- (e) The CO will use the Novation Agreement format (**see:** Appx. 7B (Sample Novation Agreement)) when the transferor and transferee are corporations and all the transferor's assets are transferred. This format may be adapted to fit specific cases, such as when the transferor or transferee is not a corporate entity or not all the transferor's assets are transferred.
- (f) Before executing a contract novation as the responsible agency on behalf of the government, the CO must determine that the successor in interest is a responsible contractor (**see:** Guide, Vol. 14, § 320.10 (Responsible Prospective Contractors)) and obtain PE approval with OGC concurrence.

If, for any reason, it is determined not to be in the government's interest to concur in the transfer of a contract from one company to another company via a contract novation, the original contractor remains responsible for contract performance and the contract may be terminated for default should the original contractor fail to perform.

- (g) A novation agreement must be signed by:
  - (1) the contractor (transferor)
  - (2) the successor in interest (transferee), and
  - (3) the judiciary CO.

- (h) After execution by all three parties, the CO will:
  - (1) forward a fully signed copy of the executed novation or change of name agreement to both the transferor and the transferee;
  - (2) retain a fully signed copy in the contract file;
  - (3) prepare an SF 30 (Amendment of Solicitation/Modification of Contract), incorporating a summary of the agreement and attaching a complete list of contracts affected, including non-judiciary contracts;
  - (4) retain the original SF 30 with the attached list in the contract file;
  - (5) send a signed copy of the SF 30, with the attached list, to the transferor and the transferee; and
  - (6) send a copy of the signed SF 30, with attached list, to each other agency contracting office involved, which will be responsible for any further appropriate distribution.
- (i) Clause 7-215, Notification of Ownership Changes is included in all open market solicitations and contracts.

#### **§ 745.55.50 Change of Name Agreements**

- (a) If only a change of the contractor's name is involved and the government's and contractor's rights and obligations remain unaffected, the parties must execute an agreement to reflect the name change. For guidance on determining which federal contracting office is responsible for executing a change of name agreement for a specific contractor on behalf of the government, **see:** § 745.55.10(b) (Policy). If the judiciary is the responsible contracting office, the proposed change of name agreement must be reviewed by the PE, who will consult with OGC. The contractor must forward to the responsible contracting officer three signed copies of the proposed Change-of-Name Agreement, and one copy each of the following:
  - (1) the document effecting the name change, authenticated by a proper official of the state having jurisdiction;
  - (2) the opinion of the contractor's legal counsel stating that the change of name was properly effected under applicable law and showing the effective date; and
  - (3) a list of all affected contracts and purchase orders remaining unsettled between the contractor and the government, showing for

each the contract number and contract type, and name and address of the contracting office. If there is any question as to which federal contracting office is responsible for executing the agreement, the contracting officer may also request the total dollar value as modified and the remaining unpaid balance for each contract.

- (b) When the judiciary is the responsible contracting office, following approval by the PE and concurrence by OGC, the CO is responsible for:
- (1) processing and signing the change-of-name agreements (**see**: Appx. 7C (Sample Change of Name Agreement));
  - (2) processing and signing the contract modification specifying that the name has been changed using the following language; and  
  
“The purpose of this modification is to incorporate the attached Change-of-Name Agreement between the contractor and the government. This contract is modified by substituting the name (contractor’s previous name) for the name (contractor’s changed name) wherever it appears in the contract. All other terms and conditions remain unchanged.”
  - (3) distributing a copy of the executed change of name agreement to all other affected federal agencies that will be responsible for any further appropriate distribution.

## **§ 750 Claims and Disputes**

### **§ 750.10 Policy**

#### **§ 750.10.10 In General**

It is the policy of the judiciary to resolve contractual issues by mutual agreement at the level of the CO whenever possible. The CO must consider holding informal discussions to resolve differences before issuing a final decision on a claim.

#### **§ 750.10.20 Initiation of Contract Disputes**

A contract dispute is initiated by:

- (a) a written claim, demand or assertion by a contracting party for:
  - (1) the payment of money in a sum certain,
  - (2) the adjustment or interpretation of contract terms, or

- (3) other specific relief arising under or relating to the contract;
- (b) any termination for convenience settlement proposal that is denied in whole or in part; and
- (c) any request for an equitable adjustment that is denied in whole or in part.

### **§ 750.10.30 Submission of a Claim**

- (a) The contract claim must be submitted in writing to the CO and must be filed within 12 months of its accrual unless superseded by a different time period as specified in the contract's terms and conditions. The CO must document the contract file with evidence of the date of receipt of any submission that the CO deems to be a claim.
- (b) The claim must contain a detailed statement of the legal and factual basis of the claim with any accompanying documents to support the claim.
- (c) The claimant must specify the specific relief requested as provided above in § 750.10.20(a)-(c) (Initiation of Contract Disputes).
- (d) If the CO requires additional information the CO will promptly request the claimant to provide such information.
- (e) The contractor must proceed with performance of the contract pending resolution of the claim.

## **§ 750.20 Decisions and Appeal**

### **§ 750.20.10 CO Authority and Responsibility**

- (a) Judiciary COs are authorized to decide or settle disputes under the Disputes clause, within the limits of their COCP appointment. This authority does not extend to:
  - (1) A claim or dispute for penalties or forfeitures prescribed by statute or regulation that another federal agency is specifically authorized to administer, settle, or determine; or
  - (2) The settlement, compromise, payment, or adjustment of any claim involving potential fraud. **See:** § 735.55 (Fraud, Gross Mistake, or Latent Defects).
- (b) The CO must issue a written determination on any contractor claim against the judiciary within 60 days of receipt of all the requested information from the contractor.

- (c) If the CO is unable to render a determination within 60 days, the CO will notify the contractor of the date on which a determination will be made.
- (d) The claim may be denied when the CO determines that the contractor is unable to support any part of the claim and/or there is evidence that the inability is attributable to either misrepresentation of fact or potential fraud on the contractor's part. CO decisions to deny a claim, in whole or in part, must be coordinated with the PE, who will consult with OGC as to the legal basis of the claim and its denial.
- (e) The determination of the CO will be considered the final determination of the judiciary.

#### **§ 750.20.20 Issuance of CO Determination**

When a claim by or against a contractor cannot be resolved by agreement and a determination to deny or assert the claim, in whole or in part, under Clause 7-235, Disputes is necessary, the CO must:

- (a) review the facts pertinent to the claim;
- (b) obtain assistance from the PE, who will consult with OGC and other advisors; and
- (c) issue a final determination in writing.

#### **§ 750.20.30 Contents of Final Determination**

The final determination must include:

- (1) a description of the claim or dispute with references to the pertinent contract provisions;
- (2) a statement of the factual areas of agreement and disagreement;
- (3) a statement of the CO's determination with supporting rationale; and
- (4) the following paragraph:

This is the final determination of the contracting officer under the clause of your contract entitled Disputes. This determination may be appealed to a court of competent jurisdiction.

#### **§ 750.20.40 Evidence of Contractor Receipt**

The CO must furnish a copy of the determination to the contractor by:

- certified mail,
- return receipt requested, or
- another method that provides evidence of receipt.

#### **§ 750.20.50 Modification of Contract**

If the CO is able to resolve the claim through discussions and negotiation, the settlement agreement must be incorporated in a bilateral modification to the contract. Contract modifications should be executed on an SF 30 (Amendment of Solicitation/Modification of Contract). The modification must include the following statement:

“This modification is intended to and does constitute a full and final settlement and disposition of all matters relating to the claim dated (*insert date*) and is a full release, accord, and satisfaction of any and all claims, demands or causes of action that the contractor has against the judiciary arising out of or related to this claim.”

#### **§ 750.20.60 Appeal**

Contractors may appeal the CO’s final determination to a court of competent jurisdiction. The contractor must comply with the final determination of the CO unless such determination is overturned by a court of competent jurisdiction. If the contractor fails to continue contract performance while the claim is being settled or fails to comply with the final determination of the CO, the CO may terminate the contract for default and/or impose other available remedies.

#### **§ 750.20.70 Clause**

Include Clause 7-235, Disputes in all open market solicitations and contracts over the judiciary small purchase threshold.

### **§ 755 Contract Termination**

#### **§ 755.10 In General**

##### **§ 755.10.10 Termination for Default or Convenience**

- (a) Contracts may be terminated for default or convenience only when such action is in the interest of the judiciary. The CO should consider a no-cost termination settlement of the contract when:
  - (1) the contractor will accept it;
  - (2) there is no judiciary furnished property; and

- (3) there are no outstanding payments, debts due to government or other contractor obligations, such as warranty or data rights issues.
- (b) The potentially high price to pay for a wrongful termination requires the CO to carefully review the clauses and surrounding circumstances before making a decision to recommend termination.

### **§ 755.10.20 Applicability**

This section applies to contracts that contain Clause 3-3, Provisions, Clauses, Terms and Conditions – Small Purchases, or other clauses permitting termination for the convenience of the judiciary or for contractor default. For other clauses and when they should be included in a contract, **see:** § 755.20.60 (Clauses) and § 755.25.60 (Clause). This section establishes uniform procedures for the complete or partial termination of such contracts.

### **§ 755.10.40 Review and Approval**

The PE must review and approve, in writing, all proposed contract terminations whether for convenience or default.

### **§ 755.15 Notice of Termination**

#### **§ 755.15.10 In General**

- (a) The CO may terminate contracts only by written notice to the contractor. For a sample notice, **see:** Appx. 7D (Sample Contract Termination Notices).
- (b) Notice of termination for convenience may be done at any time.
- (c) Notice of termination for default should be done only after following the termination procedures at § 755.30 (Termination for Default Procedures).
- (d) Issuance of any termination notice must be by certified mail, return receipt requested or any other method that provides evidence of receipt.
- (e) The notice must state:
  - (1) the type of termination contemplated (convenience or defaults) and the contract clause authorizing the termination;
  - (2) the effective date of termination;
  - (3) the extent of the termination and, if a partial termination, the portion of the contract to be continued; and

- (4) any special instructions.
- (f) For additional information required to be included in a notice of termination for default, **see:** § 755.35 (Termination for Default Notice).

#### **§ 755.15.20 Distribution**

When the termination notice is sent to the contractor, the CO must also distribute a copy of the notice to any known assignee, guarantor, or surety of the contractor.

#### **§ 755.15.30 Amendment of Notice**

The CO may amend a termination notice to:

- (a) correct nonsubstantive mistakes in the notice;
- (b) add supplemental data or instructions;
- (c) rescind the notice if the items of work terminated have been completed or shipped before the contractor receives the notice; and/or
- (d) reinstate the terminated portion of a contract.

#### **§ 755.15.40 Reinstatement**

The CO may, with the consent of the contractor, reinstate the terminated portion of a contract in whole or in part by amending the notice of termination when:

- (a) circumstances clearly indicate a requirement for the terminated items, or
- (b) reinstatement is otherwise advantageous to the judiciary.

### **§ 755.20 Termination for Convenience**

#### **§ 755.20.10 In General**

Termination for convenience is appropriate when the judiciary no longer requires the contracted products or services.

#### **§ 755.20.15 Applicability**

The provisions of this part apply to all contracts containing Clause 3-3, Provisions, Clauses, and Terms – Small Purchases, Clause 7-220; Termination for Convenience of the Judiciary (Fixed-price); Clause 7-223, Termination for the Convenience of the Judiciary (Short Form); or Clause 7-225, Termination (Cost-Reimbursement).

**§ 755.20.20 Settlement Methods**

The CO may settle contracts terminated for convenience by:

- (a) negotiated agreement (including a no-cost settlement);
- (b) CO determination (used only when a negotiated agreement cannot be reached);
- (c) costing vouchers, if the contract is a cost-reimbursement contract; or
- (d) a combination of these methods.

**§ 755.20.25 Policy**

When possible, the CO must negotiate a fair and prompt settlement with the contractor according to the applicable clause and within the appropriate allocable, allowable, and reasonable amounts. **See also:** Guide, Vol. 14, § 470 (Cost Allowability).

**§ 755.20.30 Contractor's Duties**

After receiving a termination notice and, except as otherwise directed by the CO, the contractor must comply with the clause and the termination notice, which generally require the contractor to:

- (a) stop work immediately on the terminated portion of the contract and stop placing subcontracts under that portion;
- (b) terminate all subcontracts related to the terminated portion of the contract;
- (c) immediately advise the CO of any special circumstances precluding the stoppage of work;
- (d) perform the continued portion of the contract, if any, and promptly submit any request for an equitable adjustment of price with respect to the continued portion, supported by evidence of any increase in the cost;
- (e) take necessary actions to protect and preserve property in which the judiciary has or may acquire an interest, and, as directed by the CO:
  - (1) deliver the property to the judiciary, or
  - (2) otherwise dispose of it;
- (f) promptly notify the CO in writing of any legal proceedings growing out of a subcontract or other commitment related to the terminated portion of the contract;

- (g) settle outstanding liabilities and claims arising out of subcontract terminations, with written pre-approval or ratification as required by the CO;
- (h) promptly submit a settlement offer, supported by appropriate documentation; and
- (i) dispose of any termination inventory, as the CO directs or authorizes.

#### **§ 755.20.35 Settlement of Subcontractor Claims**

##### **(a) Subcontractor Rights**

A subcontractor has no contractual rights against the judiciary, since it lacks what is known as “privity of contract.” However, the subcontractor may have rights against the prime contractor or the immediate subcontractor with which it has contracted. Following termination of a judiciary contract, or a change that necessitates subcontract termination, the contractor is responsible for prompt settlement of the termination claims of all their immediate subcontractors. The subcontractors have responsibility for settlement of any of their next lower tier subcontractors.

##### **(b) Prime Contractor Rights and Obligations**

The termination clauses provide that, following contract termination, the contractor must, except as otherwise directed by the CO, terminate all subcontracts to the extent that they relate to performance of the terminated work.

#### **§ 755.20.40 Subcontractor Settlements**

The reasonableness of the contractor's settlement with a subcontractor must be measured by the aggregate amount that would be due under an equivalent judiciary termination clause. The CO may allow reimbursement to the prime in excess of that amount only in unusual cases, and then only when satisfied that the subcontract terms were negotiated in good faith and did not unreasonably increase the subcontractor's rights. The provisions of this section must be used as a guide in evaluating settlement of a subcontract terminated for the convenience of a contractor whenever the settlement could be the basis of a prime contractor claim for reimbursement by the judiciary.

#### **§ 755.20.45 Delay in Settlement of Subcontractor Claims**

When a contractor's inability to reach settlement with a subcontractor delays the settlement of the judiciary contract, the CO may settle with the prime contractor for all amounts except the subcontractor settlement offer, and reserve judiciary and contractor rights as to the subcontractor settlement offer.

**§ 755.20.50 Assistance in Subcontract Settlements**

In unusual cases, the CO may determine that it is in the interest of the judiciary to offer to assist the prime contractor in the settlement of a particular subcontract. The judiciary, the prime contractor, and the subcontractor may then enter into an agreement covering settlement of the subcontract. In such case, the subcontractor must be paid by the prime contractor as part of the overall settlement.

**§ 755.20.55 Direct Settlement with Subcontractors**

- (a) Clause 7-220, Termination for Convenience of the Judiciary (Fixed-Price) clause gives the judiciary the right, but not the obligation, to settle and pay any claims arising out of subcontract terminations.
- (b) Direct settlements with subcontractors are not encouraged, since the judiciary contractor is obligated to settle and pay subcontractor termination claims.
- (c) However, when the CO determines that it is in the interest of the judiciary to settle a subcontractor claim directly and such direct settlement has been approved by the PE, the CO may, after notifying the contractor, direct the assignment of all contractor rights to the judiciary, and settle the subcontractor claim using the termination procedures for settlement of judiciary contracts. An example in which the interest of the judiciary would be served is when a subcontractor is the sole source of a product and it appears that a delay by the contractor in settling the subcontractor's claim will jeopardize the subcontractor's financial position.

<b>§ 755.20.60 Clauses</b>	
<b>Clause</b>	<b>Include in ...</b>
(a) Clause 7-220, Termination for Convenience of the Judiciary (Fixed-Price)	open market solicitations and contracts when a fixed-price contract is contemplated and the contract amount is expected to be over the judiciary's small purchase threshold, except in contracts for architect-engineer services, which are required to include Clause 5-70, Termination (Fixed-Price Architect-Engineer).
(b) Clause 7-223, Termination for Convenience of the Judiciary (Short Form)	open market solicitations and contracts when the contract is expected to be at or less than the judiciary's small purchase threshold, except when the contracting officer has determined that another termination for convenience clause is appropriate (i.e., Clause 3-3, Provisions, Clauses, Terms and Conditions – Small Purchases, Clause 5-70, Termination (Fixed-Price Architect-Engineer), or Clause 7-220, Termination for Convenience of the Judiciary (Fixed-Price) when a CO believes the longer form is more appropriate, or Clause 7-225, Termination (Cost-Reimbursement) for cost reimbursement contracts).

<b>§ 755.20.60 Clauses</b>	
<b>Clause</b>	<b>Include in ...</b>
(c) Clause 7-225, Termination (Cost-Reimbursement)	open market solicitations and contracts when a cost-reimbursement contract is contemplated.
(d) Clause 7-225, Termination (Cost-Reimbursement) Alternate I	open market solicitations and contracts when a time-and-materials or labor-hour contract is contemplated.

**§ 755.25 Termination for Default**

**§ 755.25.10 In General**

Termination for default is the exercise of the judiciary’s contractual right, under the applicable Termination for Default clause, to completely or partially terminate a contract by reason of the contractor’s actual or anticipated failure to perform its contractual obligations. The judiciary’s right to terminate is subject to the notice requirements of the clause. The judiciary may terminate all or any part of a contract without regard to severability of contract obligations when the contractor fails to:

- (a) complete any material requirement of the contract within the time specified in the contract (including any extensions);
- (b) make progress to a degree that this failure endangers performance of the contract;
- (c) perform any other contract provision; or
- (d) give adequate assurances of performance after issuance of a delinquency notice.

**§ 755.25.20 Waiver and Reinstatement of Termination Rights**

- (a) When termination for default is warranted, the total undelivered contract quantity, whether delinquent or not, may be terminated for default.
- (b) Failure of the CO to terminate a contract within a reasonable time when a contractor fails to make timely delivery may result in a waiver of the right of the judiciary to terminate for default. In this event, a new delivery date must be established by contract modification. The new delivery date must be reasonable considering all the circumstances of contract performance. When the new date is established, the right to terminate for default is

reinstated. In extreme cases, where the judiciary and the contractor cannot agree on a new delivery date, or the contractor refuses to commit to a new date, the CO may unilaterally establish a new date.

#### **§ 755.25.30 Conversion for Convenience Termination**

If the contractor can establish that its failure to perform arose out of causes beyond its control and without its fault or negligence, the default termination clause provides that a termination for default will be deemed a termination for the convenience of the judiciary, and the rights and obligations of the parties will be so governed. For this reason, the CO should make every attempt to determine if the reason for the failure to perform is excusable before issuing a notice of termination for default.

#### **§ 755.25.40 Mitigation of Liquidated Damages**

If the contract includes a liquidated damages clause, the CO must take all reasonable steps to mitigate liquidated damages. If the CO is considering terminating the contract for default, the CO must seek expeditiously to obtain performance by the contractor or terminate the contract.

#### **§ 755.25.50 Termination Factors to Consider**

When a default termination is being considered, the CO must ensure that termination for default rather than for convenience is appropriate. The CO must consult with program officials, technical personnel, and the PE, and consider the following factors:

- (a) the specific failure of the contractor and, unless time does not permit, the excuses for the failure;
- (b) the availability of the products or services from other sources;
- (c) the urgency of the need for the products or services, and whether they can be obtained sooner from sources other than the delinquent contractor;
- (d) the degree to which the contractor is essential to the judiciary, and the effect of a termination for default on the contractor's capability as a supplier under other contracts;
- (e) the effect of a termination for default on the ability of the contractor to liquidate progress payments; and
- (f) any other pertinent facts and circumstances.

<b>§ 755.25.60 Clause</b>	
<b>Clause</b>	<b>Include in ...</b>
Clause 7-230, Termination for Default (Fixed-Price – Products and Services)	open market fixed-price solicitations and contracts expected to exceed the judiciary’s small purchase threshold

**§ 755.30 Termination for Default Procedures**

**§ 755.30.10 Issuing Delinquency and Termination Notices**

The following table indicates which action by the CO is generally most appropriate based on the point in time at which a contractor’s performance becomes unsatisfactory.

<b>§ 755.30.10 Issuing Delinquency and Termination Notices</b>	
<b>If ...</b>	<b>the CO should issue ...</b>
(a) the contract’s required delivery date is in the future, but there is reason to believe that the contractor will not meet that date (failure to make progress so as to endanger performance); or if services being performed are not in conformance with the contract	a cure notice ( <b>see:</b> § 755.30.20 (Issuing a Cure Notice) and § 735.20.20 (Remedies Involving Cure Notice or Show Cause))
(b) the contract’s required delivery date or date for completion of services has been passed without delivery or with delivery that has been rejected	a show cause notice ( <b>see:</b> § 755.30.40 (Issuing a Show Cause Notice))
(c) a cure notice has been issued, and the contractor has failed to correct the performance issue	a show cause notice ( <b>see:</b> § 755.30.40 (Issuing a Show Cause Notice))
(d) a show cause notice has been issued, and the contractor has failed to respond or to correct the performance issue, or the contractor’s response does not show that the failure to perform was excusable	a notice of termination ( <b>see:</b> Appx. 7D (Sample Contract Termination Notices))

**Note:** While a cure notice or show cause notice is not mandatory when termination is based on failure to meet a contract delivery date(s), issuance of a show cause notice is advised to allow the contractor the opportunity to assert any alleged excusable delay. If the CO, after consultation with the PE to analyze any potential waiver of the right to terminate and any excusable delays asserted by the contractor, determines that termination for default is proper, the CO must issue a termination notice at once.

**§ 755.30.20 Issuing a Cure Notice**

- (a) A written cure notice must be issued when the CO determines that the contractor is failing to make satisfactory progress to a degree that this failure endangers contract performance, or determines that some other

failure, under the contract or otherwise (other than failure to make timely delivery) is cause for concern. Coordination of the cure notice with the PE is required. **See:** § 735.20.20 (Remedies Involving Cure Notice or Show Cause).

- (b) The notice must specify the failure and give the contractor 10 days (or longer, if necessary) to either correct the deficiency or provide written assurance to the judiciary of the steps that will be taken to cure the failure. A cure notice based on failure to make satisfactory progress may be issued before the contractually specified delivery date if the CO has cause to believe that the contractor is too far behind schedule to be able to deliver by the required date. A cure notice based on other causes (e.g., unsatisfactory quality of performance) may be issued at any time, provided that there is sufficient time remaining in the contract delivery schedule for the contractor to implement a correction.
- (c) At a minimum, a cure notice must:
  - (1) specifically state the failure endangering performance as it relates to the corresponding requirement in the contract;
  - (2) allow the contractor at least 10 days to “cure” the failure;
  - (3) be in writing and sufficient to support a default termination; and
  - (4) follow the following format:

Subject: Cure Notice

You are notified that the judiciary considers your \_\_\_\_\_ (*contracting officer specifies the contractor’s failure or failures*) a condition that is endangering performance of the contract. Therefore, unless this condition is cured within 10 days after receipt of this notice (*or the CO inserts any longer time that may be considered reasonably necessary*), the judiciary may terminate for default under the terms and conditions of the \_\_\_\_\_ (*insert clause title*) clause of this contract.

### § 755.30.30 Actions Following Issuance of Cure Notice

After a cure notice has been issued, the contract generally cannot be terminated until the 10 day “cure” period (or other time period specified in the cure notice) has elapsed.

### § 755.30.40 Issuing a Show Cause Notice

- (a) When the CO makes a preliminary determination that termination for default is appropriate, a written show cause notice should be provided to the contractor of the judiciary’s intent to terminate. Issuance of a written show cause notice is particularly critical when termination is based on

causes other than failure to make timely delivery. Issuance of the show cause notice is optional when the proposed termination is based on failure to make timely delivery. Its use is, however, encouraged before any termination for default as it affords the contractor an opportunity to provide evidence the delinquency was beyond its control or was the fault of the judiciary, or other defenses should the termination result in contract litigation.

- (b) A show cause notice is used:
- (1) after a cure notice time elapses without a satisfactory response from the contractor;
  - (2) without a preceding cure notice when there is insufficient time remaining in the contract delivery schedule for the contractor to cure or correct the delinquency; or
  - (3) when the time for delivery or completion of services has passed without performance.

**Note:** The PE must approve a show cause notice in writing before it is issued. Usually a show cause notice is issued when there is less than 10 days remaining in the contract delivery schedule, or when the delivery date has passed. However, it can be used at any time when it is determined there is an “insufficient amount of time left.”

- (c) At a minimum, a show cause notice must:
- (1) request the contractor to show cause why the contract should not be terminated for default (i.e., identify any waiver of delivery schedule or describe any action or inaction of the judiciary that has contributed to the failure to perform, or describe any other factors contributing to the delinquency that were beyond the control, and without the fault or negligence, of the contractor);
  - (2) inform the contractor that failure to explain the cause of the deficiency/delinquency may be taken as admission that no valid explanation exists;
  - (3) invite the contractor to discuss the matter at a conference, when appropriate; and
  - (4) inform the contractor of its liabilities in the event of contract default.
- (d) A show cause notice must be in the following format:

Subject: Show Cause Notice

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

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

### § 755.30.50 Evaluate Contractor's Response

A contractor's response to a delinquency notice can take several forms:

(a) Cure Notice Response

A contractor is not necessarily required to respond to a cure notice since the contractor is told to correct the problem before the contract becomes delinquent. Often, however, the contractor will respond in writing with its detailed plans to cure performance. Such a response does not absolve the contractor of actually curing the delinquency within the period specified in the cure notice. If the problem is not actually cured, the judiciary, following expiration of the cure period specified in the cure notice, has the option of issuing either a show cause notice or a termination notice. A show cause notice may also be issued if the contractor's response to the cure notice is considered inadequate.

(b) Show Cause Notice Response

If the CO chooses to issue a show cause (either with or without an earlier cure notice), the contractor has 10 days to respond. The CO must evaluate the contractor's response and take one of the following actions, based on that evaluation:

- (1) defer termination action (appropriate when the contractor's response shows that timely completion of the work is assured or

- when the response adequately addresses other issues such as quality of work, which were the basis of the show cause notice);
- (2) modify the contract (appropriate when the COs analysis shows there has been excusable delay or waiver, in which case a modification is required to establish a new delivery date and to reinstate the judiciary's termination rights).
  - (3) issue a notice of termination when the response to a show cause notice is determined to be inadequate.
- (c) The PE must review and approve all proposed terminations for default, as well as issuance of cure notices and show cause notices. When a CO proposes to initiate termination for default, the CO must prepare for the contract file a memorandum that fully explains the proposed action. This memorandum must be submitted to the PE for written concurrence before issuance of a cure notice, show cause notice or notice of termination. Any contractor response, and the court CO's analysis of that response, must also be provided to the PE.

## **§ 755.35 Termination for Default Notice**

### **§ 755.35.10 In General**

Unless it is determined that the nonperformance will be cured, then, immediately following a determination that termination is proper under § 755 (Contract Termination), or after expiration of the 10-day period, or longer, if allowed by a delinquency notice, the CO may issue a notice of termination for default, provided that such termination has been reviewed and approved by the PE in consultation with OGC.

### **§ 755.35.20 Termination Notice Contents**

The notice of termination for default must meet all the general requirements provided in § 755.15 (Notice of Termination) and:

- (a) provide the contract number and date;
- (b) describe the acts or omissions constituting the default;
- (c) state that the contractor's right to proceed with performance of the contract (or a specified portion of the contract) is terminated;
- (d) state that the products or services terminated may be procured against the contractor's account, and that the contractor will be held liable for any excess repurchase costs;

- (e) state that the judiciary reserves all rights and remedies provided by law or under contract, in addition to charging excess costs;
- (f) inform the contractor that the termination is subject to Clause 7-235, Disputes; and
- (g) when the CO has determined that the failure to perform is not excusable, state that the notice reflects that decision, and that the contractor has the right to appeal as specified in Clause 7-235, Disputes.

### **§ 755.35.30 Notice Distribution**

The CO must make the same distribution of the termination notice as was made of the contract, and any surety must be furnished a copy of both the delinquency notices and the notice of termination at both its main and local offices and asked to advise whether it desires to arrange for completion of the work under a takeover agreement. **See also:** Guide, Vol. 14, § 620.40 (Administration of Contracts Requiring Bonds).

### **§ 755.40 Procedure in Lieu of Termination for Default**

When the CO determines that the contractor's failure to perform arose from causes beyond its control and without its fault or negligence, the CO may not terminate the contract for default. When it is in the interest of the judiciary to do so, the CO may, in lieu of termination for default:

- (a) terminate the contract for convenience;
- (b) permit the contractor, its surety, or its guarantor to continue performance of the contract under a revised delivery schedule;
- (c) permit the contractor to continue performance of the contract by means of a subcontract or other business arrangement with an acceptable third party, if the rights of the judiciary are adequately preserved; or
- (d) execute a no-cost termination settlement agreement (or terminate on notice if allowed under the contract), if the requirement for the products and services specified in the contract no longer exists and the contractor is not liable to the judiciary for damages, as provided below.

### **§ 755.45 Actions Following Issuance of Termination**

#### **§ 755.45.10 Payment Precautions**

- (a) The CO must notify the payment office to withhold further payments under the terminated contract.

- (b) The CO must also guard against the potential for overpayment resulting from outstanding lien rights of laborers and material suppliers against completed products that have been accepted and for which payment have been made to the contractor.
- (c) The CO must take one or more of the following measures before making any payment following a termination:
  - (1) ascertain whether the payment bonds, if any, furnished by the contractor are adequate to satisfy all claims, or whether it is feasible to obtain similar bonds to cover outstanding liens;
  - (2) require the contractor to furnish appropriate statements from laborers and material suppliers disclaiming any lien rights they may have in the completed products;
  - (3) obtain appropriate agreement between the judiciary, the contractor, and any claimants to ensure release of the judiciary from any potential liability to the contractor or claimants;
  - (4) withhold from the amount otherwise due for the completed products an amount the CO determines necessary to protect the judiciary's interest, according to § 740.40 (Withholding Payments); or
  - (5) take any other action that is appropriate in view of the contractor's degree of solvency and other circumstances.

#### **§ 755.45.20 Determination Following Termination Notice**

When the CO is unable to determine, before issuing the notice of termination, whether the contractor's failure to perform arose from causes beyond its control and without its fault or negligence, the CO must make a written decision on that point as soon as practicable after issuing the notice. This decision must be delivered promptly to the contractor, with a notification of the right to appeal as specified in Clause 7-235, Disputes.

#### **§ 755.45.30 Undelivered Work**

The judiciary is not liable for the contractor's costs on undelivered work and is entitled to repayment of any advance payments for undelivered work.

#### **§ 755.45.40 Completed Products**

The CO may direct the contractor to transfer title and deliver to the judiciary completed products. The judiciary must pay the contractor the contract price for any products completed, delivered and accepted.

**§ 755.45.50 Excess Costs of Reprocurement**

The contractor is liable to the judiciary for any excess costs the judiciary incurs in acquiring products and services similar to those terminated for default, and any other damages, whether or not the repurchase is made.

**§ 755.45.60 Mailing Checks to Surety**

If requested by the surety, and agreed to by the contractor and any assignees, arrangements may be made to have future checks mailed to the contractor in care of the surety. In this case, the contractor must forward a written request to the designated disbursing officer, specifically directing a change in address for mailing of checks.

**§ 755.50 Remedies and Damages Following Termination for Default****§ 755.50.10 Remedies**

On rightful rejection or justifiable revocation of acceptance of products or services, the judiciary has a security interest in products delivered under the contract for any payments and expenses reasonably incurred in:

- inspection,
- receipt,
- transportation,
- care, and
- custody.

**§ 755.50.20 Repurchase Against Contractor's Account**

- (a) When products or services are still required after termination for default, the CO may repurchase the same or similar products or services against the contractor's account as soon as practicable. The repurchase must be at a reasonable price, considering the quality required by the judiciary and the time within which the products or services are required. Whenever practicable, the CO must make necessary repurchase decisions before issuing the termination notice.
- (b) The CO may repurchase a quantity larger than the quantity terminated for default when needed, but the defaulting contractor may be charged for no more than the terminated quantity (including any variations in quantity permitted by the terminated contract).
- (c) If the repurchase is for a quantity not larger than the terminated quantity, the CO may use any terms and contract methods deemed appropriate for the repurchase, following normal written approval or deviation procedures. If the repurchase is for a quantity larger than the terminated quantity, the

entire quantity must be treated as a new purchase, adhering to all applicable procedures.

- (d) If repurchase is made at a price higher than the price of the terminated products or services, the CO must, after final payment of the repurchase contract, make a written demand on the defaulted contractor for the excess amount, taking into account any increases or decreases in cost due to transportation charges, discounts, and other factors.

### **§ 755.50.30 Damages**

- (a) Default

If a contract is terminated for default or if a procedure in lieu of termination for default is followed (other than termination for convenience or a no-cost settlement agreement), the CO must ascertain and demand any damages to which the judiciary may be entitled. These damages are in addition to any excess repurchase cost.

- (b) When the CO has accepted defective products, and such acceptance has been revoked on the basis of latent defect, fraud, or gross mistake amounting to fraud (**see:** § 735.55 (Fraud, Gross Mistake, or Latent Defects)), the judiciary may recover as damages for any nonconformity the loss resulting in the ordinary course of events from the contractor's breach as determined in any reasonable manner.
- (c) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the products or services accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.
- (d) The CO must obtain concurrence of the PE before any demand for damages following a termination for default.

## **§ 760 Contract Closeout**

### **§ 760.10 Closeout of Contract Files**

#### **§ 760.10.10 In General**

Contract closeout refers to the procedure of verifying that all administrative matters have been concluded on a contract that is physically complete. A contract is physically complete when the contractor has delivered the required products or performed the required services and the judiciary has inspected and accepted the products or

services. A physically complete contract may not have had the final payment made, in which case final payment would be part of the contract closeout.

#### **§ 760.10.20 Closeout Time Frames**

Standard times for closing out a contract vary depending on the contract type:

- (a) files for orders using small purchase procedures are considered closed after receipt of property or services when the CO receives evidence of final payment;
- (b) files for firm-fixed-price contracts, other than those using small purchase procedures, must be closed within six months after the date on which the CO receives evidence of physical completion;
- (c) files for contracts requiring settlement of indirect cost rates must be closed within 36 months of the month in which the CO receives evidence of physical completion; and
- (d) files for all other contracts must be closed within 20 months of the month in which the CO receives evidence of physical completion.

#### **§ 760.10.30 Closeout Actions**

When closing out contract files, the CO must use the closeout procedures at § 760.20 (Contract Closeout Procedures). However, these closeout actions may be modified to reflect the extent of administration that has been performed. A contract file must not be closed if:

- (a) the contract is in litigation or under appeal;
- (b) all termination actions have not been completed; or
- (c) warranties or guarantees provided under the contract are still in effect.

#### **§ 760.10.40 Physically Completed Contracts**

- (a) Except for rental, use, and storage agreements, a contract is physically complete when one of two events has occurred:
  - (1) all required products or services have been delivered or performed, as well as inspected and accepted; and all existing options have been exercised or have expired; or
  - (2) a contract termination notice has been issued to the contractor.

- (b) Rental, use, and storage agreements are considered to be physically completed when the:
  - (1) judiciary has given the contractor a notice of complete contract termination; or
  - (2) contract period has expired.

## **§ 760.20 Contract Closeout Procedures**

### **§ 760.20.10 Administrative Closeout**

The CO is responsible for initiating administrative closeout of the contract after receiving evidence of its physical completion. At the outset of this process, the CO must review the contract funds status and determine whether or not there are payments to be made, claims to be settled, or excess funds to be deobligated. When complete, the administrative closeout procedures must ensure that, as appropriate:

- (a) a property clearance is received;
- (b) all interim or disallowed costs are settled;
- (c) a price revision is completed;
- (d) subcontracts are settled by the prime contractor;
- (e) all indirect cost rates are settled;
- (f) the termination is settled;
- (g) contractor's closing statement is completed;
- (h) contractor's final invoice has been submitted;
- (i) a contract funds review is completed;
- (j) excess funds are deobligated;
- (k) either a final release of claims has been obtained from the contractor or a bilateral modification has been completed to effect the final closeout with the contractor's statement of release as follows; and

This modification is intended to and does constitute a full and final settlement and disposition of all matters relating to this contract (including all its modifications) and is a full release, accord, and satisfaction of any and all claims, demands, or causes of action that

the contractor has against the judiciary arising out of or related to this contract.

- (l) the contractor's final invoice has been paid (where a release of claims is required, final payment must not be made until the release of claims has been received).

**§ 760.20.20 Contract Completion Statement**

- (a) When the actions in the above section have been completed, the CO must ensure that a contract completion statement, containing the following information, is prepared:
  - (1) contract administration office name and address (if different from the purchasing office),
  - (2) purchasing office name and address,
  - (3) contract number,
  - (4) last modification number,
  - (5) last order number (if the contract is an IDIQ or requirements contract or a blanket purchase agreement (BPA)),
  - (6) contractor name and address,
  - (7) dollar amount of excess funds, if any,
  - (8) voucher number and date, if final payment has been made,
  - (9) invoice number and date, if the final written approved invoice has been forwarded to a disbursing office and the status of the payment is unknown,
  - (10) a statement that all required contract administration actions have been fully and satisfactorily accomplished,
  - (11) name and signature of the CO, and
  - (12) date.
- (b) When the statement is completed, the CO must ensure that the signed statement is placed in the purchasing office contract file.

### **§ 760.20.30 Storage, Handling, and Disposal of Contract Files**

- (a) The process used to create and store records must record and reproduce the document, including signatures and other written and graphic images completely, accurately, and clearly.
- (b) Data transfer, storage, and retrieval procedures must protect the data from alteration.
- (c) Unless law or other regulations require signed documents to be kept, they may be destroyed after the responsible judiciary official verifies that record copies on alternate media and copies reproduced from the record copy are accurate, complete, and clear representations of the originals. For contents of contract files, **see:** § 710.10 (Procurement Files (Purchase/Delivery/Task Order or Contract Files)). For destruction of records after closeout, **see:** § 760.30 (Disposition of Contract Files), below.

### **§ 760.30 Disposition of Contract Files**

#### **§ 760.30.10 In General**

Contract files and supporting documentation may be destroyed after final payment, cancellation, or settlement of related investigations, litigation (including protests), or similar matters, whichever is later, consistent with Guide, Vol. 10, § 620 (Records Disposition Schedules).

#### **§ 760.30.20 Unsolicited Proposals**

Unsolicited proposals that did not result in a contract award may be destroyed no earlier than one year after the decision not to award a contract. **See:** Guide, Vol. 14, § 340 (Unsolicited Offers).

#### **§ 760.30.30 Canceled Solicitations**

Formal solicitations of quotations or offers may be canceled before award of a contract. The contracting officer should retain the presolicitation documentation on the requirement, any offers received before the cancellation, documentation on any judiciary action up to the time of cancellation, and evidence of the cancellation.