

# Chapter 6

## Contract Administration

<b>Section 1</b>	<b>General</b> .....	151
6.1.1	Responsibilities .....	151
6.1.1.a	Contracting Officer .....	151
6.1.1.b	Contracting Officer's Representatives .....	151
6.1.1.c	Relationship Between Postal Service and Contractor Representatives ...	151
6.1.2	Contract Administration Functions .....	151
<b>Section 2</b>	<b>Contract Performance</b> .....	152
6.2.1	Postaward Orientation .....	152
6.2.2	Record Keeping .....	153
6.2.2.a	Policy .....	153
6.2.2.b	Organization .....	153
6.2.2.c	Records in the Possession of Other Postal Service Employees .....	153
6.2.3	Contract Monitoring .....	153
6.2.3.a	Personnel .....	153
6.2.3.b	Use of Contractors to Monitor Contract Performance .....	153
6.2.3.c	Review of Contractor Submittals .....	153
6.2.4	Delivery .....	154
6.2.4.a	Transportation .....	154
6.2.4.b	Variation in Quantity .....	154
6.2.5	Right to Adequate Assurance of Performance .....	154
6.2.5.a	General .....	154
6.2.5.b	Failure to Provide Adequate Assurance .....	154
6.2.5.c	Repudiation .....	154
6.2.6	Anticipatory Repudiation .....	154
6.2.6.a	Postal Service Rights .....	154
6.2.6.b	Retraction of Repudiation .....	155
6.2.7	Bankruptcy .....	155
6.2.7.a	General .....	155
6.2.7.b	Procedures .....	155
6.2.7.c	Consultation with Assigned Counsel .....	155
6.2.7.d	Clause .....	155
<b>Section 3</b>	<b>Quality Assurance</b> .....	155
6.3.1	Inspection and Testing .....	155
6.3.1.a	General .....	155
6.3.1.b	Nonconforming Supplies or Services .....	156
6.3.2	Acceptance .....	157
6.3.2.a	General .....	157
6.3.2.b	Responsibility .....	158
6.3.2.c	Place of Acceptance .....	158
6.3.2.d	Certificate of Conformance .....	158
6.3.2.e	Revocation of Acceptance in Whole or in Part .....	158
6.3.2.f	Transfer of Title and Risk of Loss .....	158
6.3.3	Receiving Reports .....	159

6.3.3.a	General	159
6.3.3.b	Responsibility	159
<b>Section 4</b>	<b>Payments and Financing</b>	<b>160</b>
6.4.1	General	160
6.4.2.a	Payment	160
6.4.2.b	Submission	160
6.4.2	Invoices	160
6.4.3	Payment	160
6.4.3.a	Means of Payment	160
6.4.3.b	Time of Payment	160
6.4.3.c	Payment of Interest	161
6.4.3.d	Calculation of Interest	161
6.4.3.e	Alternate Provisions	162
6.4.3.f	Final Payment	162
6.4.4	Withholding of Payments	162
6.4.4.a	General	162
6.4.4.b	Actions by the Contracting Officer	162
6.4.4.c	Disallowing Costs	163
6.4.4.d	Setoffs and Recoupments	163
6.4.4.e	Third-Party Claims	163
6.4.4.f	Withholding Payment Under Contract Clauses	164
6.4.5	Progress Payments	164
6.4.5.a	General	164
6.4.5.b	Method of Computation	164
6.4.5.c	Supervision	164
6.4.5.d	Administration	164
6.4.6	Limitation of Cost or Funds	165
6.4.6.a	Administration	165
6.4.6.b	Effect of a Modification	165
6.4.7	Assignment of Claims	165
6.4.7.a	Policy	165
6.4.7.b	Approval	166
6.4.7.c	Assignments by Law	166
<b>Section 5</b>	<b>Contract Modifications</b>	<b>166</b>
6.5.1	General	166
6.5.1.a	Definitions	166
6.5.1.b	Policy	166
6.5.1.c	Types of Modifications	167
6.5.1.d	Notification of Contract Changes	167
6.5.1.e	Availability of Funds	167
6.5.1.f	Exercise of Options	167
6.5.1.g	Correction of Mistakes	168
6.5.2	Change Orders	168
6.5.2.a	General	168
6.5.2.b	Accounting	169
6.5.2.c	Administration	169
6.5.3	Equitable Adjustments for Delays	169
6.5.3.a	General	169
6.5.3.b	Excusable Delays	170
6.5.3.c	Compensable Delays	170
6.5.3.d	Concurrent Causes	170

6.5.3.e Acceleration .....	171
6.5.4 Novation and Change of Name Agreements .....	171
6.5.4.a Definitions .....	171
6.5.4.b Responsibility .....	171
6.5.4.c Novation Policy .....	171
6.5.4.d Change of Name .....	172
<b>Section 6 Postal Service Property .....</b>	<b>172</b>
6.6.1 Contractor's Property Control Systems .....	172
6.6.2 Records .....	172
<b>Section 7 Subcontracting Policies and Procedures .....</b>	<b>173</b>
6.7.1 General .....	173
6.7.1.a Definitions .....	173
6.7.1.b Requirements .....	173
6.7.1.c Considerations .....	173
6.7.2 Limitations .....	174
<b>Section 8 Claims and Disputes .....</b>	<b>174</b>
6.8.1 General .....	174
6.8.1.a Contract Disputes Act .....	174
6.8.1.b Policy .....	174
6.8.1.c Definitions .....	174
6.8.2 Claim Initiation .....	175
6.8.3 Decision and Appeal .....	175
<b>Section 9 Contract Termination .....</b>	<b>177</b>
6.9.1 General .....	177
6.9.1.a Applicability .....	177
6.9.1.b Review and Approval .....	177
6.9.1.c Definitions .....	177
6.9.1.d General Principles .....	178
6.9.1.e Termination Notice .....	178
6.9.2 Termination for Convenience .....	179
6.9.2.a General .....	179
6.9.2.b Contractor's Duties .....	179
6.9.2.c Settlement of Subcontractor Claims .....	180
6.9.3 Termination for Default .....	181
6.9.3.a General .....	181
6.9.3.b Fixed-Price Contracts .....	181
6.9.3.c Non-Fixed-Price Contracts .....	185
<b>Section 10 Remedies and Damages .....</b>	<b>186</b>
6.10.1 Remedies .....	186
6.10.1.a Postal Service's Security Interest .....	186
6.10.1.b Repurchase Against Contractor's Account .....	186
6.10.2 Damages .....	186
6.10.2.a Default .....	186
6.10.2.b Breach Damages for Accepted Supplies .....	186
6.10.2.c Incidental and Consequential Damages .....	187
6.10.2.d Deduction of Damages from the Price .....	187
6.10.2.e Damages for Nondelivery or Repudiation .....	187

# Chapter 6 Contract Administration

## SECTION 1 GENERAL

---

### 6.1.1 Responsibilities

6.1.1.a *Contracting Officer.* While contract administration requires the efforts and skills of many people, the contracting officer is ultimately responsible for all contract administration functions.

6.1.1.b *Contracting Officer's Representatives*

1. The contracting officer may appoint in writing one or more representatives to perform any administrative function that does not involve a change in the cost or duration of contract performance (see 1.6.2.e).
2. Representatives of the contracting officer may not themselves appoint representatives without the prior written approval of the contracting officer.
3. Representatives of the contracting officer may not perform any function or exercise any authority not specifically delegated by the contracting officer.
4. The contracting officer must notify the contractor in writing of the appointment of any representative or representatives, specifying the authority delegated and cautioning the contractor to notify the contracting officer any time the contractor believes the representative is exceeding the authority granted by the delegation.

6.1.1.c *Relationship Between Postal Service and Contractor Representatives*

1. The objective of any purchase action is performance of the contract objectives, not control of the contractor's business. Postal Service administrative personnel should devote their efforts to tasks associated with that objective, such as quality assurance, cost monitoring, and other activities intended to ensure compliance with contract terms. Except when required by contract terms, they may not direct the contractor's management activities or intervene to supervise, train, or discipline contractor personnel.
2. Disputes with contractors are an obstacle to contract performance. Contracting officers and their supporting staffs should seek to resolve contract disputes through a businesslike approach that promotes efficiency and cost-effectiveness and enforces the Postal Service's interests.

### 6.1.2 Contract Administration Functions

6.1.2.a The contracting officer is responsible for:

1. Ensuring timely contract performance in accordance with the contract specifications and clauses, with due regard to the need for quality and the legal rights of the parties;

2. Ensuring that the contractor is compensated promptly and in proper amount consistent with the protection of Postal Service interests;
  3. Making changes, carrying out terminations, and taking other necessary actions outside the normal course of contract performance;
  4. Making decisions and determinations that affect contract performance fairly, impartially, and in accordance with Postal Service policy and applicable law; and
  5. Maintaining complete documentation of contract performance or nonperformance to protect the Postal Service's rights.
- 6.1.2.b The specific functions required to be performed under any contract are determined by the contract clauses and the particular contract situation, as well as the policies in this manual. The contracting officer and each representative should together carefully review the contract immediately after award to determine the functions to be performed and the person or persons responsible for performance.

## SECTION 2 CONTRACT PERFORMANCE

---

### 6.2.1 Postaward Orientation

- 6.2.1.a The contracting officer should hold a postaward orientation when such a session will be useful in enabling contractor and Postal Service personnel to:
1. Achieve a clear, mutual understanding of all contract requirements; and
  2. Identify and resolve potential problems.
- 6.2.1.b In deciding whether a postaward orientation is necessary, the contracting officer should consider the:
1. Nature and extent of any preaward survey or other previous discussions with the contractor;
  2. Contract type, value, and complexity;
  3. Procurement history of the required supplies or services;
  4. Requirements for spare parts and related equipment;
  5. Urgency of the delivery schedule and relationship of the supplies or services to critical programs;
  6. Length of the planned production cycle;
  7. Extent of subcontracting;
  8. Contractor's performance history and experience with the supplies or services;
  9. Contractor's status as a small or minority business concern;
  10. Safety precautions required for hazardous materials or operations;
  11. Financing arrangements contemplated, such as progress payments; and
  12. Whether changes are anticipated that will require special accounting for change orders (see 6.5.2.b).

- 6.2.1.c When a postaward orientation is conducted, it should be held promptly after contract award. The contracting officer must prepare an agenda before the orientation, and summarize by memorandum the actual topics covered in the orientation session. Whenever possible, all representatives (for example, inspectors) must attend any orientation session.
- 6.2.1.d A postaward orientation may not be used to change the contract. Any change resulting from a postaward orientation must be made by a contract modification.

## 6.2.2 Record Keeping

- 6.2.2.a *Policy.* Maintenance of complete records on contract performance is essential for proper contract administration. All actions taken must be documented.
- 6.2.2.b *Organization.* Records must be maintained in an official contract file (see 1.10.1).
- 6.2.2.c *Records in the Possession of Other Postal Service Employees.* Records relating to contract performance may be generated and maintained by offices not under the contracting officer's authority (for example, records on repair and maintenance of equipment under warranty). The contracting officer should alert each such office to the contractual significance of such records and request any organization, retention, or transfer of records necessary to comply with paragraphs a and b above.

## 6.2.3 Contract Monitoring

### 6.2.3.a *Personnel*

1. In addition to appointing representatives (see 6.1.1.b) to monitor contract performance, the contracting officer may name one or more representatives with authority to coordinate the activities of other representatives, such as inspectors or reviewers.
2. The contracting officer may authorize one or more representatives to provide technical direction, but the authorization must specifically alert them to the prohibition on ordering changes in the work affecting schedule, price, or quality.
3. Personnel from federal government agencies may be delegated audit and inspection and testing responsibilities.

### 6.2.3.b *Use of Contractors to Monitor Contract Performance*

1. *Facilities Contracts.* For contracts covered by chapter 11, contracting officers may contract with architects, engineers, or real estate management professionals to perform any contract administration task that could be delegated to a Postal Service contracting officer's representative.
2. *Other Contracts.* Contracting officers may contract with third parties to perform only those contract administration responsibilities related to testing for conformance (but not acceptance), reviewing contractor submittals, shop drawings, and requests for design approval.

### 6.2.3.c *Review of Contractor Submittals*

1. Review of contractor submittals such as materials lists, shop drawings, catalog cuts, or samples is an important method of enforcing contract requirements, and contract terms requiring submission and approval should be strictly enforced. The contracting officer must ensure that contractor

submittals are disapproved only for failure to meet a material requirement of the contract. If a contractor submittal indicates that the specifications are inadequate, the contracting officer should use the applicable changes clause to achieve necessary quality. As to submittals affecting procurements for Technical Data Packages (TDPs), see 2.3.3.

2. Contracting officers and their representatives must approve, conditionally approve, or disapprove contractor submittals promptly and in accordance with any time limits set forth in the contract. Disapprovals and conditional approvals must clearly indicate what the contractor must do to comply with the contract requirements.

#### 6.2.4 Delivery

- 6.2.4.a *Transportation.* The contracting officer is responsible for ensuring that supplies purchased by the Postal Service are transported in accordance with:
  1. The solicitation provision prescribed in appendix A;
  2. Chapter 4 of Handbook AS-701, *Materiel Management*; and
  3. All policies, procedures, and technical guidance issued by the Manager, Materials Distribution.
- 6.2.4.b *Variation in Quantity.* Contractors are responsible for delivering the quantity specified in the contract within the tolerances allowed (see Clause B-4, *Variation in Quantity*). Excess quantities totaling no more than \$100 in value may be retained without compensating the contractor. Excess quantities worth more than \$100 may be returned at the contractor's expense, or kept and paid for at the contract price.

#### 6.2.5 Right to Adequate Assurance of Performance

- 6.2.5.a *General.* A contract imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable concerns arise with respect to performance, the contracting officer may, in writing, demand adequate assurance of due performance. The concerns need not arise from or be directly related to the contract.
- 6.2.5.b *Failure to Provide Adequate Assurance.* The contracting officer may treat the contract as defaulted if the contracting officer's concerns are not resolved within 30 days of the demand for adequate assurance.
- 6.2.5.c *Repudiation.* Failure to provide adequate assurance of performance results in a contract breach by repudiation. The contractor may retract the repudiation under 6.2.6.b below unless the contracting officer has acted on the default.

#### 6.2.6 Anticipatory Repudiation

- 6.2.6.a *Postal Service Rights.* If the contractor repudiates the contract with respect to performance not yet due, the contracting officer may:
  1. Await performance for a reasonable time; or
  2. Result to any remedy provided by this manual or the contract, even though the contractor has been notified that the Postal Service will await performance and the contracting officer has urged retraction; and

3. In either case suspend the Postal Service's own performance or proceed in accordance with the provisions of the contract's *Default* clause.

6.2.6.b *Retraction of Repudiation*

1. Until the contractor's next performance is due, it can retract a repudiation unless the Postal Service has, since the repudiation, changed its position or otherwise indicated that the repudiation is considered final.
2. Retraction may be by any method that clearly indicates that the contractor intends to perform, but must include any assurance justifiably demanded under 6.2.5.a.
3. Retraction reinstates the contractor's rights under the contract with due excuse and allowance to the Postal Service for any delay caused by the repudiation.

## 6.2.7 **Bankruptcy**

6.2.7.a *General.* Once a contractor declares bankruptcy, the right of the Postal Service to take unilateral action with respect to the contractor is limited. Contracting officers should monitor the financial strength of the contractor in order to anticipate possible problems which could arise in this area and must take prompt action to protect the interests of the Postal Service upon notification of a contractor's bankruptcy.

6.2.7.b *Procedures.* Upon notification that a contractor is in bankruptcy proceedings, the contracting officer must:

1. Furnish the notice of bankruptcy to assigned counsel and other appropriate agency offices.
2. Determine the amount of any claims which the Postal Service may have against the contractor on any contracts which have not been closed out.
3. Take actions necessary to protect the Postal Service's financial interests and safeguard Postal Service property.
4. Furnish pertinent contract information to assigned counsel.

6.2.7.c *Consultation with Assigned Counsel.* The contracting officer must consult with assigned counsel prior to taking any action regarding the contractor's bankruptcy proceedings.

6.2.7.d *Clause.* The contracting officer must insert Clause 6-1, *Bankruptcy*, in all solicitations and contracts not awarded using simplified procedures.

## SECTION 3 QUALITY ASSURANCE

---

### 6.3.1 **Inspection and Testing**

6.3.1.a *General*

1. Quality assurance requirements, including inspection and testing, acceptance, and first article approval, are treated in 2.2.1 and 2.2.2. This section focuses on the administration of such requirements during contract performance.



2. Inspection and testing must be performed in accordance with contract requirements, and must be documented.
3. Unless there are special requirements (see 2.2.1.e), the Postal Service inspects purchases made using simplified procedures (see 4.3) at destination and only for type and kind; quantity; damage; operability (if readily determinable); and preservation, packaging, packing, and marking, if applicable.

6.3.1.b *Nonconforming Supplies or Services*

1. *General*

- (a) Contracting officers must normally reject supplies or services not conforming in all respects to contract requirements.
- (b) Contracting officers should discourage the repeated tender of nonconforming property or services, including those with only minor nonconformances. In such cases, the contracting officer should take appropriate action, such as rejection and documentation of the contractor's performance record.

2. *Correction or Replacement*

- (a) Contractors must be given an opportunity to correct or replace nonconforming supplies or services when that can be accomplished within the delivery schedule.
- (b) Unless the contract specifies otherwise (as in some cost-reimbursement contracts), correction or replacement must be without additional cost to the Postal Service.
- (c) Except under non-fixed-price contracts, the Postal Service reserves the right to charge the contractor the cost of reinspection and retesting needed because of prior rejection.

3. *Rejection*

- (a) *Determination.* When correction within the delivery schedule is not possible, the contracting officer must ordinarily reject supplies or services whose nonconformance adversely affects safety, health, reliability, durability, performance, interchangeability of parts or assemblies, weight, appearance, or any other basic objective of the contract (see, however, subparagraph b.4 below). The contracting officer should consult with technical personnel as necessary in making this determination.
- (b) *Notice.* Contractors must be given prompt notice of rejection, including the reasons for rejection. If prompt notice is not given, acceptance may be implied as a matter of law. Notice must be in writing when:
  - (1) The supplies or services have been rejected at a place other than the contractor's plant;
  - (2) The contractor persists in offering nonconforming supplies or services for acceptance; or
  - (3) Delivery or performance was late without excusable cause.

4. *Substitute Performance*

- (a) When replacement or correction is not possible within the contract period of performance, and the contracting officer has rejected performance under subparagraph b.3 above, the contracting officer

should provide the contractor an opportunity to provide acceptable substitute performance if:

- (1) Substitute performance will best mitigate the damage suffered by the Postal Service; and
  - (2) Performance is still required.
- (b) When substitute performance is accepted, the contracting officer must modify the contract to provide for an equitable price adjustment or other consideration.

5. *Acceptance of Defective Performance*

(a) *Minor Defects.* If a nonconformance is minor, in that it does not adversely affect satisfaction of a basic contract objective (see 3.a above), and correction within the delivery schedule is not possible, the contracting officer may accept nonconforming supplies and services.

(b) *Other Defects.* The contracting officer may not accept supplies or services whose nonconformance adversely affects satisfaction of a basic contract objective unless acceptance is clearly in the Postal Service's interest. The contracting officer's determination to accept the supplies or services must be in writing and must be based on:

- (1) Information on the nature and extent of the nonconformance;
- (2) Advice of the technical activity that material is safe to use and will perform its intended purpose;
- (3) Contractor request for acceptance of the supplies or service;
- (4) A recommendation for acceptance by the intended user, with supporting rationale; and
- (5) Appropriate monetary or other consideration.

(c) *Consideration for Acceptance of Defective Performance*

(1) When nonconforming supplies or services are accepted under (a) above, the contracting officer need not modify the contract to provide for an equitable price adjustment or other consideration, unless:

- (i) It appears that the savings to the contractor in fabricating the nonconforming supplies or performing the nonconforming services exceed the cost to the Postal Service of processing and enforcing a modification; or
- (ii) The Postal Service's interests otherwise require a contract modification.

(2) When nonconforming supplies or services are accepted under (b) above, the contracting officer must modify the contract to provide for an equitable price adjustment or other consideration.

## 6.3.2 **Acceptance**

### 6.3.2.a *General*

1. Acceptance constitutes acknowledgment that supplies or services conform with quality, quantity, and packaging requirements set forth in the terms and conditions of the contract.

2. Acceptance may take place before delivery, at delivery, or after delivery, depending on the contract's provisions.
  3. Supplies and services should not ordinarily be accepted before completion of Postal Service inspection and other quality assurance actions. Acceptance should be evidenced by execution of an acceptance certificate on an inspection form, receiving report, or commercial shipping document or packing list.
- 6.3.2.b *Responsibility.* Acceptance is the responsibility of the contracting officer. When this responsibility is assigned to a contracting officer's representative or another postal employee, acceptance by that person is binding on the Postal Service.
- 6.3.2.c *Place of Acceptance.* Each contract must specify the place of acceptance. Contracts providing for Postal Service inspection at source ordinarily provide for acceptance at source; those providing for inspection at destination ordinarily provide for acceptance at destination. Supplies accepted at a place other than destination may not be reinspected at destination for acceptance purposes, but should be examined for quantity, damage in transit, and possible substitution or fraud.
- 6.3.2.d *Certificate of Conformance.* A contractor certificate of conformance may be substituted for Postal Service inspection, whether acceptance is at source or destination, at the contracting officer's discretion (see Clause B-5, *Certificate of Conformance*). Acceptance based on such a certificate may be in the Postal Service's interest when:
1. Only small losses will be incurred in the event of a defect; or
  2. The contractor's reputation or past performance suggests that the supplies or services furnished will be acceptable, and any defective work will be replaced, or corrected, or repaired without contest.
- 6.3.2.e *Revocation of Acceptance in Whole or in Part*
1. If the value of performance has been substantially impaired, the contracting officer may revoke acceptance of nonconforming performance if acceptance has:
    - (a) Resulted from the reasonable assumption that the nonconformance would be cured and it is not cured; or
    - (b) Taken place because the nonconformance has not been discovered before acceptance, as a result of the difficulty of discovery, or because of the contractor's assurances.
  2. Revocation of acceptance must occur within a reasonable time after the contracting officer discovers or should have discovered the ground for it and before any substantial change not caused by their own defects takes place in the condition of the goods. It is not effective until the contracting officer notifies the contractor.
  3. The Postal Service has the same rights and duties upon revocation as upon rejection.
- 6.3.2.f *Transfer of Title and Risk of Loss*
1. Title to supplies passes to the Postal Service upon formal acceptance, regardless of when or where the Postal Service takes physical possession, unless the contract specifically provides for earlier passage of title.
  2. Unless the contract specifically provides otherwise, risk of loss of or damage to supplies remains with the contractor until:

- (a) Delivery of the supplies to a carrier if transportation is free on board (f.o.b.) origin;
  - (b) Placement in the U.S. mail, when the Postal Service has provided permit labels for the contractor's use; or
  - (c) Acceptance by the Postal Service or delivery to the Postal Service at the destination specified in the contract, whichever is later, if transportation is f.o.b. destination.
3. The provisions of subparagraph f.2 above do not apply to supplies that are rejected. The risk of loss of or damage to such supplies remains with the contractor until cure or acceptance. After cure or acceptance, subparagraph f.2 above applies.
  4. Under f.2(b) above, the contractor is not liable for loss or damage caused by the negligence of officers, agents, or employees of the Postal Service acting within the scope of their employment.

### 6.3.3 Receiving Reports

#### 6.3.3.a General

1. Completed receiving reports should be submitted to the information service center (ISC) within five days of receipt of the supplies or services.
2. Receiving activities whose reports are regularly received at the ISC more than ten days after receipt of supplies or services will be reported by the ISC to the appropriate purchasing office for remedial action.

#### 6.3.3.b Responsibility

1. As required by Clause B-6, *Receiving Reports*, the contracting officer must provide the proper forms to the contractor. Payment may not be made for shipments not accompanied by receiving reports.
2. The contracting officer must ensure that receiving activities get proper notification of contract awards, including appropriate receiving report forms with instructions for prompt completion and submission.
3. Day-to-day responsibility for monitoring the completion and submission of receiving reports may be delegated to purchasing personnel, or, as necessary, to other responsible managers within the receiving installations.
4. Each installation head must:
  - (a) Designate in writing an individual (or individuals) responsible for receiving and accepting all delivered supplies and services;
  - (b) Provide the appropriate purchasing activities with a copy of the designation; and
  - (c) See that procedures are established to ensure that the individual responsible for receipt and acceptance of supplies is notified promptly when a shipment arrives.
5. Individuals responsible for receipt and acceptance must follow procedures detailed in Management Instruction AS-710-87-15, *Receiving Reports and Payments to Vendors for Supply and Service Contracts*.
6. When partial shipments are certified for payment, a copy of the certified receiving report must be kept for use in receiving the balance of the shipment.

## SECTION 4 PAYMENTS AND FINANCING

### 6.4.1 General

- 6.4.1.a Nonpayment and delays in payment have harmful effects. Contracting officers and financial personnel must ensure that payments legitimately due are made promptly. If a dispute arises regarding the contractor's entitlement to payment, the contracting officer must pay the contractor any amount not in dispute, except for withholding as allowed under 6.4.4.f.
- 6.4.1.b The contracting officer should generally approve requests for partial payment upon delivery of goods or services that partially fulfill contract requirements. When the contract does not provide unit prices, the contracting officer may determine an appropriate formula for payment.
- 6.4.1.c Requests for payment under non-fixed-price contracts must be reviewed by the contracting officer, with the assistance of technical personnel, to determine that such requests comply with the requirements for allowability, allocability, and reasonableness (see 5.2.3).

### 6.4.2 Invoices

- 6.4.2.a Payment will be made only after receipt of an invoice (see Clause B-20, *Invoices*), except for:
  - 1. Regularly scheduled payment under real estate leases and contracts for cleaning services, vehicle hire, and contract postal units;
  - 2. Payments under mail transportation contracts;
  - 3. Over-the-counter transactions using simplified purchasing procedures; or
  - 4. Advance payments, when authorized.
- 6.4.2.b *Submission.* Invoices must be sent to the office specified in the contract or order, with a copy to the contracting officer if necessary. Invoices sent to any other person or office are not considered properly submitted. Invoices submitted before performance or delivery are in violation of the certification provision of the *Invoices* clause.

### 6.4.3 Payment

- 6.4.3.a *Means of Payment.* Payments may be made by check or electronic funds transfer (if available), as requested by the contractor and approved by the contracting officer.
- 6.4.3.b *Time of Payment.* Payment must be made as close as possible to, but not later than, the 30th day after receipt of an invoice or acceptance, whichever occurs later, except as follows:
  - 1. In those limited circumstances when a specified payment date is provided for in the contract, payment will be made as close as possible to, but not later than, that date.
  - 2. When a time discount is taken, payment must be made as close as possible to, but not later than, the discount date. Discounts must be taken from the date on which the invoice is received by the office specified in the contract, or the date on which supplies or services are delivered or performed,

whichever is later, to the discount date. Discounts should be taken whenever economically justified, but only after acceptance.

6.4.3.c *Payment of Interest*

1. Interest will be automatically paid, whether or not a contractor has requested payment of interest, when all of the following conditions have been met:
  - (a) Acceptance has occurred and there is no disagreement over quantity, quality, or other contract provisions;
  - (b) A proper invoice has been received, except when no invoice is required for payment (see 6.4.2.a) or the contracting officer fails to give notice within 7 days after receipt of an improper invoice.
2. When a prompt payment discount is taken after the discount period has expired, the Postal Service has 10 days after expiration of the discount period to correct the underpayment. Failure to do so will result in the automatic payment of interest, whether or not the contractor has requested payment.

6.4.3.d *Calculation of Interest*

1. Except where the interest is prescribed by other governmental authority (e.g., tariffs), it will be calculated using the rate set by the Secretary of the Treasury under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) and in effect on the day after the due date. The rate will be published semi-annually in the *Postal Bulletin*, in January and July. The rate will remain fixed during the period for which interest is calculated. The interest will accrue daily on the invoice payment amount approved by the Postal Service. The interest will be compounded in 30-day increments, starting with and including the first day after the due date through the payment date. Interest accrued at the end of any 30-day period will be added to the approved invoice payment amount and be subject to interest if not paid in the succeeding 30-day period.
2. For the sole purpose of computing interest under this policy, acceptance will have constructively occurred on the 7th day after the contractor has delivered the supplies or performed services in accordance with the terms and conditions of the contract, unless there is a disagreement over quantity, quality, or contractor compliance with the contract. If actual acceptance occurs within 7 days of delivery, the calculation of interest will be based on the actual date of acceptance. When necessary to inspect and test the supplies furnished or to evaluate the services performed, the contracting officer may specify a longer period for constructive acceptance in the solicitation and resulting contract. The justification for extending the constructive acceptance period beyond 7 days must be documented in the contract file.
3. If the office specified in the contract for receipt of invoices fails to date stamp the invoice, the invoice due date will be the 30th day after the date of the invoice, provided that a proper invoice was received and there is no disagreement over the quantity, quality, or contractor compliance with the contract.
4. The interest amount, interest rate and the period for which the interest was computed, will be separately stated on the check or accompanying remittance advice. If requested by the contractor, adjustments will be made for errors in calculating interest.

5. For contracts awarded on or after October 1, 1989, a penalty amount (calculated, as a matter of policy, in accordance with Office of Management and Budget regulations) will be paid, in addition to the interest, if the contractor:
    - (a) Is owed interest;
    - (b) Is not paid the interest within 10 days after the date the invoice amount is paid; and
    - (c) Makes a written demand that the Postal Service pay such a penalty not later than 40 days after the date the invoice amount is paid.
  6. When a prompt payment discount is taken after the discount period has expired, interest will be calculated on the amount of discount improperly taken. The interest will be calculated for the period beginning with the first day after the end of the discount period through the date when the contractor is paid.
  7. If the office specified in the contract for receipt of invoices fails to notify the contractor of a defective invoice within 7 days after its receipt, the due date on the corrected invoice will be adjusted. The number of days taken beyond the 7-day period will be subtracted from payment due date. Any interest owed the contractor will be based on this adjusted due date.
- 6.4.3.e *Alternate Provisions.* The provisions on time of payment may be changed by agreement of the parties, but no interest may be paid by the Postal Service except as provided in paragraph c above.
- 6.4.3.f *Final Payment.* Final payment under any contract involving progress payments, retainage, payment or performance guarantees, or construction may not be made until the contracting officer receives a release from the contractor.

#### 6.4.4 **Withholding of Payments**

- 6.4.4.a *General.* The contracting officer may refuse to pay a contractor or may withhold payments otherwise due, in whole or in part, when:
1. The contract provides for withholding (for instance, when retainage is authorized);
  2. Elements of the amount invoiced by the contractor are not allowable (see 5.2.3);
  3. The contractor has been overpaid or otherwise owes the Postal Service money as a result of the contractor's actions or inactions under the contract;
  4. The contractor owes the Postal Service money for reasons unrelated to the contract under which payment will be withheld; or
  5. As a result of judicial action or applicable law, parties other than the contractor have made claims against the Postal Service, or have not waived rights exercisable against the Postal Service.
- 6.4.4.b *Actions by the Contracting Officer*
1. Nonpayment may be damaging to a contractor's business and may jeopardize performance. Therefore, the contracting officer must carefully consider the reasons for withholding or refusing payment, and must process disputes regarding payment expeditiously.

2. The contracting officer must notify the contractor of any intended withholding and must provide an opportunity for the contractor to object. If time permits, notice should be in writing.

6.4.4.c *Disallowing Costs*

1. At any time during the performance of a non-fixed-price contract, the contracting officer may issue the contractor a written notice of intent to disallow specified costs incurred or planned (see Clause B-17, *Disallowance of Costs*). However, before issuing the notice, the contracting officer should make a reasonable effort to reach a satisfactory settlement through discussions with the contractor.
2. If the contractor disagrees with the deduction from current payments, the contractor may:
  - (a) Request in writing that the contracting officer consider whether the unreimbursed costs should be paid and discuss the matter with the contractor;
  - (b) File a claim under Clause B-9, *Claims and Disputes*, which the cognizant contracting officer will process in accordance with the procedures in 6.8; or
  - (c) Do both of the above.
3. Contractor discounts, rebates, and refunds voluntarily offered or provided for by contract clauses are not subject to this part and may be taken by adjustments to invoices or other procedures acceptable to the information service center.

6.4.4.d *Setoffs and Recoupments*

1. *Definitions*
  - (a) A setoff is a deduction from payments due to the contractor under one contract for sums due the Postal Service under one or more other contracts.
  - (b) Recoupment is a deduction of sums due the Postal Service (damages for delay or defective performance, warranty costs, repair costs, and the like) from the payment due the contractor under a single contract.
2. *Procedures*
  - (a) At any time during performance of a contract, the contracting officer may issue the contractor a written notice of intent to set off or recoup amounts due the Postal Service from payments otherwise due the contractor. However, before issuing the notice, the contracting officer should make a reasonable effort to reach a satisfactory settlement through negotiation.
  - (b) If no settlement is reached, the contracting officer may withhold the amounts due the Postal Service by setoff or recoupment.
  - (c) If the contractor disagrees with the intended setoff or recoupment, the provisions of subparagraph c.2 above apply.
  - (d) When contract payments have been assigned (see 6.4.7), the contracting officer may use setoff or recoupment in accordance with paragraph d only with the concurrence of assigned counsel.

- 6.4.4.e *Third-Party Claims.* The Postal Service may be subject to claims by third parties for moneys otherwise due a contractor. When a claim is filed with the contracting officer, assigned counsel must be notified immediately. Assigned counsel will



provide instructions for handling the claim, for disposition of the fund, and for notice required to be given to the contractor.

- 6.4.4.f *Withholding Payment Under Contract Clauses.* Some contract clauses, such as Clause 2-10, *Liquidated Damages*, and Clause 2-8, *Warranty*, provide for withholding payment in certain circumstances. In addition, some contract clauses provide for withholding a percentage or portion of payments otherwise due to induce continued acceptable performance. The contracting officer must strictly enforce such clauses and must maintain a complete record of the amounts withheld under any clause, the basis for withholding, and the disposition of funds withheld.

## 6.4.5 Progress Payments

- 6.4.5.a *General.* The Postal Service makes progress payments, when provided for by the contract, only in return for demonstrated progress toward completion of performance.

### 6.4.5.b *Method of Computation*

1. Progress payments for nonconstruction contracts must be based on costs incurred in performance. However, as provided in Clause 1-3, *Progress Payments*, the contracting officer may reduce or suspend payments in cases where costs incurred are substantially at variance with progress under the contract. In such cases, the contracting officer should obtain the advice of technical personnel and assigned counsel in computing the amount of payment justified.
2. Progress payments for construction contracts are made in accordance with Clause 11-10, *Payment (Construction)*.

- 6.4.5.c *Supervision.* The extent of progress payments supervision should depend upon the adequacy of the contractor's accounting system and controls and the contractor's experience, performance record, reliability, quality of management, and financial strength.

### 6.4.5.d *Administration*

1. The contracting officer must obtain monthly progress reports from the contractor, showing progress of the work as related to progress payments made.
2. The contracting officer may, in approving progress payment requests, rely on the contractor's accounting system and certification without prepayment review. However, postpayment reviews (including audits when considered necessary) must be made periodically, or when considered necessary in determining the validity of progress payments already made and expected to be made.
3. Clause 1-3, *Progress Payments*, gives the Postal Service the right to reduce or suspend progress payments, or to increase the liquidation rate, under specified conditions. The contracting officer may take such actions only in accordance with the contract terms and only after:
  - (a) Notifying the contractor of the intended action and providing an opportunity for discussion;
  - (b) Evaluating the effect of the action on the contractor's operations, on the basis of the contractor's financial condition, projected cash requirements, and existing or available credit arrangements; and

- (c) Considering what is equitable in the particular situation.
- 4. The contracting officer may take immediate unilateral action only if warranted by circumstances such as overpayments or unsatisfactory contract performance. In all cases, the contracting officer must:
  - (a) Act fairly and reasonably;
  - (b) Base decisions on substantial evidence; and
  - (c) Document the contract file.
- 5. Progress payments are recouped through the deduction of liquidations from payments that would otherwise be due the contractor for completed performance. The usual method is that the liquidation rate is the same as the progress payment rate; at the beginning of a contract, only this method may be used. Any liquidation method other than the ordinary method must be approved by the manager of Headquarters Purchasing, Field Customer Support, National Mail Transportation Purchasing, or Major Facilities Purchasing.

#### 6.4.6 Limitation of Cost or Funds

##### 6.4.6.a Administration

1. When a contract contains Clause 5-5, *Limitation of Cost*, or Clause 5-6, *Limitation of Funds*, and the contractor has given notice that costs incurred are approaching the estimated cost of the contract or the limit of the funds allotted, the contracting officer must promptly obtain funding and programming information pertinent to the contract's continuation and notify the contractor in writing that:
  - (a) Additional funds have been allotted, or the estimated cost has been increased, in a specified amount;
  - (b) The contract is not to be further funded, and the contractor should submit a proposal for an adjustment of fee, if any, based on the percentage of work completed in relation to the total work called for under the contract; or
  - (c) The contract is to be terminated.
2. The contractor is entitled by the contract terms to stop work when the funding or cost limit is reached, and any work beyond the funding or cost limit is at the contractor's risk.

- 6.4.6.b *Effect of a Modification.* The contracting officer may issue a change order, a direction to replace or repair defective items or work, or a termination notice without immediately increasing the funds available. Since a contractor is not obligated to incur costs in excess of the estimated cost in the contract, the contracting officer must ensure availability of funds for directed actions. The contracting officer may direct that any increase in the estimated cost or amount allotted to a contract be used for the sole purpose of funding termination or other specified expenses.

#### 6.4.7 Assignment of Claims

- 6.4.7.a *Policy.* A contractor may assign monies coming due under a Postal Service contract to a single bank or other financial institution, with the approval of the

contracting officer (see Clause B-8, *Assignment of Claims*). Any other attempted assignment may be treated as a breach of contract.

- 6.4.7.b *Approval*. Contracting officers may approve any authorized assignment that does not jeopardize contract performance. See also the discussion of novation agreements in 6.5.4.
- 6.4.7.c *Assignments by Law*. This part does not govern assignments ordered by a court or by operation of law. Contracting officers should consult assigned counsel in such cases.

## SECTION 5 CONTRACT MODIFICATIONS

### 6.5.1 General

#### 6.5.1.a Definitions

1. *Administrative change*. This is a unilateral contract change, in writing, that does not affect the substantive rights of the parties (for example, a change in the paying office).
2. *Effective date*. This has one of the meanings given below, depending on the circumstances in which it is used:
  - (a) The effective date of an administrative change, change order, or other unilateral modification issued by the Postal Service under a contract is any effective date established therein, or, if none, the date of the modification.
  - (b) The effective date of any bilateral modification under a contract, such as a supplemental agreement, is any effective date established therein, or, if none, the date agreement is reached (usually evidenced by the date signed by the last agreeing party).
  - (c) Modifications issued in connection with previous directions or agreements — such as settlements of the cost of changes, confirmations of terminations, or conversions of terminations for default to terminations for convenience — ordinarily take the effective date of the underlying action.
  - (d) For a modification converting a termination for default to a termination for convenience, the effective date will be the same as the effective date of the termination for default.

#### 6.5.1.b Policy

1. Only contracting officers acting within the scope of their authority are authorized to sign contract modifications on behalf of the Postal Service. Other Postal Service personnel may not:
  - (a) Sign contract modifications;
  - (b) Act in such a manner as to cause the contractor to believe that they have authority to bind the Postal Service; or
  - (c) Direct or encourage the contractor to perform work that should be the subject of a contract modification.

2. Contract modifications, including changes that can be issued unilaterally, must be priced before their execution if this can be done without adversely affecting the interest of the Postal Service. If a significant cost increase could result from a contract modification and time does not permit negotiation of a price, at least a maximum price must be negotiated whenever practicable. As to modifications affecting Technical Data Packages (TDPs), see 2.3.3.
- 6.5.1.c *Types of Modifications.* Contract modifications are of the following types:
1. *Bilateral.* A bilateral modification (supplemental agreement) is a contract modification that is signed by the contractor and the contracting officer. Bilateral modifications are used, for example, to:
    - (a) Make equitable adjustments under Clause B-2, *Changes*, Clause 11-26, *Changes (Construction)*, or other clauses providing for equitable adjustment; and
    - (b) Reflect other agreements of the parties modifying contract terms.
  2. *Unilateral.* A unilateral modification is a contract modification that is signed only by the contracting officer in accordance with a contract clause. Unilateral modifications are used, for example, to:
    - (a) Make administrative changes;
    - (b) Issue change orders;
    - (c) Make changes authorized by specific clauses or contract provisions (such as exercise of an option or a suspension of work); and
    - (d) Issue termination notices.
- 6.5.1.d *Notification of Contract Changes.* Under the *Changes* clause, when a contractor considers that any written or oral order (including direction, interpretation, instruction, or determination) from the contracting officer causes a change in the contract, the contractor must notify the contracting officer in writing that the contractor regards the order as a change order. The contracting officer must then evaluate the order and:
1. Confirm that it is a change, direct the mode of further performance, and plan for its funding;
  2. Countermand the alleged change; or
  3. Notify the contractor that no change is considered to have been ordered.
- 6.5.1.e *Availability of Funds*
1. The contracting officer may not execute a contract modification that causes or will cause an increase in funds without having first obtained a certification of funds availability, except for modifications to contracts that:
    - (a) Are conditioned on availability of funds; or
    - (b) Contain a limitation of cost or funds clause.
  2. A certification of funds availability should be based on the negotiated price. Modifications executed before agreement on price may be based on the best available estimate.
- 6.5.1.f *Exercise of Options*
1. Before exercising an option, the contracting officer must determine that (a) funds are available, (b) the Postal Service has a need for the supplies or services covered by the option, and (c) exercise of the option is the most advantageous alternative, price and other factors considered. "Other factors"

includes any need for continuity of operations and potential costs to the Postal Service of disrupting operations.

2. A determination that the option price is the most advantageous must be based on one of the following:
  - (a) An informal investigation of prices, or other examination of the market, indicates clearly that a better price than that offered by the option cannot be obtained.
  - (b) The time between the award of the contract containing the option and the exercise of the option is so short that it indicates the option price is the lowest price obtainable, considering such factors as market stability and a comparison of the time since award with the usual duration of contracts for such supplies and services.
  - (c) A new solicitation fails to produce a better price than that offered by the option. (This method of testing the market should be used only if neither of the methods described in 2(a) and (b) is satisfactory.)
3. If the contract provides for economic price adjustment, the effect of such adjustment on prices under the option must be ascertained in determining whether to exercise the option.
4. When an option is to be exercised, the contracting officer must:
  - (a) Make a written determination that the option may properly be exercised in accordance with subparagraph f.1 above;
  - (b) Give written notification to the contractor within the time period specified in the contract; and
  - (c) Give the contractor written notification of the exercise of the option and execute a contract modification as needed, citing the option clause as authority for the purchase.

#### 6.5.1.g *Correction of Mistakes*

1. A contract may be modified to correct or mitigate the effect of a mistake such as the following:
  - (a) A mistake or ambiguity consisting of the failure to express, or express clearly, in a written contract, the agreement as both parties understood it.
  - (b) A contractor's mistake so obvious that it was or should have been apparent to the contracting officer.
  - (c) A mutual mistake as to a material fact.
2. A claim of mistake asserted after award is a claim subject to the procedures of Clause B-9, *Claims and Disputes*. A decision to deny, in whole or in part, a claim of mistake asserted after award is a final decision under the clause (see 6.8.3).

## 6.5.2 **Change Orders**

### 6.5.2.a *General*

1. The *Changes* clause permits the contracting officer to make unilateral changes, as specified in the clause, within the general scope of the contract. These changes are accomplished by issuing written change orders.
2. The contractor must continue performance of the contract as changed, except that in non-fixed-price or incrementally funded contracts the

contractor is not obligated to continue performance or incur costs beyond the limits established in Clause 5-5, *Limitation of Cost*, or Clause 5-6, *Limitation of Funds*.

#### 6.5.2.b *Accounting*

1. Contractor's accounting systems are seldom designed to segregate the costs of performing changed work. Clause B-21, *Change-Order Accounting*, requires them to do so.
2. The following categories of direct costs normally are segregable and accountable under the terms of the *Change-Order Accounting* clause:
  - (a) Nonrecurring costs (for example, engineering costs and costs of reperformed work).
  - (b) Costs of distinct tasks added by the change order (for example, new subcontract work, new prototypes, or new retrofit or backfit kits).
  - (c) Costs of recurring work (for example, labor and material costs).

#### 6.5.2.c *Administration*

1. When change orders are not priced before performance, they usually require two documents — the change order and a supplemental agreement reflecting a resulting equitable adjustment. If an equitable adjustment in the contract price or delivery terms, or both, can be agreed upon in advance, only a supplemental agreement need be issued. If the change order has no effect on price or delivery, no equitable adjustment is needed and there will be no related supplemental agreement. Administrative changes and changes issued pursuant to a clause giving the Postal Service a unilateral right to make a change (such as an option clause) require only one document.
2. Contracting officers must promptly negotiate equitable adjustments resulting from change orders, and must follow up when claims for equitable adjustment are not received within 30 days after the order.
3. Before negotiating an equitable adjustment, the contracting officer must ensure that price and cost analyses, as appropriate, are made and must consider the contractor's segregable costs of the change, if available. If additional funds are required as a result of the change, the funds must be available before the supplemental agreement is executed.
4. To avoid controversies that may result from a supplemental agreement making an equitable adjustment, the contracting officer should:
  - (a) Ensure that all elements of the equitable adjustment have been presented and resolved; and
  - (b) Include a release in the supplemental agreement.

### 6.5.3 **Equitable Adjustments for Delays**

- 6.5.3.a *General.* In determining the consequences of events that delay performance, the United States Court of Federal Claims and the Postal Service Board of Contract Appeals have applied general risk allocation principles. These have been supplemented by standard contract clauses under which the time and cost effect of delays are dealt with separately. Clause B-19, *Excusable Delays*, deals with the types of events that protect the contractor from sanctions for late performance. Other clauses, such as Clause B-16, *Suspensions and Delays*, cover the recovery of costs associated with delays. The contractor bears the risk of schedule and cost effects for delays it causes or for delays within its control.

Generally, the contractor is excused from nonperformance because of delays caused by factors for which neither the contractor nor the Postal Service is responsible. However, the contractor must bear the cost impact of such delays. The Postal Service is responsible for the schedule and cost effects of delays it causes, delays that are under its control, or delays for which it has agreed to compensate the contractor. Clause B-15, *Notice of Delay*, requires the contractor to notify the contracting officer of problems that might delay performance.

6.5.3.b *Excusable Delays*

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

6.5.3.c *Compensable Delays*

1. A contractor may be granted an extension of the contract delivery or performance schedule, a price adjustment, or both, as the contracting officer deems appropriate, when an unreasonable delay in performance is caused by the Postal Service or is under its control, or when it has agreed to pay the contractor for the delay. Situations that may entitle the contractor to an equitable adjustment (schedule, cost, or both) include:
  - (a) Delay in issuing the notice to proceed;
  - (b) Delay in availability of the site;
  - (c) Differing site conditions;
  - (d) Actual or constructive changes or delays;
  - (e) Delay in providing funding;
  - (f) Delay in inspections;
  - (g) Delay in issuing changes;
  - (h) Delay in providing Postal Service-furnished equipment; and
  - (i) Failure of performance of other Postal Service contractors.
2. The contractor has the burden of proof in establishing the basis for the equitable adjustment required to overcome the delay.

6.5.3.d *Concurrent Causes*. When a delay is attributable to both the Postal Service and the contractor, a contract delivery or performance schedule adjustment should not normally be granted for a period of delay caused at least in part by actions or failures on the part of the contractor. (But damages may not be assessed against the contractor in such situations.)

#### 6.5.3.e *Acceleration*

1. The Postal Service has the right to require accelerated performance under Clause B-2, *Changes*. This right should be exercised only when required to maintain the operational capability of the Postal Service.
2. Contracting officers must document the specific facts that require acceleration of performance and the estimated impact on contract price. Whenever possible, the contracting officer must negotiate acceleration actions in advance.
3. Contracting officers should be alert to constructive acceleration situations. Constructive acceleration occurs when the Postal Service does not agree to a contract delivery or performance schedule extension to which the contractor is entitled, or is later determined to be entitled, and that has the effect of causing the contractor to accelerate performance. Such acceleration may form the basis for a claim against the Postal Service for an increase in contract price.

### 6.5.4 **Novation and Change of Name Agreements**

#### 6.5.4.a *Definitions*

1. *Change-of-name agreement*. This is an agreement signed by the contractor and the Postal Service that recognizes a legal change of the contractor's name without altering the original contractual rights and obligations of the parties.
2. *Novation agreement*. This is an agreement signed by (a) the contractor (transferor), (b) the successor in interest (transferee), and (c) the Postal Service, by which, among other things, the transferor guarantees performance of the contract, the transferee assumes all obligations under the contract, and the Postal Service recognizes the transfer of the contract and related assets.

#### 6.5.4.b *Responsibility*

1. The contracting officer is responsible for:
  - (a) Determining, in consultation with assigned counsel, whether to permit contract novation; and
  - (b) Processing and signing novation and change-of-name agreements.
2. When multiple contracts of one contractor or transfers from several transferors to one transferee are involved, the contracting officer responsible for executing a novation or change-of-name agreement is the contracting officer responsible for the largest unsettled (unbilled plus billed but unpaid) contract dollar balance.

#### 6.5.4.c *Novation Policy*

1. The Postal Service generally prohibits contract novation (see Clause B-8, *Assignment of Claims*). However, the Postal Service may recognize a third party as the successor in interest when that party's interest arises out of the transfer of:
  - (a) All the contractor's assets; or
  - (b) The entire portion of the assets involved in performing the contract.
2. Situations in which novation may be permitted include but are not limited to:
  - (a) Sale of the contractor's assets with a provision for assuming liabilities;



- (b) Transfer of assets as part of a merger or corporate consolidation; and
  - (c) Incorporation of a proprietorship or partnership, or formation of a partnership.
3. Before concurring in a contract novation, the contracting officer must determine that the successor in interest is a responsible contractor (see 3.3.1).
  4. When it is not in the Postal Service's interest to concur in a contract novation, the original contractor remains responsible for contract performance, and the contract may be terminated for default for failure to perform.
- 6.5.4.d *Change of Name.* A change-of-name agreement is appropriate when only a change of the contractor's name is involved, and the rights and obligations of the parties remain unaffected. The agreement must be executed by the contracting officer and the contractor modifying all existing contracts between the parties to reflect the change of name.

## SECTION 6 POSTAL SERVICE PROPERTY

---

### 6.6.1 Contractor's Property Control Systems

- 6.6.1.a The contracting officer or the representative assigned to act as property administrator should review contractors' property control systems to ensure compliance with the contract's property clauses.
- 6.6.1.b The property administrator should notify the contractor in writing when its property control system does not comply with the contract requirements, requesting prompt correction of deficiencies. If the contractor does not correct the deficiencies within a reasonable period, the property administrator should request action by the contracting officer. The contracting officer may:
1. Notify the contractor in writing of any required corrections and establish a schedule for completion;
  2. Caution the contractor that failure to take the required corrective action within the time specified will result in withholding or withdrawing system approval; and
  3. Advise the contractor that its liability for loss of or damage to Postal Service property may increase if approval is withheld or withdrawn.

### 6.6.2 Records

- 6.6.2.a Contractor records of Postal Service property, established and maintained under the terms of the contract, are the Postal Service's official records. Duplicate official records should be furnished to or maintained by Postal Service personnel, except as provided in subparagraph b.2 below.
- 6.6.2.b Contracts may provide for the official records to be maintained by the Postal Service when the contracting officer retains contract administration and Postal Service property is furnished to a contractor:

1. For repair or servicing and return to the shipping organization;
2. For use at a Postal Service installation;
3. Under a local support service contract;
4. Under a contract with a short performance period or involving Postal Service property having an acquisition cost of \$50,000 or less; or
5. When otherwise determined by the contracting officer to be in the Postal Service's interest.

## SECTION 7 SUBCONTRACTING POLICIES AND PROCEDURES

### 6.7.1 General

#### 6.7.1.a Definitions

1. *Contractor.* The contractor organization and each separate entity, such as an affiliate, division, or plant, that performs its own purchasing.
2. *Subcontract.* Any contract to furnish property or services for the performance of a prime contract or higher-tier subcontract. It includes but is not limited to purchase orders and modifications of purchase orders.
3. *Subcontractor.* Any firm that furnishes supplies or services to or for a prime contractor or higher-tier subcontractor.

#### 6.7.1.b Requirements

1. When a contract contains Clause B-18, *Subcontracts*, the contractor must give the contracting officer advance notice of its intent to subcontract. The contractor may enter into a subcontract unless notice of disapproval is received from the contracting officer within 15 days from the date the contracting officer was notified.
2. The contracting officer must:
  - (a) Promptly evaluate contractor notices of intent to subcontract;
  - (b) Obtain assistance in this evaluation, as necessary, from subcontracting, audit, pricing, technical, or other specialists; and
  - (c) Notify the contractor in writing if the subcontract is disapproved.

#### 6.7.1.c Considerations

1. The contracting officer must review the notice of intent to subcontract and any supporting data and must consider the following:
  - (a) Is the subcontractor to acquire special test equipment or facilities that are available from Postal Service sources?
  - (b) Is the selection of the particular supplies, equipment, or services technically justified?
  - (c) Was adequate price competition obtained or its absence justified?
  - (d) Did the contractor adequately assess its subcontractor's alternate proposals?
  - (e) Does the contractor have a sound basis for selecting and determining the responsibility of the subcontractor?

- (f) Has the contractor performed adequate price or cost analysis?
  - (g) Is the proposed subcontract type appropriate for the risks involved and consistent with current policy?
  - (h) Service-furnished facilities?
  - (i) Has the contractor adequately and reasonably translated prime contract technical requirements into subcontract requirements?
  - (j) Is the proposed subcontractor on the Postal Service's consolidated list of debarred, suspended, and ineligible contractors?
2. Particularly careful and thorough consideration is necessary when:
- (a) The prime contractor's purchasing system or performance is inadequate;
  - (b) Close working relationships or ownership affiliation between the prime and subcontractor may preclude free competition or result in higher prices;
  - (c) Subcontracts are proposed on a noncompetitive basis, at prices that appear unreasonable, or at prices higher than those offered the Postal Service in comparable circumstances; or
  - (d) Subcontracts are proposed on other than a fixed-price basis.

### 6.7.2 Limitations

- 6.7.2.a Lack of disapproval of a subcontract does not constitute a determination of the acceptability of the subcontract terms or price, or of the allowability of costs.
- 6.7.2.b Contracting officers should not disapprove a subcontract merely because it gives the subcontractor the right to appeal a dispute to the Board of Contract Appeals in the name of the prime contractor.

## SECTION 8 CLAIMS AND DISPUTES

---

### 6.8.1 General

- 6.8.1.a *Contract Disputes Act.* This section and Clause B-9, *Claims and Disputes*, implement the Contract Disputes Act of 1978, as amended (41 U.S.C. 601–613).
- 6.8.1.b *Policy.* It is the policy of the Postal Service to resolve contractual issues by mutual agreement at the level of the contracting officer. The contracting officer should consider holding informal discussions between the parties to resolve differences before issuing a final decision on a claim.
- 6.8.1.c *Definitions*
  - 1. *Claim.* A written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of a specified sum of money, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim.

2. *Certified claim.* A contractor's claim exceeding \$50,000 that is accompanied by the certification required by Clause B-9, Claims and Disputes.

## 6.8.2 Claim Initiation

- 6.8.2.a Contractor claims must be submitted in writing to the contracting officer for final decision. The contracting officer must document the contract file with evidence of date of receipt of any submission that the contracting officer deems to be a claim.
- 6.8.2.b The contracting officer must issue a written decision on any Postal Service claim against a contractor.
- 6.8.2.c Each contractor claim exceeding \$50,000 must be a certified claim.
- 6.8.2.d When the contracting officer determines that the contractor is unable to support any part of the claim and there is evidence that the inability is attributable to either misrepresentation of fact or fraud on the contractor's part, the contracting officer must deny the claim and refer the matter to the Inspection Service.

## 6.8.3 Decision and Appeal

- 6.8.3.a Contracting officers are authorized to decide or settle all claims arising under or relating to a contract subject to the Contract Disputes Act, except for:
  1. Claims or disputes for penalties or forfeitures prescribed by statutes or regulation that a federal agency is to administer; or
  2. Claims involving fraud
- 6.8.3.b When a claim by or against a contractor cannot be resolved by agreement and a decision under Clause B-9, *Claims and Disputes* is necessary, the contracting officer must review the facts pertinent to the claim, obtain assistance from legal and other advisors, and issue a final decision in writing. The decision must include a description of the claim or dispute with references to the pertinent contract provisions, a statement of the factual areas of agreement and disagreement, and a statement of the contracting officer's decision with supporting rationale.
- 6.8.3.c When the contracting officer cannot issue a decision because the contractor has not provided sufficient information, the contracting officer must promptly request the required information. Further failure to provide the requested information is an adequate reason to deny the claim.
- 6.8.3.d The contracting officer must furnish a copy of the decision to the contractor by certified mail, return receipt requested, or by any other method that provides evidence of receipt.
- 6.8.3.e If the contractor has asked for a decision within 60 days, the contracting officer must issue a final decision on a submitted claim of \$50,000 or less within 60 calendar days of its receipt. The contractor may consider the contracting officer's failure to issue a decision within the applicable time period as a denial of its claim, and may file a suit or appeal on the claim.
- 6.8.3.f For certified claims over \$50,000, contracting officers must either issue a final decision within 60 calendar days of their receipt or notify the contractor within the 60-day period of the time when a decision will be issued. The time period established must be reasonable, taking into account the size and complexity of

the claim, the adequacy of the contractor's supporting data, and any other relevant factors.

6.8.3.g The contracting officer's final decision must contain the following paragraph:

"This is the final decision of the contracting officer pursuant to the Contract Disputes Act of 1978 and the clause of your contract entitled *Claims and Disputes*. may appeal this decision to the Postal Service Board of Contract Appeals by mailing or otherwise furnishing written notice (preferably in triplicate) to the contracting officer within 90 days from the date you receive this decision. The notice should identify the contract by number, reference this decision, and indicate that an appeal is intended. Alternatively, you may bring an action directly in the United States Court of Federal Claims within 12 months from the date you receive this decision."

6.8.3.h When the claim or claims denied total \$10,000 or less, the contracting officer must add the following to the paragraph prescribed in paragraph g above:

In taking an appeal to the Board of Contract Appeals, you may include in your notice of appeal an election to proceed under the Board's Small Claims (expedited) procedure, which provides for decision within approximately 120 days, or an election to proceed under the Board's Accelerated procedure, which provides for a decision within approximately 180 days. If you do not make an election in the notice of appeal, you may do so by written notice anytime thereafter.

6.8.3.i When the claim or claims denied total \$50,000 or less, but more than \$10,000, the contracting officer must add the following to the paragraph prescribed in paragraph g above:

In taking an appeal to the Board of Contract Appeals, you may include in your notice of appeal an election to proceed under the Board's Accelerated procedure, which provides for a decision within approximately 180 days. If you do not make an election in the notice of appeal, you may do so by written notice anytime thereafter.

6.8.3.j Contracting officers must have sufficient information available at the time a final decision is issued on a claim so as not to delay the resolution of appeals within the period set for an expedited or accelerated disposition. Once an appeal is docketed and expedited or accelerated disposition is elected, contracting officers must devote sufficient resources to the appeal to ensure that the schedule for resolution is met.

6.8.3.k Purchasing offices may seek to settle the controversy after an appeal has been filed. However, processing of the appeal must not be suspended during the efforts to settle the controversy, unless the Board of Contract Appeals directs a suspension.

6.8.3.l Any amount determined in a final decision to be payable, less any portion previously paid, normally should be promptly paid the contractor without prejudice to either party in the event of appeal or action on the claim. In the absence of appeal by the Postal Service, a board or court decision favorable in whole or in part to the contractor must be implemented promptly by payment by the appropriate information service center. In cases when only the question of entitlement has been decided and the matter of amount has been remanded to the parties for negotiation, a final decision of the contracting officer must be issued if agreement is not reached promptly.

- 6.8.3.m Interest on the amount found due on the contractor's claim must be paid from the date the contracting officer received the claim (properly certified, if required, in accordance with Clause B-9, *Claims and Disputes*), or from the date payment would otherwise be due, if that date is later, until the date of payment. Simple interest will be paid at the rate established by the Secretary of the Treasury for each six-month period in which the claim is pending. Information on the rate at which interest is payable is announced from time to time in the *Postal Bulletin*.
- 6.8.3.n The Postal Service will seek review of an adverse decision of the Board of Contract Appeals in the Court of Appeals for the Federal Circuit, if the responsible VP, with the concurrence of the General Counsel or the General Counsel's designee, decides to pursue an appeal.

## SECTION 9 CONTRACT TERMINATION

---

### 6.9.1 General

#### 6.9.1.a *Applicability*

1. This section applies to contracts that contain clauses permitting termination for the convenience of the Postal Service or for contractor default, and to those contracts with clauses that provide for termination on notice. It establishes uniform policies for the complete or partial termination of such contracts.
2. The provisions of this section must be used by the contracting officer as a guide in evaluating settlement of a subcontract terminated for the convenience of a contractor whenever the settlement could be the basis of a contractor claim for reimbursement by the Postal Service.
3. The contracting officer may follow the provisions of this section in determining any equitable adjustment resulting from modification of a contract, other than a non-fixed-price contract, under the *Changes* clause.

6.9.1.b *Review and Approval.* No contract with a face value or potential termination liability exceeding \$1 million may be terminated for convenience or default unless the VP, P&M, has reviewed and approved the proposed termination. In addition, no contract, regardless of the face value, which is considered to be of a sensitive or highly visible nature may be terminated for convenience or default unless the VP, P&M, has reviewed and approved the proposed termination.

#### 6.9.1.c *Definitions*

1. *Amount of proposal or amount of claim.* The gross settlement proposed by the contractor, less amounts acceptable for the completed articles or work at the contract price and amounts for any subcontractor settlement proposals.
2. *Claim.* Defined in 6.8.1.c.
3. *Continued portion of the contract.* That part of a partially terminated contract which the contractor must continue to perform.
4. *Effective date of termination.* The date on which the notice of termination requires the contractor to stop performance under the contract. If the contractor receives the termination notice after the date fixed for termination, then the effective date of termination means the date the notice is received.

5. *Other work.* Any current or scheduled work of the contractor, whether Postal Service or commercial, other than work related to the terminated contract.
6. *Partial termination.* The termination of a part, but not all, of the work that has not been completed and accepted under a contract.
7. *Settlement proposal or proposal.* A request for payment submitted by a contractor or subcontractor in the form, and supported by the data, required by this section. A settlement proposal is included within the meaning of the word "claim" under the False Claims acts (18 U.S.C. 2807 and 31 U.S.C. 3729).
8. *Terminated portion of the contract.* The part of a terminated contract that relates to work or end items not completed and accepted on the effective date of termination. For construction contracts that have been completely terminated for convenience, it means the entire contract notwithstanding completion of and payment for individual items of work before termination.
9. *Unadjusted contract change.* Any contract change or contract term for which a definitive modification is required but has not been executed.

6.9.1.d *General Principles*

1. Contracts may be terminated — whether for default, convenience, or upon notice — only when such action is in the interest of the Postal Service.
2. The contracting officer may effect a termination on notice or a no-cost settlement agreement in lieu of issuing another form of termination, upon determination that:
  - (a) The contractor will accept a no-cost settlement or the contract allows termination on notice;
  - (b) Postal Service property was not furnished or will be returned; and
  - (c) All outstanding payments, claims, and contractor obligations are or will be resolved.

6.9.1.e *Termination Notice*

1. *General*
  - (a) The contracting officer may terminate contracts only by written notice to the contractor. (In termination of a fixed-price contract for default for a cause other than failure to make timely delivery, the termination notice discussed in this paragraph d must be preceded by the notice or notices discussed in 6.9.3.b.5 and 6.)
  - (b) Notice must be by:
    - (1) Certified mail, return receipt requested;
    - (2) Telegraphic notice; or
    - (3) Hand delivery with written acknowledgment by the contractor.
  - (c) The notice must state:
    - (1) The type of termination contemplated and the contract clause authorizing the termination;
    - (2) The effective date of termination;
    - (3) The extent of the termination and, if a partial termination, the portion of the contract to be continued; and
    - (4) Any special instructions.

2. *Distribution.* When the termination notice is sent to the contractor, the contracting officer must simultaneously send a copy to the information service center and to any known assignee, guarantor, or surety of the contractor.
3. *Amendment.* The contracting officer may amend a termination notice to:
  - (a) Correct nonsubstantive mistakes in the notice;
  - (b) Add supplemental data or instructions;
  - (c) Rescind the notice if the items of work terminated have been completed or shipped before the contractor receives the notice; and
  - (d) Reinstate the terminated portion of a contract.
4. *Reinstatement.* The contracting officer may, with the consent of the contractor, reinstate the terminated portion of a contract in whole or in part by amending the notice of termination when:
  - (a) Circumstances clearly indicate a requirement for the terminated items; or
  - (b) Reinstatement is otherwise advantageous to the Postal Service.

## 6.9.2 Termination for Convenience

### 6.9.2.a General

1. *Applicability.* The provisions of this part 6.9.2 apply to all fixed-price contracts containing Clause B-11, *Termination for Convenience*, and all non-fixed-price contracts containing Clause B-12, *Termination for Convenience or Default*.
2. *Type of Settlement*
  - (a) The contracting officer may settle contracts terminated for convenience by:
    - (1) Negotiated agreement;
    - (2) Contracting officer determination;
    - (3) Costing out under vouchers, if the contract is a cost-reimbursement contract; or
    - (4) A combination of these methods.
  - (b) When possible, the contracting officer should negotiate a fair and prompt settlement with the contractor.

### 6.9.2.b Contractor's Duties. After receiving a termination notice and except as otherwise directed by the contracting officer, the contractor must comply with the contract clause and the termination notice, which generally require that the contractor:

1. Stop work immediately on the terminated portion of the contract and stop placing subcontracts under that portion;
2. Terminate all subcontracts related to the terminated portion of the contract;
3. Immediately advise the contracting officer of any special circumstances precluding the stoppage of work;
4. Perform the continued portion of the contract and promptly submit any request for an equitable adjustment of price with respect to the continued portion, supported by evidence of any increase in the cost;



5. Take necessary action to protect and preserve property in which the Postal Service has or may acquire an interest, and, as directed by the contracting officer, deliver the property to the Postal Service or otherwise dispose of it;
6. Promptly notify the contracting officer in writing of any legal proceedings growing out of a subcontract or other commitment related to the terminated portion of the contract;
7. Settle outstanding liabilities and claims arising out of subcontract terminations, with prior approval or ratification as required by the contracting officer;
8. Promptly submit a settlement proposal, supported by appropriate schedules; and
9. Dispose of any termination inventory, as the contracting officer directs or authorizes.

6.9.2.c *Settlement of Subcontractor Claims*

1. *Subcontractor Rights.* A subcontractor has no contractual rights (privity of contract) against the Postal Service but may have rights against the Postal Service contractor or the immediate subcontractor with which it has contracted. Upon termination of a Postal Service contract, or a change that necessitates subcontract termination, the contractor and each subcontractor are responsible for prompt settlement of the termination claims of their immediate subcontractors.
2. *Prime Contractor Rights and Obligations*
  - (a) The termination clauses provide that, upon contract termination, the contractor must, except as otherwise directed by the contracting officer, terminate all subcontracts to the extent that they relate to performance of the work terminated.
  - (b) The reasonableness of the contractor's settlement with a subcontractor should be measured by the aggregate amount that would be due under an equivalent Postal Service termination clause. The contracting officer may allow reimbursement in excess of that amount only in unusual cases, and then only when satisfied that the subcontract terms were negotiated in good faith and did not unreasonably increase the subcontractor's rights.
3. *Delay in Settlement of Subcontractor Claims.* When a contractor's inability to reach settlement with a subcontractor delays the settlement of the Postal Service contract, the contracting officer may settle with the contractor for all amounts except the subcontractor settlement proposal, and reserve Postal Service and contractor rights as to the proposal.
4. *Assistance in Subcontract Settlements.* In unusual cases, the contracting officer may determine that it is in the interest of the Postal Service to offer to assist the contractor in the settlement of a particular subcontract. The Postal Service, the contractor, and the subcontractor may then enter into an agreement covering settlement of the subcontract. In such case, the subcontractor must be paid through the contractor as part of the overall settlement.
5. *Direct Settlement by the Postal Service.* The *Termination for Convenience* clause gives the Postal Service the right, but not the obligation, to settle and pay any claims arising out of subcontract terminations. Direct settlements with subcontractors are not encouraged, since the Postal Service contractor is obligated to settle and pay subcontractor termination claims. However,

when the contracting officer determines that it is in the interest of the Postal Service to settle a subcontractor claim directly, the contracting officer may, after notifying the contractor, direct the assignment of all contractor rights to the Postal Service, and settle the subcontractor claim using the termination procedures for settlement of Postal Service contracts. An example in which the interest of the Postal Service would be served is when a subcontractor is the sole source of a product and it appears that a delay by the contractor in settling the subcontractor's claim will jeopardize the subcontractor's financial position.

### 6.9.3 Termination for Default

#### 6.9.3.a General

1. Termination for default is the exercise of the Postal Service's contractual right to completely or partially terminate a contract by reason of the contractor's actual or anticipated failure to perform its contractual obligations. When the contracting officer has the right to terminate a contract for default, the total undelivered contract quantity, whether delinquent or not, may be terminated for default.
2. If the contractor can establish that its failure to perform arose out of causes beyond its control and without its fault or negligence, the default termination clause provides that a termination for default will be deemed a termination for the convenience of the Postal Service, and the rights and obligations of the parties will be governed accordingly.
3. When a contract provides for liquidated damages, the contracting officer must mitigate damages when grounds for termination for default exist by obtaining performance by the contractor or terminating the contract for default. Liquidated damages, once incurred, may be remitted in whole or in part as may be just and equitable, by a vice president with procurement authority, with the advice of counsel, upon the recommendation of the VP, P&M.
4. When the contracting officer determines in writing that the supplies or services are still required and that reinstatement is advantageous to the Postal Service, the contracting officer may reinstate the terminated portion of a contract, but only with the contractor's written consent.
5. For termination for default of orders placed under Federal Supply Schedule (FSS) contracts, see 3.1.5.b.2(f).

#### 6.9.3.b Fixed-Price Contracts

1. *Postal Service Rights and Obligations*
  - (a) Under the *Termination for Default* clause, the Postal Service has the right, subject to the notice requirements of the clause, to terminate all or any part of a contract without regard to severability of contract obligations when the contractor:
    - (1) Fails to complete any material requirement of the contract within the time specified in the contract (including any extensions);
    - (2) Fails to make progress to a degree that this failure endangers performance of the contract;
    - (3) Fails to perform any other contract provision; or
    - (4) Fails to give adequate assurances as required by 6.2.5.

- (b) The Postal Service is not liable for the contractor's costs on undelivered work and is entitled to repayment of any progress payments for undelivered work.
  - (c) The contracting officer may direct the contractor to transfer title and deliver to the Postal Service completed supplies and manufacturing materials. The completed supplies and manufacturing materials may be acquired for use in continuing the terminated contract work or for use under another contract.
  - (d) Subject to the provisions of (e)(4) below, the Postal Service must pay the contractor the contract price for any supplies completed and delivered, and the amount agreed upon by the contracting officer and the contractor for any manufacturing materials acquired by the Postal Service.
  - (e) The Postal Service must be protected from failure to make provision for the Postal Service's potential liability to laborers and material suppliers for lien rights. The contracting officer must take one or more of the following measures before making the payment referred to in (d) above:
    - (1) Ascertain whether the payment bonds, if any, furnished by the contractor are adequate to satisfy all claims, or whether it is feasible to obtain similar bonds to cover outstanding liens.
    - (2) Require the contractor to furnish appropriate statements from laborers and material suppliers disclaiming any lien rights they may have in the supplies and materials.
    - (3) Obtain appropriate agreement between the Postal Service, the contractor, and any claimants to ensure release of the Postal Service from any potential liability to the contractor or claimants.
    - (4) Withhold from the amount otherwise due for the supplies or materials an amount the contracting officer determines necessary to protect the Postal Service's interest, in accordance with 6.4.4.
    - (5) Take any other action that is appropriate in view of the contractor's degree of solvency and other circumstances.
  - (f) The contractor is liable to the Postal Service for any excess costs the Postal Service incurs in acquiring supplies and services similar to those terminated for default, and any other damages, whether or not repurchase is made.
2. *Determination of Appropriateness.* When a default termination is being considered, the contracting officer should ensure that termination for default rather than for convenience is appropriate. The contracting officer should consult with purchasing personnel, technical personnel, and assigned counsel, and may consider the following factors:
- (a) The provisions of the contract, and applicable laws and regulations.
  - (b) The specific failure of the contractor and, unless time does not permit, the excuses for the failure.
  - (c) The availability of the supplies or services from other sources.
  - (d) The urgency of the need for the supplies or services, and whether or not they can be obtained sooner from sources other than the delinquent contractor.

- (e) The degree to which the contractor is essential to the Postal Service, and the effect of a termination for default on the contractor's capability as a supplier under other contracts.
  - (f) The effect of a termination for default on the ability of the contractor to liquidate progress payments.
  - (g) Any other pertinent facts and circumstances.
3. *Surety Notification and Arrangements*
- (a) When a termination for default appears imminent, the contracting officer must send a written notification of that fact (not an actual notice of default) to any surety, at both its main and local offices.
  - (b) If requested by the surety, and agreed to by the contractor and any assignees, arrangements may be made to have future checks mailed to the contractor in care of the surety. In this case, the contractor must forward a written request to the designated disbursing officer, specifically directing a change in address for mailing of checks.
4. *Initiation of Termination — Failure to Make Timely Delivery*
- (a) When a contractor fails to make timely delivery, the contracting officer has a reasonable time after the delivery date to determine whether the contract should be terminated for default. When the contractor is continuing performance of the contract, a reasonable time for the contracting officer to make a decision is 30 working days. Delay beyond that date may result in a waiver of the right of the Postal Service to terminate for default.
  - (b) When the contracting officer determines that termination for default is proper, the contracting officer should issue a termination notice at once, following the procedures in subparagraph b.7 below. No demand for adequate assurances should be issued. However, the contracting officer may allow the contractor to assert any alleged excusable delay.
  - (c) If contracting officer delay in issuing a notice of termination for default results in a waiver of that right, a new delivery date must be established by bilateral or unilateral modification of the contract. The new delivery date must be reasonable considering all the circumstances of contract performance. When the new date is established, the right to terminate for default is reinstated.
5. *Notice of Impending Termination — Causes Other Than Failure to Make Timely Delivery.* When the contracting officer makes a preliminary determination that termination for default is appropriate in cases other than failure to make timely delivery, the contracting officer should, if practicable, notify the contractor in writing of the possibility of termination. This notice may:
- (a) Call the contractor's attention to its liabilities in the event that the contract is terminated for default;
  - (b) Request the contractor to show cause why the contract should not be terminated for default;
  - (c) State that failure of the contractor to explain why the contract should not be terminated may be taken as an admission that no valid explanation exists;
  - (d) When appropriate, invite the contractor to discuss the matter at a conference.

6. *Demand for Adequate Assurance — Causes Other Than Failure to Make Timely Delivery*
  - (a) A written notice must be issued when the contracting officer determines that the contractor is failing to make satisfactory progress to a degree that this failure endangers contract performance, or determines that some other failure, under the contract or otherwise (other than failure to make timely delivery) is cause for concern. However, no demand is required when there is anticipatory repudiation of the contract, that is, when the contractor positively states, by work or action, that it will not or cannot perform its contractual obligations (see 6.2.6.).
  - (b) The demand must specify the failure and give the contractor ten days (or longer, if necessary) to assure the Postal Service of steps that will be taken to cure the failure.
  - (c) When the time remaining in the contract delivery schedule does not permit a response period of ten days or longer, a demand may be made part of the notice described in subparagraph b.5 above.
7. *Termination Notice*
  - (a) Immediately upon determination that termination is proper under subparagraph b.4 above, or upon expiration of the ten-day or longer period allowed by a notice under subparagraph b.6 above, the contracting officer may issue a notice of termination for default, unless it is determined that the nonperformance will be cured.
  - (b) When a demand for adequate assurance has been issued, the notice of termination must be coordinated with assigned counsel before issuance.
  - (c) The notice of termination for default must meet all the general requirements set forth in 6.9.1.d as well as:
    - (1) Set forth the contract number and date;
    - (2) Describe the acts or omissions constituting the default;
    - (3) State that the contractor's right to proceed with performance of the contract (or a specified portion of the contract) is terminated;
    - (4) State that the supplies or services terminated may be procured against the contractor's account, and that the contractor will be held liable for any excess repurchase costs;
    - (5) State that the Postal Service reserves all rights and remedies provided by law or under contract, in addition to charging excess costs; and
    - (6) Inform the contractor that the termination is subject to Clause B-9, *Claims and Disputes*.
  - (d) When the contracting officer has determined that the failure to perform is not excusable, the termination notice must also state that it reflects that decision, and that the contractor has the right to appeal as specified in Clause B-9, *Claims and Disputes*.
  - (e) The contracting officer must make the same distribution of the termination notice as was made of the contract, and any surety must be furnished a copy and asked to advise whether it desires to arrange for completion of the work.
  - (f) The contracting officer must notify the information service center to withhold further payments under the terminated contract.

8. *Procedure in Lieu of Termination.* When the contracting officer determines that the contractor's failure to perform arose from causes beyond its control and without its fault or negligence, the contracting officer may not terminate the contract for default. When it is in the interest of the Postal Service to do so, the contracting officer may, in lieu of termination for default:
  - (a) Terminate the contract for convenience;
  - (b) Permit the contractor, its surety, or its guarantor to continue performance of the contract under a revised delivery schedule;
  - (c) Permit the contractor to continue performance of the contract by means of a subcontract or other business arrangement with an acceptable third party, if the rights of the Postal Service are adequately preserved; or
  - (d) Execute a no-cost termination settlement agreement (or terminate on notice if allowed under the contract) if the requirement for the supplies and services specified in the contract no longer exists and the contractor is not liable to the Postal Service for damages, as provided below.
9. *Determination Following Termination Notice.* When the contracting officer is unable to determine, before issuing the notice of termination, whether the contractor's failure to perform arose from causes beyond its control and without its fault or negligence, the contracting officer must make a written decision on that point as soon as practicable after issuing the notice. This decision must be delivered promptly to the contractor, with a notification of the right to appeal as specified in Clause B-9, *Claims and Disputes*.
10. *Contracting Officer Memorandum.* When a contract is terminated for default, or when a procedure authorized by subparagraph b.8 above is followed, the contracting officer must prepare a memorandum for the contract file that fully explains the action taken.

6.9.3.c *Non-Fixed-Price Contracts*

1. *Postal Service Rights and Obligations.* The right to terminate a non-fixed-price contract for default is provided under Clause B-12, *Termination for Convenience or Default*. In the event of termination, the contractor must be reimbursed costs allowable under the clause; the costs of preparing the contractor's settlement proposal are not allowable. Any fee payable under the contract must be reduced as directed by the clause. The clause does not give the Postal Service the right to recover excess repurchase costs, but it does give the Postal Service continuing rights when the contractor fails to replace or correct defective supplies.
2. *Determination and Notice.* The contracting officer must consider the factors in subparagraph b.2 above in determining whether termination for default is appropriate. Under Clause B-12, *Termination for Convenience or Default*, the contractor must be given the notice or notices required by subparagraphs b.5 and b.6 above, before termination for default.

## SECTION 10 REMEDIES AND DAMAGES

---

### 6.10.1 Remedies

6.10.1.a *Postal Service's Security Interest.* On rightful rejection or justifiable revocation of acceptance, the Postal Service has a security interest in supplies delivered under the contract for any payments and expenses reasonably incurred in inspection, receipt, transportation, care, and custody.

6.10.1.b *Repurchase Against Contractor's Account*

1. When supplies or services are still required after termination for default, the contracting officer may repurchase the same or similar supplies or services against the contractor's account as soon as practicable. The repurchase must be at as reasonable a price as possible considering the quality required by the Postal Service and the time within which the supplies or services are required. Whenever practicable, the contracting officer should make necessary repurchase decisions before issuing the termination notice.
2. The contracting officer may repurchase a quantity larger than the quantity terminated for default when needed, but the defaulting contractor may be charged for no more than the terminated quantity (including any variations in quantity permitted by the terminated contract).
3. If the repurchase is for a quantity not larger than the terminated quantity, the contracting officer may use any terms and procurement methods deemed appropriate for the repurchase, following normal approval or deviation procedures. If the repurchase is for a quantity larger than the terminated quantity, the entire quantity must be treated as a new purchase, adhering to all applicable policies and procedures.
4. If repurchase is made at a price higher than the price of the terminated supplies or services, the contracting officer must — after final payment of the repurchase contract — make a written demand on the contractor for the excess amount, taking into account any increases or decreases in cost due to transportation charges, discounts, and other factors.

### 6.10.2 Damages

6.10.2.a *Default.* If a contract is terminated for default, or if a procedure in lieu of termination for default is followed, the contracting officer must ascertain and demand any damages to which the Postal Service may be entitled. These damages are in addition to any excess repurchase cost.

6.10.2.b *Breach Damages for Accepted Supplies*

1. When the contracting officer has accepted defective supplies under 6.3.1.b.5, the Postal Service may recover as damages for any nonconformity the loss resulting in the ordinary course of events from the contractor's breach as determined in any reasonable manner.
2. The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the supplies or services accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

3. In a proper case, any incidental and consequential damages may also be recovered.

6.10.2.c *Incidental and Consequential Damages*

1. Incidental damages resulting from the contractor's breach include expenses reasonably incurred in inspection, receipt, transportation, and care and custody of supplies rightfully rejected; any commercially reasonable charges; expenses in connection with repurchase; and any other reasonable expense incident to the delay or other breach.
2. Consequential damages resulting from the contractor's breach include:
  - (a) Any loss resulting from general or particular requirements and needs of which the contractor at the time of contracting had reason to know and which could not reasonably be prevented; and
  - (b) Injury to person or property proximately resulting from any breach of warranty.

6.10.2.d *Deduction of Damages from the Price.* The contracting officer, on notifying the contractor, may deduct all or any part of the damages resulting from any breach of the contract, or from late delivery or delay not subject to liquidated damages (see 2.2.6), from any part of the price still due.

6.10.2.e *Damages for Nondelivery or Repudiation*

1. The measure of damages for nondelivery or repudiation by the contractor when repurchase is not possible is the difference between the market price at the time when the contracting officer learned of the breach and the contract price, together with any incidental and consequential damages, but less expenses saved as a consequence of the contractor's breach.
2. Market price is to be determined as of the place of acceptance or, in cases of rejection after arrival or revocation of acceptance, as the place of arrival.