

## SECTION 7

### CONTRACT ADMINISTRATION

#### 7-1. General.

Contract administration is the day-to-day activities required to accomplish the construction contract. This business relationship takes place between the authorized representative of the prime contractor and the resident engineer (as the ACO). Typically, the prime contractor does not authorize subcontractors or suppliers to do business directly with the resident engineer. Similarly, the resident engineer rarely allows any other agency of the Government or the resident office staff to do business with the prime contractor without specific knowledge and official authorization. All contractual communications, shop drawings, samples, reports, and cost proposals are exchanged directly between the prime contractor and the resident engineer. This professional approach is the basis of the relationship between the Government and the contractor to construct quality facilities within time and budget constraints.

#### 7-2. Inspection by Audit Agencies.

The Corps of Engineers contract administration process is audited and inspected both by internal HQUSACE teams, and by a number of other agencies, such as Army Audit Agency (USAAA), DODIG, DAIG, EIG, and GAO. The negotiation and documentation procedures utilized in contract administration are an important area of concern to these agencies, The emphasis placed on Quality extends to actions in the contract administration process. Contract administration must be performed in accordance with ALL applicable Federal, DOD, and Army acquisition policies. The following modification actions are considered to be critical areas where the ACO should continue to place emphasis, in order to improve compliance with good DOD contract procedures:

- a. Technical Analysis (TA)
- b. Pre-negotiation Objectives (PNO)
- c. Price Negotiation Memoranda (PNM)
- d. Independent Government Estimates (IGE)
- e. Proper use and disposition of audits
- f. Business Clearance Memorandum (BCM)

EP 415-1-260  
6 Dec 90

**7-3. Defense Priorities and Allocations System (DPAS) & Materials Expediting for Military Funded Construction.**

a. DPAS is the implementing regulation of the Defense Production Act of 1950 which is designed to assure the timely availability of industrial resources to meet current national defense requirements and to provide a framework for rapid industrial mobilization in case of a national emergency. DPAS is generally thought of with respect to wartime mobilization, however, it can be a valuable tool in accomplishing our peacetime mission by preventing schedule slippages resulting from late material/equipment deliveries.

b. Guidance for implementation of DPAS is contained in Part 12 of the FAR and EFARS. During the final design biddability/constructibility review a determination must be made as to whether or not the project will be included in the system. This determination must be made so that the appropriate contract clauses can be included in the solicitation. Effective use of the system during construction can be assured by:

- (1) Assigning appropriate ratings to orders
- (2) Tracking rated orders to insure they are receiving the required priority treatment
- (3) Providing timely response to requests for priority assistance
- (4) When necessary, discussing the requirements of the law and potential penalties for noncompliance with suppliers

c. A detailed description of the system is contained in a pamphlet entitled DPAS published by the Department of Commerce. The overview section of the pamphlet is particularly informative and is suggested reading for all contract administrators. Copies of the pamphlet can be obtained by contacting the office of Industrial Resource Administration, Room 3876, U.S. Department of Commerce, Washington, D.C. 20230. DPAS is another potentially valuable tool for accomplishing our goal of producing a quality product in a timely manner. Its application should be considered along with the other contract administration tools and utilized as appropriate.

d. If late arriving material causes an impact on national defense or critical operations of other Government agencies, the resident engineer is responsible for follow-up on the effectiveness of the DPAS procurement. The resident engineer must insist that the contractor and his subcontractors comply with the contract provisions requiring submittal of copies of all purchase orders.

e. Materials expediting.

(1) Construction contracts provide that the contractor be responsible for procuring the materials and equipment according to the contract specifications. Construction progress often falls behind schedule due to delays in the delivery of materials and equipment. The resident engineer ensures that the contractor does the following: Orders all materials and equipment promptly; specifies delivery dates that will meet the construction schedules; expedites the submissions of required shop drawings; maintains a vigorous follow-up of all orders; and keeps the resident engineer informed of the progress of procurement. The resident engineer also maintains a follow-up system to ensure materials are ordered and delivered in sufficient time to avoid work delays.

(2) If the contractor is unable to obtain satisfactory delivery of materials and/or equipment through its own efforts, an expediting service is maintained in the district office to assist in such cases. When it becomes apparent that the efforts of the contractor will not obtain the desired results, the contractor should be advised to submit a request for assistance from the appropriate element in the district office. The following is a list of required items on the request for assistance:

- (a) Contract number and name.
- (b) Contractor's name and address.
- (c) Name of subcontractor who ordered the material.
- (d) Purchase order number.
- (e) Distributor's name and address.
- (f) Product name and model number.
- (g) Required delivery date.

EP 415-1-260  
6 Dec 90

(h) Promised delivery date to job site.

(i) Project office contact point and phone number.

(j) Remarks (brief reasons for request; if overseas, state request for military shipment or shipment at contractor's expense).

(3) After a request for assistance has been submitted, it is essential that the contractor keep the district informed of any change which may alleviate the need for assistance or affect the delivery dates.

#### 7-4. Mobilization Areas.

a. The resident engineer should request a plan from the contractor showing the use of the material storage and work areas. This should include a layout of the work area with the location of temporary sheds, buildings, utility connections, and project and safety signs. If the work areas shown on the drawings are unacceptable, the resident engineer should negotiate an acceptable area for the contractor's mobilization and storage requirements. The provisions of the contract regarding waste and borrow areas and all utility connections should be coordinated with both the DEH and the contractor to ensure that interruption and shutdown procedures are followed.

b. Temporary construction project and safety signs may be specified for individual construction contracts by the contracting officer. When signs for civil projects are specified, they must conform to EP 310-1-6, Graphic Standards Manual. Project signs for military projects must also conform to EP 310-1-6a & b, Signage Manuals, or they may be modified to meet user requirements. The location of these signs will be indicated on the area use plan. Additionally, information regarding the Davis-Bacon Act, Drug-Free Workplace, EEO, etc. shall be prominently displayed on a jobsite sign.

#### 7-5. Buy American Act.

a. The "Buy American Act" as stated in FAR clause 52.225-5 provides that the Government give preference to domestic construction material and this is a standard clause in all USACE construction contracts. With few exceptions, only domestic construction materials may be incorporated into civil and military construction work in the United States. The FAR 25.201 defines domestic construction material as:

(1) An unmanufactured construction material mined or produced in the U.S., or

(2) A construction material manufactured in the U.S., if the cost of its components mined, produced, or manufactured in the U.S. exceeds 50 % of the cost of all its components.

b. ACO's have the responsibility to actively enforce the "Buy American Act" requirements. When you have questions concerning the status of materials under the Buy American Act provision, consult your contracting and legal counterparts. Cofferdams and other temporary structures are to be treated as a permanent dam under the provisions of PL 100-371 and the provisions of the Buy American Act applies unless the temporary structures are detailed in the contract plans and specifications. (See CB # 88-9)

#### 7-6. Changes and Modifications.

a. General. The basic construction contract expressly sets forth the rights and obligations of the parties signing the contract. The contractor is bound within the time specified to deliver a facility, as prescribed by the detailed technical plans and specifications, and he must do this in accordance with the provisions of the contract. The Government has a legally enforceable right to this performance. In return, the Government is bound to pay the contractor a firm fixed price for successful completion of its undertaking, and the contractor has a corresponding legally enforceable right to such payment. After the basic contract is awarded, any change within the general scope of the contract will be accomplished by a contract modification. Modifications can be executed only by the Contracting Officer or the Administrative Contracting Officer. Guidance for processing modifications and claims is treated in detail in EP 415-1-2, Modifications and Claims Guide; further applicable guidelines are issued by each division and district as local refinements in the administrative process.

b. Types of Modifications. FAR 43.101 defines a contract modification as: "any written change in the terms of a contract." Modifications are executed pursuant to the FAR clauses of the contract. The various types of FAR clauses under which modifications are processed is discussed later in this section. For the purpose of this discussion, a modification to a contract is a signed document altering a fixed-price construction contract. FAR 43.103 defines a contract modification as either:

(1) Bilateral. A bilateral modification, including a supplemental agreement, is a contract modification signed by the contractor and the Contracting Officer. Bilateral modifications are used to (a) make negotiated equitable adjustments resulting from the issuance of a change order, (b) definitize letter contracts; and (c) reflect other agreements of the parties modifying the terms of the contract.

(2) Unilateral. A unilateral modification is a contract modification that is signed only by the Contracting Officer. Unilateral modifications are used, for example, to (a) make administrative changes; (b) issue change orders; (c) make changes authorized by clauses other than a changes clause (e.g., Property clause, Options clause, Suspension of Work clause, etc.); and (d) issue termination notices. Sound contract administration practices require good faith efforts to execute bilateral modifications. However, there are instances when issuance of unilateral modifications is necessary. First, when all attempts to negotiate and execute a bilateral modification are exhausted, a unilateral modification should be issued. Second, if a contractor has submitted a claim on which the Government determines partial merit, a unilateral modification should be issued for that portion of the claim which has merit and for which a monetary amount can be determined with reasonable certainty. These procedures for unilateral modifications will facilitate the updating of schedules and recognition of the impact on overall project completion.

c. Definitions.

(1) Change Order. FAR 43.101 defines a "change order" as "... a written order, signed by the contracting officer, directing the contractor to make a change that the Changes clause authorizes the contracting officer to order without the contractor's consent." The Government's right to make such changes is provided for in the Changes clause at the time the basic contract is awarded. The contractor and the surety have agreed under the terms of the contract to execute changes that are within the general scope of the contract. The "without the contractor's consent" provides the contracting officer with a powerful tool. This written order is binding upon the contractor whether or not it contains an adjustment of price and time, and the contractor is obligated by the basic contract to proceed with the work as changed. This definition of change order differs from the terminology previously used by the USACE. Historically, the USACE referred to any within scope contract modification as a

change order. This was used for bilateral as well as unilateral modifications. The use of "change order" to describe a unilateral directed modification again matches other agencies terminology and is consistent with the FAR.

(2) Unpriced Changed Orders. An unpriced change order is a written order under the "Changes" clause of the contract requiring the contractor to accomplish the work prior to definitization of the modification. Specific procedures must be followed as required by EFARS 17.7503 and DFARS 217.75 when an unpriced change order is issued. These procedures should be used only when conditions of urgency or uncertainty dictate proceeding with the work prior to reaching final agreement on the change. Since forward pricing of contract actions, including modifications, is the preferred method of contracting.

(3) Supplemental Agreement. FAR 43.101 defines "supplemental agreement" as: "a contract modification that is accomplished by the mutual action of the parties" i.e., a bilateral agreement making a change to the terms or conditions of the contract. It may be either within or not within the scope of the contract. A supplemental agreement is added as a supplement to an existing contract simply as a matter of administrative convenience. Additional work outside the scope of the original contract should normally be avoided, however if required, it should be limited to the following cases, and must be a negotiated supplemental agreement.

(a) The work to be accomplished by supplemental agreement is so interrelated with that already being accomplished under the contract as to make utilization of a separate contractor impracticable.

(b) The site is so remote and the amount of the work so small, as to make obtaining bids from a contractor other than the one already on the site impracticable.

(c) There is an extreme urgency in the performance of the work and bids cannot be solicited immediately.

When approval is secured, the funds available, and the contractor's surety has consented, this alteration to the contract is processed in accordance with paragraph 7-6e.

(4) Scope.

(a) The proper medium for making changes within the general scope of a contract and within the physical limits of

the construction site is by a written order from the contracting officer to the contractor in the form of a bilateral or unilateral modification. Deletion of work is handled likewise, unless it is a major reduction. If it is a major reduction, the deletion of work will be handled under the Termination for Convenience of the Government clause of the contract

(b) The proper medium for making changes that are outside the general scope of the contract is by a supplemental agreement. The contractor has not agreed in advance to perform work outside the general scope of the contract and such work cannot be required without consent or acceptance by the contractor and his surety. A supplemental agreement is a new negotiated contract which must be founded upon offer, acceptance, and consideration; and therefore, by definition is a bilateral agreement. The magnitude, or scope, of a construction contract is determined by the physical characteristics of the work contracted for, as expressed in the basic contract. Enlarging the scope of the work or adding materially to the work by supplemental agreements is generally considered sole source actions, and have been criticized as circumventing the intent of the Competition in Contracting Act. The probability that additional work may be done more conveniently, or even at less expense by the original contractor, because the contractor is already on site, is not the controlling factor in determining whether or not the work should be obtained by competition.

d. Authorization to Issue Modifications. Modifications can be signed by the contracting officer or anyone directly authorized as an ACO, in accordance with AFARS 1.603.2 (91). The letter of authorization from the contracting officer will state the type of modifications the resident engineer can sign and the monetary limitations. The contractor will be furnished the same information.

e. Elements of the modification process. Modification preparation is in accordance with district guidelines. Modifications of a criteria or design nature are usually originated in the district or by the using service. User requested changes on military construction (Army) projects must be approved by the Corporate Group consisting of the military construction division, the using agencies major command, and HQUSACE. Modifications of a field nature are originated by the resident engineer. Justification for a design change requires that a definite benefit be derived by the Government as a result of the change. Benefit normally means a change in which the Government receives an improvement

in function or service, based on design requirements, or a reduction in time (check the contractor's schedule) or money in the contract without affecting established quality. Once a modification is deemed necessary, it is incumbent upon the Government to proceed expeditiously with the processing of that modification.

(1) Request for proposal (RFP). The originator of the alteration to the contract prepares the revised drawings and specifications. If these revisions inadequately describe the alteration, additional sketches and descriptive wording may be required to clarify the scope. The contractor may be required to submit the proposal, including detailed breakdown for cost and time, by a specific date (allowing a reasonable time). When the contractor fails to meet the date, and the RE is unsuccessful in securing a proposal, the contractor is advised that this constitutes noncompliance with the contract. If the situation persists, the matter should be forwarded to the district for contracting officer assistance which may require issuing a unilateral modification.

(2) Construction Funds Requests.

(a) Construction contract changes and cost increases, have always been a subject of management attention. One of the principle concerns of HQUSACE, the ASA(I&L), customer organizations (such as Air Force, other DOD Agencies, etc.) and Congress has been whether appropriate actions are being taken to prevent recurrence of similar problems in the future. Unfortunately, many requests received by HQUSACE fail to address this and other critical issues. An impression may develop that there is a lack of concern in the Corps beyond simply getting the money to pay for the mistakes. Unless this impression is turned around, the ability to successfully respond to valid change requirements will be seriously jeopardized.

(b) There is no guarantee of funds approval for a construction change. However, a well prepared justification will enhance the process significantly. As a minimum, fund requests should contain, in addition to basic project information such as description, contract number, BAAN (for AF), etc., the following information:

- A category for each change: user request, differing site conditions, design deficiency, etc.
- The cost of each change.

EP 415-1-260  
6 Dec 90

- The status of each change.
- The cost for each change category executed.
- The cost for each change category pending.
- The ratio, expressed in percentage, of CWE/PA.
- Identification of those changes which can be accomplished by separate follow-on contract.
- The impact if the proposed work is not approved.
- If an A-E design is involved, identification of actions underway with regard to possible liability. The status of the Contracting Officer's evaluation will be provided, and, if a decision is made not to pursue recovery, the basis for that decision will be provided.
- If an in-house design is involved, the status of actions underway to preclude future recurrence.
- Special efforts to reduce cost growth associated with these changes, if any.
- Payment date upon which the agreement is predicated.
- The identification of follow-up actions intended, with respect to avoiding similar circumstances and when they will be accomplished.

(c) Timely Submittal of Requests. Certain funds requests will require reprogramming approval. Current DOD procedure is to make Congressional reprogramming submittals on the 10th of each month. Only in rare cases will submittals be made in the months of August and September. DOD processing time runs from 2-5 weeks. Field offices need to be aware of this schedule to minimize adverse impact on time sensitive reprogramming actions. Detailed justification is necessary to document prudent business practices and to assure customers, as well as the Congress, that efficient use of the taxpayer's dollar is being made. Thus, complete candor in analyzing all circumstances associated with overruns is essential.

(3) Government Estimate and Cost Analysis. An independent Government estimate must be prepared and approved prior to negotiating for any change order of \$25,000 or more, or when the combined amount of increases and decreases alone is \$25,000 in value. The resident engineer provides field

data needed to develop the estimate which will be prepared either in the resident office or in the district in accordance with district procedures. Changes for less than \$25,000 may be evaluated using the detailed contractor's proposal and a cost analysis prepared by the resident office (see EFARS 36.203, Government Estimate of Construction Costs, for estimate requirements).

(4) Technical Analysis. The FAR defines technical analysis as the examination and evaluation by experienced personnel having specialized knowledge of the proposed quantities and kinds of materials, labor, processes, special tooling, facilities, and associated factors in the proposal; in order to determine and report on the need for and reasonableness of, the proposed resources assuming reasonable economy and efficiency (See FAR 15.801). For all proposals where cost and pricing data is required, a technical analysis should be prepared. If the contracting officer decides to waive the technical analysis, the modification file should be appropriately documented as to the reason for the waiver. The technical analysis should include all the items noted in FAR 15.805-4. The format for the portion of the technical analysis specifically addressing the proposal should clearly emphasize each item required by the FAR, even if to state that it is not applicable. This guarantees that all pertinent topics are addressed. Additional guidance on preparing a good technical analysis can be found in EP 415-1-2.

(5) Audits. When a proposal including cost or pricing data is received, the resident engineer reviews the proposal for completeness, prepares a technical analysis of the proposal, and forwards the proposal (with an SF 1411, Contract Pricing Proposal Cover Sheet, signed by the contractor) and the technical analysis to the construction division with a request for an audit. If the estimated value of the changes to the contract exceed \$100,000, a written Business Clearance Memorandum (BCM) is required prior to initiating price negotiations in accordance with AFARS 15-807, Pre-negotiation Objectives. Negotiations on price cannot proceed until the audit is available. However, discussions concerning the technical analysis, regarding scope and other matters not involving price can be resolved with the contractor, insofar as possible, while the audit is in process to reduce the time required to negotiate the modification.

(6) Negotiation Objectives. The FAR requires that the administrative contracting officer (ACO) establish pre-negotiation objectives before negotiation of any pricing action. This requirement can be fulfilled in several

different ways. The scope and depth of the analysis supporting the objectives should be directly related to the dollar value, importance, and complexity of the pricing action. For all modifications over \$100,000, and for most other types of negotiated contract acquisitions, AFARS 1.691 requires that a Business Clearance Memorandum (BCM) be prepared and retained in the contract file. For all other types of modifications under \$100,000, it is encouraged that informal pre-negotiation objectives be prepared before proceeding with negotiations. The purpose of a Business Clearance Memorandum (BCM) is to document that a proposed contractual action represents good business judgment, conforms to Federal, DOD, and Army acquisition policies, and that the price established is fair and reasonable. The BCM serves as the historical record of the business and pricing aspects of a contract action. It shows the significant facts that were considered in reaching agreement and how these facts influenced the judgment of the contracting officer. The BCM must satisfy the requirements of FAR 15.807 and FAR 15.808. The BCM generally consists of two parts as follows:

(a) Pre-negotiation Business Clearance Memorandum (PreBCM). Upon receipt of the contractor's proposal, DCAA audit, pricing and contract administration reports, and upon the completion of a thorough evaluation of the technical aspects, price and proposed contract terms; a PreBCM shall be prepared setting forth all the significant details of the proposed contract action and the course the contracting officer proposes to pursue. The PreBCM demonstrates that the negotiator is adequately prepared to enter negotiations, that the significant facts have been evaluated, and the judgments made in arriving at the prenegotiation objective are sound. The PreBCM must meet the requirements of FAR 15.807.

(b) Post-negotiation Business Clearance Memorandum (PostBCM). Upon the completion of negotiations, the PostBCM shall set forth in detail the negotiation results obtained, in accordance with AFARS 1.691-3. The PostBCM completes the historical record and documents that the agreement reached is fair and reasonable. It reconciles the differences between the PreBCM objective and the negotiated settlement by presenting additional facts obtained during negotiations. The PostBCM must meet the requirements of FAR 15.808.

(7) Negotiations. The modification cannot be issued for a price greater than the Government estimate. (except in the case where the estimated credit is equal to or less than the contractor's proposal). The contractor's proposal, audit, and signed pre-negotiation memorandum of objectives are

compared with the Government estimate, and pricing is resolved by negotiations with the contractor. If it is determined that the contractor's proposal is in error, the contractor is requested to change the quotation, preferably on the face of the original, and sign the changes. If the Government estimate is in error, it may be revised in accordance with guidelines furnished in ER 415-345-42, Costs, Cost Estimating, and Reserves for Contingencies, and the EFARS. In addition, a statement is included in the record of negotiations stating specifically where and why the contractor's quotation or the Government's estimate was revised. At the conclusion of negotiations a complete price negotiation memorandum is prepared and signed by the negotiator. The negotiation record should clearly indicate the basis for agreements reached, any outstanding disagree Government estimate, reliance placed on the contractor's cost or pricing data in the negotiation, and the basis for any allowed time extension, preferably from an analysis of the contractor's construction schedule, material deliveries and any equipment changes.

(8) Preparation of the modification package. The final modification package should include the RFP, the funds reservation, the contractor's original and revised proposals, the original and revised Government estimates, the audit (if required), the pre-negotiation objectives, the price negotiation memorandum, and the BCM (if required). All records of negotiation are either included in the body of, or attached to, the price negotiation memorandum supporting the final settlement.

(9) Notice to proceed. A notice to proceed is effective the day the authorized representative of the Government signs the document. A notice to proceed cannot be issued on military construction until funds are certified available by the district. Civil works construction follows the requirements of EFARS 52.2/9109(d), Continuing Contracts. If a notice to proceed is needed prior to issuing the modification package, the district should be advised.

f. Changes clause. The "Changes" clause provides that the CO may unilaterally make changes to the contract within the general scope of the contract. The clause further provides that if such change orders affect the contract time and/or price, an equitable adjustment shall be made and the contract modified accordingly. If due to the urgency of work, the normal process as stated in the general paragraph above is inadequate, then a two-part change order may be used. The first part prescribes the work to be accomplished and/or an

EP 415-1-260  
6 Dec 90

amount for payment purposes, expressly stipulating that such amount is tentative. The second part will be issued at a later date and will include the final adjustment of the change in price and time. It is important when issuing a two-part change order to follow the first part with the second part as soon as possible, so that the contractor or the Government cannot figure the cost of the change on a cost-plus percentage cost basis, which is a prohibited practice.

g. Differing site conditions. It is the contractor's responsibility under the contract clause, "Differing Site Conditions," to notify the contracting officer in writing of a condition differing from that shown in the contract documents, and to preserve the site until a Government inspection is completed. The resident engineer promptly investigates the site, and records existing conditions in photographs and memorandums. The resident engineer usually notifies the district of the conditions, and relies on their expertise for support during the investigation. If the investigation deems the site to have differing conditions, the records of the investigation become the basis for an RFP.

h. Excusable Contract Delays.

(1) Time extensions due to weather. Time extensions in this context apply only to the contract clause entitled "Default" and more specifically to the time extensions for weather. When time extensions for weather delays are being considered, there are two fundamental principles that must be followed: (a) The contractor must have been actually hampered in a manner that would delay final completion of the job and, (b) the weather conditions must have been other than those which could have been anticipated in the approved schedule. Also, the contractor must not have willfully or negligently caused the delay. Generally, the contractor must notify the contracting officer of delays caused by unusually severe weather. The contracting officer bears the obligation of extending contract time for such delays. The basis for evaluating the length of time for the delay is described in ER 415-1-15, "Construction Time Extensions for Weather". The contract provisions should already contain data on weather normally expected to occur. The contractor is advised in writing on a monthly basis of the results of the evaluation and the allowable time delays. A suspense date is given the contractor for response. If the contractor's concurrence is not received, negotiations may be warranted. Negotiations with the contractor are based on the progress schedule, which is updated to determine the effects of the time extension on construction. At the conclusion of negotiations, the

evaluation of time delays and the progress schedule become the basis of the recommendation that a modification be issued. Any necessary modifications as a result of weather delays will be issued on not less than a quarterly basis. Under this contract clause, no consideration is given to cost.

(2) Time extensions due to material delay. It is the contractor's responsibility to notify the Government of any delays caused by suppliers. This notification includes specific features of work affected, the date material was ordered, the original scheduled delivery and the new anticipated delivery date. These dates should be tied to the construction progress schedule or critical features. Additionally, the contractor must demonstrate that negligence on the part of the prime contractor, subcontractor or supplier at any tier was not the cause of the delay by listing actions taken to improve delivery, and efforts made to secure the supplies from other sources. The resident engineer examines the facts and either informs the contractor, in writing, that the request has no merit, or forwards the entire package to the contracting officer with recommendations that a modification to the contract be issued.

i. Suspension of Work.

(1) Orders to suspend work under the "Suspension of Work" clause (FAR 52.212-12, Suspension of Work) of the contract should not be issued unless absolutely necessary, as the Government may be liable for any damages caused by issuing such orders. Partial rather than total suspension should be used whenever possible. Suspension orders must be issued by the contracting officer. The resident engineer should notify the district when a suspension order is necessary. Suspension orders may be necessary to prevent the contractor from proceeding with work that will have to be removed or changed.

(2) The clause allows the Government a reasonable time to make decisions and revise designs. Only after it is determined that a modification cannot be issued in a reasonable time to prevent stopping all or part of the contractor's work, will a suspension order be issued.

(3) The resident engineer establishes a suspense on all actions required to permit resumption of suspended work. The district is advised immediately to take necessary action to rescind the suspension as soon as work can be resumed. Partial lifting of a suspension should be requested when practicable. A delay in lifting a suspension of work may substantially increase the final cost and time for completion.

(4) Since the Government will be liable for additional costs and/or time resulting from an unreasonable suspension of the work, every effort should be made to investigate the the effect of the suspension. The resident engineer requests contracting officer action, if needed, to direct the contractor to reschedule or revise work procedures in order to reduce the effect of such suspensions.

(5) Immediately after issuing a suspension of work, the resident engineersupervises an inventory of equipment and personnel made idle or delayed bythe suspension. Careful records are established and maintained to accurately record the effects of the suspension.

j. Contract Requests, Disputes, and Claims.

(1) General. The resident engineer assumes responsibility to resolve all questionable areas of disagreement as soon as they arise. Correspondence and reports must properly identify actions on disagreements in accordance with the definitions that follow in paragraph (2). Improper identification of a "contract request" as a "claim" may result in triggering actions unnecessarily. Improper identification and action on a claim could have severe repercussions. If the first written request by the contractor disagrees with the resident engineer's on any subject, the resident engineer examines the facts and determines if the matter has merit. The contractor is given a written reply including complete justification of the resident engineer's position based upon plans and specifications. If complete merit is determined, the contractor is advised that a modification will be processed. If partial or no merit is determined, the agreement becomes a dispute. If the contractor responds with a request for a decision by the contracting officer, the contractor's letter is forwarded promptly to the district along with the resident engineer's comments and recommendations. The resident engineer always acknowledges letters from the contractor and states in the reply the disposition of them. Problems should be settled at the lowest possible level.

(2) Definitions. The following definitions are provided to assist in determining the legal level of disagreement, if any.

(a) Contract request. Any written request for time, money, or other relief for which a contracting officer's decision has not been requested.

(b) Dispute. A disagreement between the contractor and the contracting officer, or any of his authorized representatives, which is not a claim because it does not meet the precise criteria for a claim. Disputes must be handled expeditiously to avoid escalating a dispute to a claim. As soon as a dispute is known to exist, the resident engineer must begin recording all facts, keeping accurate records, and taking photographs where applicable.

(c) Claim. A "Claim" is defined in the FAR as a written demand by one of the contracting parties, as a matter of right, the payment of money in sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. A written demand by the contractor seeking adjustments to the contract must meet the requirements of the Contract Disputes Act of 1978 for it to be properly classified as a claim. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim.

(3) Initiation of a Claim. A dispute can become a claim only when it fully meets the definition stated above. Contractor claims must be submitted in writing to the contracting officer for a decision. The CO must document the contract file with evidence of the date of receipt of any submission deemed to be a claim. However, a written demand or written assertion by the contractor seeking the payment of money exceeding \$50,000 is not a claim under the Contract Disputes Act of 1978 until certified as required by the "Disputes" clause of the contract (FAR 52.233-1, Disputes). A contractor's claim exceeding \$50,000 must be accompanied by a certification which includes the following:

- The claim is made in good faith;
- Supporting data is accurate and complete to the best of the contractor's knowledge and belief; and
- The amount requested reflects the contract adjustment for which the contractor believes the Government is liable.

The aggregate amount of both the increased and decreased costs must be used in determining when the dollar thresholds requiring claim certification are met. If the contractor is an individual, the certification must be executed by that individual. If the contractor is not an individual, the certification must be executed by a senior company official in charge of the project or an officer or general partner of the contractor. A contracting officer's decision must be issued

EP 415-1-260  
6 Dec 90

within 60 days of the date the Government receives a properly endorsed contractor's request for a CO decision. The resident engineer promptly advises the district of each claim and forwards the claim and all pertinent supporting data with his recommendation. If a determination is made by the contracting officer that the claim has merit, the claim then is subject to negotiation and is appropriately processed as a contract modification.

(4) Interest on Claims. The Government must pay interest on a contractor's meritorious claim on the amount found due and unpaid from the date the contracting officer receives the claim. If it is over \$50,000, it must be properly certified in accordance with FAR 33.201(a) before receipt is acknowledged by the Government.

#### 7-7. Officer Engineering.

a. General. Some of the main duties of a field office are as follows:

- (1) Keep all engineering records.
- (2) Maintain master sets of plans and specifications.
- (3) Prepare partial and final contract payment estimates.
- (4) Prepare progress reports.
- (5) Review and check shop drawings, certificates, and samples of materials to be used by the contractor.
- (6) Prepare cost estimates.
- (7) Negotiate change orders and prepare modification packages.
- (8) Solve engineering problems, within their capability.
- (9) Disseminate engineering data to quality assurance personnel.
- (10) Assure that drawings used to produce record drawings are current and factual.
- (11) Keep abreast of potential claims.
- (12) Monitor contract funds.

b. Payments to the contractor.

(1) The resident engineer reviews and approves all progress payment estimates. Payments to the contractor and payment frequency are set forth in the "Payments Under Fixed Price Construction Contracts" or an equivalent clause of the contract. Frequency of payment is usually specified as monthly, but the pay period date should be mutually agreed upon by the resident engineer and the contractor. The item to consider in establishing a pay period date is the workload of the resident engineer and the district. If possible, pay days for various contracts should be spread out over the month. The resident engineer must comply with the requirements of the Prompt Payment Act as described in paragraph 7-8.

(2) Progress payments to the contractor are based on the value of acceptable work the contractor has placed from one pay period to the next. Preferably, agreement is obtained with the contractor on progressive earnings through consultation prior to preparing the partial pay estimate. The contractors breakdown of the payment estimate should be compared to the appropriate line-item pay items in the NAS.

(3) Partial pay estimates are prepared by the resident engineer on ENG Form 93. Estimates are numbered consecutively and submitted for each pay period in which earnings accrue throughout the life of the contract, with the last estimate marked "final." If no money is earned during a pay period, that period is included in the next pay period in which earnings accrue. The date on the estimate is the inclusive period covered by this estimate. The estimate must be arithmetically correct. The estimates may be signed and approved by the resident engineer, if so authorized. The contractor or authorized representative should sign the original before forwarding the estimate for payment to the district, but this is a requirement only on "final" payment. The contractor does not have to agree with the amount being paid. When a NAS is used, it should provide the supporting data for interim pay estimates. When there is an unreconciled disagreement in the amount of contractor earnings, the resident engineer advises the contractor of the differences and forwards the estimate to the district for payment. The contracto "Disputes" clause. The resident engineer should submit a report of the facts relating to the protest to the district.

(4) The contractor may be paid for materials onsite which have not been incorporated into the construction, if an invoice is provided with the pay estimate. Material stored offsite may be included for payment only when the specific authority is provided. Payment for materials stored offsite is made against the contractor's furnishing of paid invoices. Only then does the Government have title to the material. Payment is made only on approved material to be incorporated in the job which is properly stored and protected. Care is taken to deduct the cost of the material previously paid for as such. When NAS is used, work activities may be broken down into material delivered and materials installed to permit easier control for payment purposes and to eliminate double bookkeeping, and the necessity of invoices to support payment for materials.

(5) Retainage is deducted in accordance with the provisions of the payments clause. If the performance date covered by the estimate extends beyond the established contract completion date as modified, liquidated or actual damages are deducted in accordance with the terms of the contract. When the contractor is entitled to additional time excusable under the terms of the contract, liquidated damages are not withheld from monies due the contractor merely because a formal modification was not issued. Should such a situation arise, the resident engineer attaches a statement of facts to the payment estimate form. Where liquidated damages are not stipulated by the contract, and it has been determined by the contracting officer or the authorized representative of the contracting officer that there are no actual damages due to delays in the work for which the contractor should be held liable, the following statement is submitted with the estimate: "No damage to the Government occurred as a result of delay in completion of the contract." A statement of facts is attached to justify having no requirements for assessment of damages. When a contractor is lagging behind schedule, when deficiencies or controversy exists over the amount of additional time that is excusable, enough pay is held back to cover all possible liquidated or actual damages or corrective work. The resident engineer possesses and may exercise the right to withhold monies for operation/maintenance manual submittals, defective workmanship, wage rate violations, failure to correct deficiencies, unsafe conditions, and poor administration of the contract. However, funds withheld will not exceed the value of the disputed items.

(6) When a contract contains estimated quantity payment items, the "Variation in Estimated Quantity" contract clause is operative (FAR 52.212-11, Variation in Estimated Quantity). The clause provides that when the actual quantity varies more than 15 percent above or below the estimated quantity in the contract bid schedule, an equitable adjustment in the contract price will be made on demand of either party. All appearances of overrun or underrun in costs of line items should be called to the district's attention when they are first discovered and again when submitting the pay estimate. Separate from the estimate, a report is furnished to the district giving the facts concerning the overrun or underrun of items of work and cost. An overrun or underrun occurs when it is determined that the estimated quantity given in the bid schedule is not the final quantity. The computations of the final price in excess of 115 percent of the original bid price should reflect the fact that the contractor has been paid fixed costs plus mobilization and demobilization costs. Therefore, the new unit cost will probably be less than the contract unit costs. Although the unit price may be increased for quantity underruns of 15 percent or greater, the total costs for the line item may not exceed the contractor's bid for the line item. Be aware that a large variation may be tantamount to a differing site condition. The cause of the variation must be considered. When added work is directed, a modification to the contract should be considered rather than a variation. This modification may include an adjustment for time only if the final quantity is between 85 percent and 115 percent of the original bid quantity and the adjustment delays contract completion.

(7) The final estimate is based on an exact summary of all work performed under the terms of the contract. Computation sheets are prepared to back up each final estimate. The computation sheets should contain necessary drawings, sketches, cross-sections, weight tickets, adding machine tapes, and computations. All items are indexed with the computation sheets and compiled for ready review and checking. All computations are checked, signed, and dated, and computation sheets are kept current as items of work are completed. The completed computation sheets and final estimates can be submitted to the district for review and final payment without lengthy delay. Delay in making the final payment may result in Government liability for interest on late payment. Accordingly, all final payment actions should be processed promptly. Outstanding claims should not delay final payment. The contractor should sign the final payment estimate and the release statement with a listing of claims as exceptions to the release.

c. Progress and progress reporting.

(1) Progress schedule. Within 5 days of commencing work, or a length of time otherwise specified, the contractor must submit to the resident engineer for approval a realistic progress schedule for the prosecution of the contract work. The schedule must be in the specified format and should include sufficient detail to indicate how the contractor plans to meet the required completion date or dates. It may be a modified network or a fully computerized NAS. As a minimum, the salient features of work under the contract must be shown. The planned operations for each feature having a separate completion date must be identifiable in the schedule. The resident engineer may guide the contractor by means of a sample schedule; however, the sample schedule should be for some other job to avoid directing the contractor's work sequence. The resident engineer carefully reviews the contractor's submitted progress schedule, and if it is found to be practical, adequate in detail, well balanced in regard to value, and in compliance with contract requirements, the schedule should be approved by the resident engineer. The magnitude and complexity of the project, will determine the level of detail that will be required from the contractor. The contractor's NAS submittal should contain a realistic schedule, appropriate dollar distribution for the various sections of work and sometimes also manpower projections. This approach will assist the resident engineer in managing the contract schedule. If the schedule is not satisfactory, it is returned with comments to the contractor for correction.

(2) Schedule changes. To be effective, a progress schedule must be maintained up-to-date to reflect the current operating procedures and all changes in the contract work. The schedule submitted and approved must be followed by the contractor. When the contractor changes the sequence of actual operations from that shown on the schedule, the resident engineer requires the contractor to revise the schedule, at no additional cost to the Government, to indicate how the contractor currently plans to complete the work within the time allowed by the contract. The contract requires the contractor to modify the schedule to include any revision necessitated by alterations in the work for which a notice to proceed has been issued. After the change occurs, these revisions should be incorporated into the schedule by the contractor for the succeeding progress update. When the contractor fails to modify the schedule, the resident engineer directs the modification by the next update. Any major revisions to the schedule by the contractor are subject to the approval of the resident engineer or by the ACO.

(3) Network analysis. When a network analysis system (NAS) has been specified, the contractor is normally required to update the diagram or analysis periodically for progress and submit a narrative report explaining actual or anticipated delays and actions taken or proposed to overcome these delays. The resident engineer not only enforces the contract provisions for submitting the reports, but also carefully reviews the content of the contractor's report, checking it against the findings of the Government's QA inspections for comparative differences, veracity, appropriate actions, and notice of claims, among other considerations. When NAS is used for a schedule, the analysis of time impact on the job is determined by adding or deleting activities (time and value), entering actual progress to date as of the date the change was ordered, and making new analysis computations. This analysis should be used in negotiating the time which might be due to the contractor for an alteration to the contract, as it automatically considers "ripple" effects in the network process. Information on administering NAS is found in ER 1-1-11.

(4) Progress reporting. The resident engineer provides all necessary field input required for the Automated Management Progress Reporting System (AMPRS) in accordance with district policy and procedures. When requested, a special report of actual progress is forwarded to the district by the resident engineer. Actual progress versus scheduled progress should be adequately delineated and significant variations should be explained. Actual or anticipated delays should be mentioned along with actions which the contractor or resident engineer is taking or proposes to take to regain the schedule. When the contractor falls behind schedule, all facts concerning the progress, delays, laxity on the part of the contractor, estimated time extension, and estimated completion date should be reported to the contracting officer. Recommended actions to the contracting officer, if any, should also be shown on the report. It is very important that each resident office provide accurate and timely data input to the AMPRS system, since many other management levels use this data for reporting and forecasting of future requirements.

d. Submittal.

(1) Submittals referred to in this paragraph include all shop drawings, samples, letters of certification, tests, and engineering information that required by the contractor for quality control and by the contract documents. All submittals are processed in accordance with ER 415-1-10.

(2) During the design phase for each contract, the district engineering division or the A/E prepares a list of required submittals. This list should be available at the time of the constructibility review. It is prepared on ENG Form 4288 (Submittal Register) and is made a part of the special clauses of the specifications. The list notes the submittals considered to be an extension of design and shows the level of review required (government approved, or information only). During the constructibility review, this list may be edited. The notations in this list provide advance warning to the resident engineer and the contractor of items requiring additional time-consuming coordination.

(3) Submittals are classified as "Government approved" or "information only." Submittals which will always require government approval are: extensions of design, critical materials, deviations, or those involving equipment that must be checked for compatibility with the entire system. All submittals not requiring government approval are for information only. Government personnel shall perform quality assurance reviews of information only submittals to assure that the contractor's quality control program is properly handling submittals. The number of reviews will be at the FOA commander's discretion, however a minimum of 10 percent of all information only submittals will be reviewed. The resident engineer or his staff reviews all submittals and shop drawings submitted for Government approval, to verify conformance with contract requirements and should expedite those that are critical. All unsatisfactory shop drawings are returned to the contractor for correction and resubmission. When the resident engineer is unable to check the drawings, the technical expertise of the district is used. When the drawings have been carefully checked by personnel other than resident engineer staff, they must be returned to the resident engineer for approval action, then returned to the contractor. A predetermined policy establishes internal distribution among the resident and district offices and the using agency.

(4) One of the first administrative actions of the contractor after NTP is the submittal of ENG Form 4288, as given in the contract specifications, including any changes needed. This revised list is reviewed for approval and returned promptly to the contractor. Timely and complete submittals of shop drawings contribute materially to the successful completion of the job by the contract completion date. The submittal list in ENG Form 4288 provides a record indicating the status of submittals and should be checked at frequent intervals to ensure necessary approvals are provided sufficiently in advance of need to avoid delays.

If it is determined that the contractor is dilatory or negligent in furnishing shop drawings, the resident engineer requests in writing prompt action by the contractor to avoid delays. ENG Form 4025, (Transmittal of Shop Drawings, Equipment Data, Material Samples, or Manufacturer's Certificates of Compliance) is used as the transmittal document for all submittals.

(5) It is essential that shop drawings not only be submitted on time, but expeditiously handled by reviewers. To maintain adequate control of submittals, the resident engineer institutes a systematic suspense and follow-up procedure for handling shop drawings.

(6) Reviewing requests for approval of methods and procedures for accomplishing such work as blasting, ground water control, earthwork compaction, grouting, pile driving, and similar work utilizing certain equipment and materials; attention should be directed not only to the requested methods and procedures; but also to the flexibility of varying these to meet all possible conditions. Approvals of this type should be made contingent upon obtaining the satisfactory specified results from the proposed methods and procedures.

(7) Any office having the delegated authority to approve material submittals must maintain a technical reference library to serve as the basis for these official decisions. The district office technical library is available to resident engineers. However, each resident office should maintain sufficient reference materials to determine that materials and workmanship comply with applicable standards such as American Society of Testing Materials (ASTM), SMACNA, and American Association of State Highway and Transportation Officials (AASHTO), etc.; USACE specifications; manufacturer's descriptive information and installation instructions; estimating manuals; and other appropriate documents. Allowance are made in each annual budget to update and/or purchase technical publications.

e. Photographs.

(1) Each resident office should have a camera and supplies for taking construction photographs, or an agreement may be made with the using service to use their photography equipment. Photographs are usually taken of the following:

EP 415-1-260  
6 Dec 90

(a) Views of major construction projects during various stages of completion. These photographs are used later by HQUSACE, Divisions, and Districts to compile a supply of quality photographs for use in command presentations.

(b) Scenes of claim situations, potential claim areas, or changed conditions.

(c) Detailed views of work in place for which removal has been ordered because of noncompliance with plans and specifications.

(d) Construction in which unusual difficulties have been overcome or where the subject is of technical interest.

(e) New methods of construction.

(f) Property or material damages.

(g) Accident evidence and/or sites or potential safety hazards.

(2) HQUSACE occasionally requests 35mm color slides of completed military construction facilities be submitted when construction is completed. Black and white photographs and 35mm color slides which illustrate, in detail, phases and sequences of construction and new methods and equipment are particularly desirable, as are video taping and time lapse movies of certain projects or construction activities. This material can be used for construction training programs, special presentations, and accident analysis. A complete description and identification should be prepared for each picture. The district develops and files the photographs and provides guidance for photographing other non-routine items.

f. Record drawings.

(1) The contractor is responsible for maintaining at the job site a current set of record drawings (formerly referred to as as-built) marked up to indicate all changes to the original drawings. The contractor's record drawings should be reviewed monthly by the resident engineers staff to make sure that they are current. Additionally, it is advisable for the Government's representative on site to note changes as they are observed. Such changes should include, but are not limited to, sketches that are provided in modifications to the contract, approved deviations, and details on shop drawings varying from original drawing requirements.

As construction work nears completion, in its entirety or by major phase, the contractor must submit a marked-up set of record drawings to the resident engineer. This set is usually combined with other items not noted on the Government representative's marked-up set. When the contract does not require the contractor to maintain a set of record drawings.

(2) The resident engineer is responsible for assuring that the record drawings reflect final as-built conditions. Record drawings are forwarded to the district when the contractor's work is substantially complete or when phases of the work are complete. The district can then correct the original tracings and, if practicable, have the reproducible copies ready to return with the DD Form 1354, Transfer and Acceptance of Military Real Property, when completed construction is transferred to the using agency. It is not necessary to retain the drawings until such items as painting, seeding, and clean-up are completed.

7-8. **Prompt Payment Act.**

a. Public Law 100-496, The Prompt Payment Act Amendments of 1988, significantly changes the bill paying practices of the Federal Government. These changes apply to contracts awarded, contracts renewed, and contract options exercised after March 31, 1989.

b. Federal Acquisition circular (FAC) 84-45 contains changes to the Federal Acquisition Regulations to incorporate the required revisions. These revisions include elimination of the 15 day grace period during which the Government was entitled to make invoice payments without incurring interest penalties, and the establishment of an additional penalty if a contractor is not paid an interest penalty owed by the government.

c. In addition, the law contains provisions applicable specifically to construction contracts, which are in turn included in the FAR. The following paragraphs will synopsize the construction contract payment requirements and procedures for implementation of these regulations.

(1) The "designated billing office" is defined as the office or person designated in the contract to first receive the contractor's invoice or request for payment. In most cases, the designated billing office will be the Area, Resident or Project office that is administering the construction contract and should be so named in the solicitation. Add this item to your Biddability, Constructibility, Operability (BCO) review checklist.

(2) The payment "clock" starts to run on the date that a "proper invoice" is received at the designated billing office. (The law also provides for starting the clock upon "constructive acceptance", but this only applies to construction in cases in final payments and payments for partial deliveries that have been accepted by the government and are priced separately in the contract.) Each invoice shall be date stamped on its face immediately upon receipt by the office or individual named in the solicitation. If the designated billing office fails to stamp the invoice with the actual date of receipt, the "clock" starts on the date of the invoice.

(3) A "proper invoice" is defined by FAR clause 53.232-27 (a) (2) and must include, among other items, "substantiation of the amounts requested and certification in accordance with the requirements of clause 52.232-5". Payment will not be made

without contractor substantiation of the amounts requested; certification that previous amounts were expended in accordance with the contract; subcontractors and suppliers have been paid from previous payments, and will be paid promptly from the payment requested; and that the prime contractor's payment request does not include any amounts to be withheld or retained from a subcontractor. The certification must appear exactly as stated in the aforementioned clause and be fully executed by the contractor. The degree of substantiation required will depend upon the type of work involved and will be left to the discretion of the contracting officer. In most cases, however, an update of the approved contract price breakdown indicating itemized completion percentages that were established by mutual agreement between government and contractor project personnel would constitute substantiation of work-in-place.

(4) If an invoice is found to be improper or defective, as defined by FAR clause 52.232-27 (a)(2), the contractor must be notified of the defect within 7 days after receipt of the invoice. It is recommended that the initial notification be placed telephonically (see clause 52.232-27 (a) (2), (vii)) and then confirmed in writing. The "clock" is effectively stopped upon notification of the defect and the whole process starts over with the resubmission of the corrected invoice. Disagreement between the Government and the Contractor over the payment amount, issues of contract compliance or retainage does not form the basis for finding the invoice to be defective and requiring resubmission. However, since clause 52.232-27 (a)(4)(iv) states that "Interest penalties are not required on payment delays due to disagreement. . . .", it is imperative that the ENG Form 93 be annotated to document the delay and alert the designated payment office not to pay interest during the delay period.

(5) If the Government takes longer than 7 days to notify the contractor of an invoice defect, the subsequent payment period for processing the corrected invoice is shortened by the number of days that the Government exceeded the 7 day requirement (e.g., if the specified due date is 14 days after receipt, and the Government takes 10 days to notify the contractor of a defect, payment of the corrected invoice is due 11 days after receipt).

(6) The due date for progress payments shall be 14 days after receipt of a proper payment request. This requirement is contained in P.L. 100-496 and is not subject to negotiation.

EP 415-1-260  
6 Dec 90

The FAC does provide for making a determination as to a contract or class of contracts and specifying, in the solicitation, "a period longer than 14 days if required to afford the Government a practicable opportunity to adequately inspect the work and to determine the adequacy of the contractor's performance....". The Office of Management and Budget (OMB) Circular A-125 states that, "extended payment periods would not be appropriate... for the mere convenience of government employees, or to avoid any possibility of making late payment." In order to carry out the Congressional intent, determinations to specify longer payment periods shall be made by the Contracting Officer and shall be documented by written justification in the contract file. Current feedback from the field indicates that where ENG Form 93's are transmitted electronically to the payment office, the "50 percent rule" (in the payment office by close of business on the day that represents half the pay period, or in this case, the 7th day) can usually be met.

(7) The release of retained amounts shall be based on the Contracting Officer's determination that satisfactory progress has been made. Payment is due within 30 days, or other specified period, after release is approved.

(8) On final payments, we don't have the latitude of specifying a longer payment period. Payment is due either the 30th day after receipt of the invoice or the 30th day after Government acceptance of the work, whichever is later. Where final payment is subject to settlement actions (e.g., release of claims), acceptance is deemed to have occurred on the effective date of settlement.

(9) If a contractor is overpaid (his performance is later found not in conformance with the contract specifications or he has held retainage from a subcontractor and was paid the full amount), the Government is entitled to interest, and the interest must be deducted from the next available payment to the contractor. Although clause 52.232-5(d) predicates such action upon the contractor's discovery of the "unearned amount", there may be instances where it is necessary for the Government to provide information for discovery.

(10) Another major revision is the addition of some very detailed provisions applying to the payment of subcontractors. The highlights are:

(a) The provisions flow down to subcontractors and suppliers at all tiers. The prime contractor must include a contract clause requiring each of its subcontractors to flow down these same requirements to each of their subcontractors.

(b) Contractors and subcontractors must pay their subcontractors within 7 days of receipt of their respective payment. They may not specify longer payment periods in their subcontracts.

(c) Contractors and subcontractors must pay interest to their subcontractors for payments made after the due date (7th day).

(d) Interest that the contractor pays a subcontractor cannot be charged to the Government.

(e) The Contracting Officer must be provided copies of retainage and withholding notices issued to subcontractors.

(11) While the section payments to subcontractors constitutes a large portion of FAR clause 52.232-27, the Congress did not indicate it intended to place the Government in an enforcement role between the prime and subcontractor on payment issues. Although the requirements to provide the contracting officer with copies of correspondence to subcontractors may indicate deeper involvement, the Office of the Chief Counsel has confirmed that neither OMB circular A-125 nor the FAR requires us to monitor and enforce activities between the prime and subcontractor as identified in subparagraphs (d), (e), (f), and (g) of clause 52.232-27. Compliance with subparagraph (c) will be implemented through a mechanism similar to the Statement and Acknowledgement Form used in the labor provisions.

**7-9. Contractor Performance Evaluation.**

a. The Construction Contractor Performance Evaluation system is fully described in ER 415-7-1(FR) and is a valuable management tool. The evaluation does influence contractor performance. The first step in documenting performance is explaining to the contractor, during the pre-construction conference, what is satisfactory and unsatisfactory performance. The contractor should clearly understand what is expected during the life of the contract and that the Contracting Officer (CO) intends to use interim and final performance evaluations to document contract performance.

b. Under normal circumstances, when a contractor's performance is unsatisfactory for a period of three months or longer, an interim evaluation must be initiated. The Contracting Officer Representative (COR) must be on the alert for indications of unsatisfactory performance. When unsatisfactory performance is noted, the contractor will be called into conference to discuss problem areas and their resolution. A Memorandum of Record (MFR) will be prepared on this conference. The contractor will be advised that performance must improve within 30 days. During this period, the COR will closely monitor problem areas. If no material improvement is noted, a letter will be sent to the contractor as notification of intent to issue an interim unsatisfactory performance rating. The letter will address the previous conference and identify the facts on which the interim unsatisfactory rating is based. A copy of this correspondence will be forwarded to the contractor's bonding company. The COR will insure that the CO is personally aware of the status of the contract at this time.

c. The contractor will be permitted at least 14 days to respond, in writing. At the end of the specified time period, if there is no response or evidence of improved performance, the interim unsatisfactory rating will be sent to the district's Construction Division for processing. Once again, the contractor's bonding company will be notified of the actions taken. If the contractor responds within the allotted time frame, all written comments will be included in the COR's report. If not, a comment regarding the contractor's lack of response will be included in the evaluation. In such cases, construction division will normally send another letter to the contractor, usually over the contracting officer's signature, offering an additional opportunity for contractor comment, before final processing. Any response will be treated as in paragraph (1) below.

(1) Should the contractor respond to the "letter of intent" within the allotted time frame, any written comments made by the contractor shall be included in the report and factual discrepancies alleged shall be discussed, resolved if possible, and made a part of the report.

(2) Item 14 of the SF 1420 must contain comments in sufficient detail, based on back-up material and using specific instances of deficiencies, as required, to back up the proposed unsatisfactory rating. This is particularly true of Item 9a, QUALITY OF WORK. That item reflects the contractor's management of the quality control program, as well as the quality of the work which is placed.

d. As stated in paragraph b above, the normal time frame for initiating interim unsatisfactory performance evaluations is three months. However, if there is a critical period of time where the contractor must perform satisfactorily and does not, or if the project is of short duration, an unsatisfactory rating may be issued for poor performance that occurs in less than the normal three month evaluation period. The contracting officer must be informed and should be involved in the processing of each unsatisfactory rating. Proper use of special interim unsatisfactory ratings can alert the contractor to his shortcomings and serve as a valuable tool to energize him to better his performance and to avoid a final unsatisfactory rating. After the issuance of an interim unsatisfactory rating, the COR must continue to document and to evaluate the contractor's performance. Documents can be in the form of memoranda of meetings, "cure" letters to the contractors, quality assurance reports, photographs, etc. The COR will re-evaluate the interim unsatisfactory rating every three months until the contract is complete.

e. Contractor Performance Appraisal Documentation. There are several reasons why it is extremely important to document the unsatisfactory performance of a construction contractor. The performance documentation can be used to establish in writing your case for possible future termination; to document possible justification for debarment; and also as a tool to prod the contractor to perform up to your expectations. However, the question that continues to get asked is, what constitutes adequate documentation for unsatisfactory performance appraisals? It is suggested that you ask yourself the following questions as a starting point when you evaluate a contractor's performance with respect to each rated element.

EP 415-1-260  
6 Dec 90

(1) Quality of Work (Contractor Quality Control): Has a quality product been provided? If not, specifically describe the deficiency in quality and the shortcomings in the contractor's quality control system responsible for it, for example:

- Inadequate inspection
- Failure to perform necessary testing
- Failure to implement 3-phase inspection process
- Inadequate or incomplete CQC documentation
- Failure to identify, and correct deficient work
- Inadequate reviews of materials and shop drawings
- Incorporation of unspecified materials

(2) Timely Performance:

- Is the contractor completing the construction activities in a timely manner? This includes administrative activities, as well as physical construction activities such as submittal management, response to RFP's etc.

- Did the contractor adequately plan and schedule the work?

- Has the contractor met milestone dates?

- Has the contractor met physical milestone dates either specified by contract or agreed to in the project schedule?

- If the schedule has slipped through the contractor's fault or negligence, has he taken appropriate corrective action of his own volition?

- Has the contractor furnished updated project schedules on a timely basis?

(3) Effectiveness of Management:

- Are the contractor's on-site and home office management personnel exhibiting the capacity to adequately plan, schedule, resource, organize and otherwise manage the work? If not, describe and relate to other rated elements.

(4) Compliance with Safety Standards:

- Has the contractor implemented an effective safety program; one which minimizes/mitigates potential accidents?
- Has the contractor provided appropriate personnel protective equipment and associated necessary training?
- Has the contractor taken necessary corrective actions when safety deficiencies are noted or are violations only corrected after significant Government intervention?

(5) Compliance with Labor Standards:

- Has the contractor complied with all required labor standards and provisions?
- Have necessary corrective actions been made without significant Government intervention?
- Are payroll records being submitted in a complete and timely manner?

(6) The above questions are not intended to be all inclusive, but should provide a point of departure to develop additional questions and responses which will result in the preparation of a well-documented performance appraisal. Also, Office of Counsel should be brought into the process as early as possible, so that they can assist in reviewing and developing adequate documentation.

g. Final ratings are processed in the same manner as described above with the exception of the 30 day period for noting improvement. There are no rigid rules governing the number of items on a performance evaluation which must be unsatisfactory before an overall unsatisfactory rating is issued. Unsatisfactory performance on one or more of the five items to be rated may be sufficient to justify an overall unsatisfactory rating. The final evaluation report must be issued within 60 days of substantial completion of the work. The process of documentation should involve the counsel and contracting staffs. Use their expertise to help with documentation. Further, the contracting officer must be aware of and comfortable with the justification and adequacy of documentation which supports each unsatisfactory rating.

(1) Within 60 days of substantial completion, an SF 1420 (Performance Evaluation Construction-Contracts) must be prepared and sent to the district and transmitted to CENPD-CT.

(2) It is important to note that the percentage of work accomplished by each subcontractor is required information, and that the signature of the resident engineer or appropriate official designated by the district commander is also required. The rating is forwarded by the district to higher authority and is marked "For Official Use Only."

(3) The resident engineer is usually the evaluating official who prepares the report. If the official concludes that a contractor's overall performance was unsatisfactory, the contractor is advised in writing that a report of unsatisfactory performance is being prepared (FAR 36.2, Special Aspects of Contracting for Construction). If there is no improvement, the district is informed of all the facts, with recommendations. Interim and final unsatisfactory performance evaluation reports prepared by the evaluating official are signed by the district commander or his designee.

(4) Final unsatisfactory ratings will be processed in the same manner as described above, except the thirty (30) day period stipulated for noting improvement is not applicable for final evaluations. Final unsatisfactory ratings can be amended, if warranted, after claim settlement.

#### h. Subcontractor Performance Ratings.

(1) Where a subcontractor is known to exert significant influence on or control progress through special agreement with the prime contractor, a performance evaluation will be prepared on the subcontractor, in addition to the evaluation prepared on the prime contractor. The following interpretations, as examples, are for information and guidance in determining if this type of evaluation is required.

- Significant Influence. Where the major portion of a construction contract is contained in the cost of the equipment and installation, such as a complex materials handling system for a munitions storage facility; the building or shell then becomes the minor portion of the contract.

- Special Agreement. Interpreted as the subcontractor's contract with the prime contractor for the purchase and installation of the complex mechanical equipment.

i. Outstanding Performance Ratings. When appropriate, contractors should be recognized for outstanding performance on projects. When submitting an outstanding rating, area engineers will include a draft letter of appreciation forwarding to the contractor a copy of the evaluation.

The construction division project manager shall review the draft and have it typed in final form for the contracting officer's signature.

j. The Construction Contractor Appraisal Support System (CCASS) is a centralized and automated data base containing performance evaluation information on DOD construction contractors. A copy of the SF 1420 Performance Report should be forwarded to the central database in accordance with the criteria in DFARS 236.201. The completion of the SF 1420 construction contractor performance evaluation report is an important management tool for determining the contractor's past performance.

(1) When any ratings are processed, provide a name and telephone number on the SF 1420 of the individual most knowledgeable of the rated contractor. This information will enable CCASS users to contact the person having first-hand experience with the contractor's performance.

(2) A copy of the completed SF 1420 should be formally transmitted to the contractor. This action is especially important for contractors who are performing in an unsatisfactory manner. Unsatisfactory contractors should be given a copy of the performance appraisal as soon as it has been processed and signed by the Contracting Officer. The fact that the form is classified "FOUO" does not preclude you from sending the contractor a copy, since the contractor clearly qualifies as a party with a "need to know".

(3) Contracting Officers will be using CCASS as a valuable source of pre-award information, therefore it is imperative that the data included in the performance appraisal package be accurate and current. If you need any additional assistance on the operation of the CCASS System, contact USACE, CENPD-CT, P.O. Box 2870, Portland, Oregon 97208.

**7-10. Value Engineering Incentive Clause. (FAR 52.248-3)**

a. This clause is applicable to all firm fixed-price construction contracts over \$100,000 or more, and may be included in lesser contracts when the contracting officer determines there is potential for cost reduction. Value engineering arrangements are also mandatory in all subcontracts of \$50,000 or greater and may be included in contracts of less value. The clause provides for Value Engineering Change Proposals (VECP) initiated and developed by the contractor for changing the drawings, designs, specifications, or other requirements of the contract.

EP 415-1-260  
6 Dec 90

They must result in savings to the Government, by providing less costly items or methods than those specified, without impairing any essential functions, and characteristics; such as service life, reliability, economy of operation, ease of maintenance, and necessary standardized features.

b. The incentive for the contractor to submit proposals is that he shares in the resultant savings. His share is 55% of the instant contract savings (ICS). Instant contract savings are the estimated reduction in the contractor's cost of performance resulting from acceptance of the VECP. The ultimate deductive price is determined by subtracting Government costs from instant contract savings and multiplying the result by 55% on fixed-price contracts. Government costs are those which directly result from development and implementation of the VECP, such as test and evaluation of the VECP. The contract price is also adjusted without regard to profit. An interesting aspect of this clause is that the contracting officer may accept the VECP, even though an agreement on price reduction has not been reached. Furthermore, the decision of the contracting officer to accept a VECP is final and not subject to the "Disputes" clause.

c. The principles of value engineering (VE) are implemented in accordance with district and local guidelines. The resident engineer encourages both the resident office staff and each contractor to apply their expertise to the VE concept in initiating alternatives to high cost construction and procurement items, and in seeking a savings for the Government while preserving quality. EP 11-1-4 is a handy pamphlet describing the VE process which is available for distribution to contractors. On completion of a VE study and approval in principle, a modification to the contract is pursued in accordance with paragraph 7-6. The VE officer is kept advised of progress and government preparation costs on VE proposals.

#### 7-11. Closeout and Warranties.

a. Transfer of completed facilities. ER 415-345-38, Transfer and Warranties, is the basic regulation which prescribes USACE policy and procedures for transfer of completed construction projects. The transfer of construction to the using service will be simultaneous with the acceptance of that construction from the contractor. The materials to be transferred to the using service are accumulated, organized, and ready to be transferred on the date of the final inspection.

The material should consist of the following: (subparagraphs (1) and (9) apply only to military and civil construction, respectively; the remaining subparagraphs are common to both)

(1) DD Form 1354. A DD Form 1354, Transfer and Acceptance of Military Real Property form, must be used to transfer any facility to the using agency prior to either partial or complete occupancy. All facilities (including buildings, structures, utilities, distribution systems, and paved areas), whether new construction, rehabilitation, or remodeling, are listed on the DD Form 1354. This form is supplemented by DA Form 2877, Real Property Record, on Army construction projects. The initial DD Form 1354 is to be provided by the design A-E. The resident engineer supplements the information provided on the initial DD Form 1354 and accompanying forms and completes the form. This should be a simplified process if material is gathered as the construction progresses. The completed DD Form 1354, with the real property records, is submitted by the resident engineer to the using service. Regulations require the using service to accept the transfer of construction by signing the form. The deficiencies found during the final inspection that were not immediately corrected are listed on the back of the form. The deficiencies relate to contract requirements only. Design deficiencies are not included. If there are any disputes as to items being construction deficiencies, these should be resolved by the resident engineer, if possible. If not, the dispute is forwarded, in writing, to the district with an explanation of the facts. All renovation and alteration projects require a DD Form 1354, as well as all maintenance and repair projects. Prior to the final inspection, the resident engineer determines the approximate cost of the contract, exclusive of possible claims. Computation of this cost is available, if desired, at the final inspection. On unit price contracts it may be necessary to submit an interim DD Form 1354. A final DD Form 1354 will be submitted once all invoices are received from the contractor and validation of final quantities is complete.

(2) Equipment testing record. All equipment tests required by the contract are made and recorded prior to the prefinal inspection. All contract equipment incorporated into the project that was temporarily used during the construction period (i.e. elevators) must be refurbished to new condition prior to turnover. A complete record of the tests must be available for examination at the final inspection. It is good practice to invite the local user to participate in the tests. In contracts where training of user personnel is specified, such training is satisfactorily completed prior to formal transfer.

EP 415-1-260  
6 Dec 90

The using service is furnished a copy of the equipment test report upon request.

(3) Shop drawing record. The shop drawings and other data are compiled so that the drawings for any desired item can be made readily available at the final inspection. After inspection, the material is bound for transfer to the user.

(4) Operating and maintenance instructions. When provisions have been made for operation and maintenance (O&M) manuals for complete systems, they are obtained from the architect-engineer (AE) or contractor, and furnished to the using service. These manuals are the manufacturer's published data and/or supplemental material provided by the contractor.

(5) Spare parts and tools. Where required by the contract, all necessary spare parts and tools, spare parts lists for the items of equipment, and the source of suppliers and unit costs are obtained from the contractor for transfer to the user.

(6) Keys. The contract is carefully checked to determine the number, type, and kind of keys required. Special care is taken in checking the requirements for such items as master keys, key blanks, keys for valves, hydrants, registers, and windows. All required keys are obtained from the contractor, labeled, and prepared for transfer to the user by letter with a complete listing of the keys. It is imperative that the master keys are secure and that no duplicates have been made.

(7) Warranty of construction. The contract specifications are reviewed in order to compile a list of warranties or guarantees. The resident engineer assures that all warranties or guarantees are received from the contractor. This includes names, addresses, and contact points for all parties responsible for implementing such warranties or guarantees. A list of warranty or guarantee expiration dates is made and retained, and copies are provided to the user. Further information on implementing the warranty provisions are provided in 7-11b.

(8) Leases and contracts. All leases and contracts pertinent to the transfer of the facilities are secured by the resident engineer for transfer to the user. This includes leases for land, approach rights for airplanes, and contracts for commercial utilities.

(9) Policy and procedures. Transferring civil works projects (facilities) is covered in ER 1150-2-302, Annual Report on Local Cooperation Agreements. This involves a local cooperation agreement, the authority for which is in the act authorizing the project. A formal notice to the responsible authorities (sent by registered or certified mail with return receipt requested) transfers the completed facilities, as of a specific date, for operation and maintenance in accordance with the requirements of the authorizing legislation. Copies of correspondence are furnished to the division engineer and the Commander, USACE, (CECW-O), Washington, DC 20314-1000. The notice of transfer is accompanied by the necessary manuals, guarantees, spare parts/tools, and testing and shop drawing records, as discussed above.

b. Warranty Procedures.

(1) The warranty provisions on each fixed-price construction contract are described in FAR clause 52.276.21, "Warranty of Construction". The provisions of this clause state that the contractor must provide a warranty that the work required by the construction contract conforms to the contract requirements and is free of any defect in equipment, material, and workmanship for a period of 1 year after the date of final acceptance of the work or 1 year from the date the Government takes possession. Further guidance on implementing instructions concerning the warranty provisions are found in ER 415-345-38, "Transfer and Warranties".

(2) The interpretation and enforcement of the Warranty of Construction Clause (FAR 52.246-21), with respect to the extension of the warranty period when repairs are performed during the one year warranty period, revolve around the interpretation of paragraph (d) of the clause which is reproduced below.

"(d) The contractor shall restore any work damaged in fulfilling the terms and conditions of this clause. The Contractor's warranty with respect to work repaired or replaced will run for 1 year from the date of repair or replacement."

Interpretation of this clause by the Armed Services Board of Contract Appeals (Humphrey Heating and Roofing, Inc., ASBCA No. 29730 (Nov. 8, 1984)) concluded that the one year extension applies only to replacement or repairs to work of property

which was consequentially damaged in fulfilling the terms and conditions of the clause and not to the warranted item itself. An exception to this would be in the case of of a manufacturers or suppliers warranty, since paragraph (g) of the clause requires that these warranties be passed on to the government.

(3) There are many other scenarios which can and do occur, however, the principles expressed will be of assistance in resolving questions concerning warranties. Each incident of warranty enforcement will have to be evaluated on it's own merit and in complicated or controversial situations, legal assistance should be obtained.

(4) Implied Warranties. Implied warranties are warranties implied by the general law of sales. The inspection clause, which provides that acceptance is conclusive except for latent defects, fraud, or gross mistake amounting to fraud, or as otherwise contractually provided. If after acceptance, the Government discovers latent defects, fraud, or gross mistake amounting to fraud, it may revoke its acceptance and exercise its right to apply the pre-acceptance remedies provided in the Inspection clause.

(5) Latent Defects. Latent defects are defects hidden from sight and knowledge, existing at the time of acceptance, which are not discoverable by a reasonable inspection and require that:

(a) The defect existed at the time of acceptance. Any defect must not have been caused by events after acceptance.

(b) The defect caused any failure of the item. Where a malfunction could have resulted from two causes, one patent and one latent, the Government must prove that the malfunction is attributable to the latent cause.

(c) A reasonable inspection would not have uncovered the defect. The Government must establish what a reasonable inspection is and why it would not have disclosed the defect. The failure to make a reasonable inspection that would have disclosed the defect is fatal to a latent defect allegation. If a defect is detectable by a visual inspection, a reasonable inspection should discover it and, generally, the defect will not be latent. If the contract specifies a test that would have uncovered the defect and the Government failed to perform the test, the defect is not latent.

(d) The effect of a latent defect is to remove the conclusiveness of final acceptance, thereby entitling the Government to the same remedies it would have if acceptance had not yet occurred; the Government is entitled to the remedies prescribed in the contract. This includes costs of correcting defects, costs of correcting damage done by the defects, and extra costs of inspection that were the natural and probable consequences of the contractor's failure to follow specifications. Generally, the contractor is liable for latent defects discovered at any time after acceptance, to include periods after the expiration of a warranty clause. A warranty is an additional remedy to the pre-acceptance remedies provided by contract.

(4) In accordance with AR 420-10, Chapter 6, support to the Director of Engineering and Housing (DEH) is provided under the "Installation Support" program. Initial contact with the contractor, vendor, or manufacturer to obtain correction of warranty defects should be made by the using service. (See ER 415-345-38.) Upon notification by the DEH that warranty assistance is required, the district assumes primary responsibility for warranty enforcement with the correction of all design or construction defects on all projects/facilities for one year after the date of transfer (execution of DD Form 1354) of the construction to the using service. The warranty enforcement service covers the full warranty period on items having manufacturer's or contractor's warranties longer than one year. The resident engineer provides field implementation of this responsibility.

(5) The DEH should be advised in writing of the provisions of ER 415-345-38 with regard to warranty enforcement. The contractor should be advised, in writing, that requests for warranty correction may be forthcoming from the DEH or the resident engineer.

(6) If the initial efforts by the DEH to resolve warranty issues are unsuccessful, the problem will be referred to the resident engineer. The matter is forwarded to the district for action when compliance with warranty or guarantee provisions cannot be obtained by the resident engineer.

(7) Design or construction defects not covered by warranty or guarantee are corrected after determining the most expedient method of correction and assuring that funds are available.

c. Completion report.

(1) As soon as a contract is complete, the resident engineer prepares and submits a certificate of completion to the district stating that the final inspection has been accomplished, that all contracted work has been performed in accordance with contract plans and specifications, and that the construction has been accepted by the contracting officer. It is then transferred to the using service. A list of data such as the date the contract was completed, the date accepted by the contracting officer, and the date transferred to the using service, is included for the record. If there were deficiencies noted in the transfer document, the date these deficiencies were corrected is included in the report. When required, a structure foundation and/or embankment report is prepared.

(2) The resident engineer also certifies that:

(a) All contractor and subcontractor payrolls have been received from the contractor.

(b) All GFP accounts and documents have been cleared by the appropriate action officer and forwarded to the district (stating transmittal document).

(c) Transfer of the facilities to the using service has been completed and the using service has been furnished all material noted in paragraph 7-11a, Transfer of completed facilities.

d. Acceptance of work. The contracting officer accepts the entire contract work or any specified divisible part as promptly as practicable after completing the work. The resident engineer assumes the responsibility of furnishing the district the necessary data to assist in the prompt financial closeout of all contracts in accordance with ER 415-345-13.

e. Financial closeout policy. It is USACE policy to financially closeout projects as expeditiously as possible after acceptance of construction and ER 415-345-13 describes the regulations in detail. Unobligated funds which are in excess of funds necessary to liquidate current or anticipated obligations are returned by a revoking directive as soon as surplus funds are identified. Data entered into AMPRS is used to evaluate the effectiveness of all FOA's financial closeout performance.

(1) When more than one project provides funds for a construction contract, financial closeout of the projects shall be accomplished only after final payment has been made on the contract.

(2) When a project provides funds for more than one contract, financial completion of the project shall be accomplished only after final payment has been made on all contracts.

(3) Projects with any of the following outstanding issues shall not be financially closed until these issues are resolved:

(a) Claims pending before the Corps of Engineers Board of Contract Appeals (ENGBCA), Armed Services Board of Contract Appeals (ASBCA), or a Federal court.

(b) Unresolved A-E liability issues.

(c) Labor violations.

(4) Closeout requirements. The USACE goal is to financially closeout all CONUS projects within six (6) months of contract acceptance and all OCONUS projects within twelve (12) months. Acceptance occurs on the date the Contracting Officer accepts the constructed facility(s) required under the contract from the contractor with or without deficiencies (AMPRS data item 0435). Financial completion of a project occurs when all obligations have been liquidated, all accounts receivable have been collected, and excess funds have been returned-i.e. cost and current working estimate (CWE) are equal. Projects with the following types of funding are excluded from the financial closeout performance ratings: Modernization of US Facilities (MOUSF), Foreign Military Sales (FMS), Government of Japan (GOJ), and Government of Korea (GOK).

#### 7-12. Post Completion A-E Evaluation.

a. Architect-engineer completion of construction performance evaluation.

(1) In addition to evaluating the construction contractor, the resident engineer completes ENG Form 1421-R (Test), Sep 89 Performance Evaluation (Architect-Engineer), and forwards it to the district after physical completion of the contract.

EP 415-1-260  
6 Dec 90

(2) Completing the form requires that the number and cost of all construction change orders be listed with a break-out showing those resulting from deficiencies in A/E performance and a further break-out showing those deficiencies which the A/E is liable for and those absorbed by the Government. The resident engineer gives a rating to the design of excellent, above average, average, below average, or poor. Additionally, a recommendation to award future contracts to the A/E is made. If the recommendation is negative or conditional, an explanation is required in the remarks section.

7-13. **Management of LCPM Civil Works Projects.**

a. General. The project manager (PM) is authorized within the limits defined in ER 5-2-1 to modify the project schedule and adjust project costs to accommodate changing conditions in a timely and responsive manner. Responsibility for initiating, evaluating, recommending and approving changes is also established in the ER, as is accountability for the impacts of each change.

b. Schedule Change Authority. The PM is authorized to revise project schedules that do not impact major milestones. Changes which extend major milestones require approval of the Division Project Review Board (PRB). Also, changes which extend the completion dates of preconstruction engineering, design, or construction for budgeted projects beyond the completion dates presented to Congress must be approved by the Director of Civil Works (DCW).

c. Cost Change Authority. The PM is authorized to adjust the project cost estimate within limits based on the size of the project, and the cumulative percentage of contingency used. ER 5-2-1 shows the limits of authority for project cost changes. No authority is granted to increase the total project cost beyond the Division Approval Level (DAL) without DCW approval.

d. Contract Modifications. When a design or construction contract must be modified, the party initiating the modification must prepare a project schedule and cost change request. When a modification is initiated, the PM will reserve funds, coordinate and assess the evaluation of impacts on cost and schedule and obtain the required approvals before the modification is issued. Nothing in ER 5-2-1 is intended to supersede or interfere with the Administrative Contracting Officer (ACO) or Contracting Officer's authorities and responsibilities established in the

Federal Acquisition Regulations (FAR) and supplements, to manage the contract, decide disputes and issue changes (subject to the availability of funds) which are within delegated authorities.

e. Responsibility and Accountability. The PM is responsible for the proper evaluation, approval, management of the project schedule and cost change requests and is accountable for documenting impacts resulting from the change. The District element chiefs are responsible for identifying and justifying the need for changes that revise the project cost and schedule established in the Project Management Plan (PMP) and for initiating requests for approval of such changes. The chiefs are also accountable for the project impacts of changes resulting from activities within their elements. The PM is responsible for identification of inflation changes and changes in adjusted baseline estimates including inflation during construction resulting from schedule delays or from extended construction time.

f. Maximum Project Cost Limit. The procedure and format for determining the maximum project cost limit for projects subject to Section 902 of the Water Resources Development Act of 1986 (PL 99-662), as amended, is contained in EC 1105-2-176. Furthermore, the management philosophy of the Section 902 limit is applicable to all projects within the LCPM system.

(1) For projects subject to the provisions of Section 902, the objective will be to complete the project within the authorized cost, plus allowable increases for inflation and modifications required by law, referred to as the Division Approval Limit (DAL). Adjustments of the project costs may be made within the change authorities defined in ER 5-2-1.

(2) Those projects in the LCPM system not subject to the legislative limitations of Section 902 will be managed at the District level within the established baseline estimate with allowable adjustments for inflation and changes required by law. Adjustments to the project cost may be made within the change authorities described in ER 5-2-1.

g. All projects in the LCPM system will be managed to comply, insofar as possible, with the schedule developed for the project network and the project management plan (PMP) in coordination with the cost-sharing partner. Adjustments to the project schedule may be made within the change authorities described in ER 5-2-1.

**7-14. Small Business and Small Disadvantaged Business Utilization.**

a. General.

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

(2) The contractor has agreed, by executing the contract, to award subcontracts in keeping with the above policy to the fullest extent consistent with the efficient performance of the contract. (FAR 52.219-8 and FAR 52.219-13). The contractor usually carries out this responsibility in good faith, generally without oversight on the part of the Federal agency.

b. Subcontract Plan. When a construction contract exceeds \$1 million, the successful offeror is required to submit a subcontract plan prior to award, for review by the Small and Disadvantaged Business Utilization (SADBU) specialist, and approval by the Contracting Officer (FAR 52-219-9). This provision does not apply to small and small disadvantaged business concerns. The elements of the subcontracting plan include goals for subcontract awards to small and small disadvantaged business concerns, certain reporting requirements, flow down provisions for subcontracting, and other responsibilities which the contractor agrees to carry out. The approved subcontract plan is incorporated into and made a part of the contract. The monitoring and documentation of the subcontract plan compliance is the responsibility of the SADBU specialist at the district, with assistance from the Area or Resident Engineer and other members of the district staff.

c. Liquidated Damages. Liquidated damages are assessed, at completion of the contract, when a contractor fails to make a good faith effort to comply with the subcontract plan requirements (FAR 52-219.16). Liquidated damages are assessed at the actual dollar amount by which the prime contractor failed to meet each subcontract goal and are in addition to any other remedies the Government may have under the contract. The most frequent and easily identified issues of noncompliance are failure to submit quarterly and semiannual reports (SF 294 and SF 295) as required by the subcontracting plan and failure to identify, contact, solicit, or consider small business or small

disadvantaged business concerns for contract award. The ACO must insure, in coordination with the SADBUs specialist, that liquidated damages are assessed, when applicable, before approving final payment under the contract. The liquidated damages provision applies to contracts for construction which exceed \$1 million, which require a subcontract plan, and which were awarded after August 15, 1989. This provision does not apply to contracts awarded to small or small disadvantaged business concerns.

d. Incentives. Fixed price negotiated contracts (over \$1 million for construction) include a provision for incentives to be paid to the prime contractor when subcontract plan goals for awards to small disadvantaged business concerns are exceeded (DFARS 252.219-7009). The ACO must be cognizant of subcontractors at the job site and the records which the contractor is maintaining concerning subcontracting.

e. Preconstruction Conference. Subcontracting requirements, including the plan incorporated into the contract, reporting requirements, incentives, and liquidated damages contract provisions, must be included in the agenda for preconstruction conferences and noted in the preconstruction minutes, when the contract amount exceeds \$1 million and award is made to a large business concern. Disputes can be avoided when these issues are discussed in the early stages of contract performance, so that contractors know what is expected and will have maximum opportunity to comply. The SADBUs specialist may be invited to the preconstruction conference to advise on subcontracting requirements.

f. Performance Ratings. Contractor's performance ratings must reflect compliance or noncompliance with subcontracting plans in the contract. Subcontracting is a management function under the contract. Interim or final unsatisfactory appraisals will be used to identify noncompliance with subcontract plans, to inform the contractor's upper management officials, and to serve as a record of compliance which may have a bearing on the firm's future contract awards. The SADBUs specialist will provide comments to the contracting officer on all satisfactory or outstanding performance appraisals assigned to large business concerns, and will insure that the degree of compliance with the subcontracting plans is considered in the final performance evaluation.