

## CHAPTER 7

### MONITORING CONTRACTOR PERFORMANCE

---

#### **Introduction**

The COR/QAE assists in monitoring contractor performance in order to ensure:

- Delivery or performance of the specified supplies or services
- The level of quality specified
- Adherence to the terms and conditions of the contract (including environmental protection requirements, and public and worker safety and health terms)

Monitoring includes administration of inspections, acceptance testing, and reviewing invoices and other payment issues.

Monitoring does not include controlling the way the contractor performs, except when imminent environmental, safety, or health hazards dictate.

---

#### **What the COR/QAE should know**

The COR/QAE should know:

- The main features of the inspection clause of the instant contract
  - Any reporting requirements that have been placed on the contractor
  - Quality assurance requirements
  - The contractor's self-inspection system, as appropriate
  - Basic requirements of the Prompt Payment Act
  - Award fee plans and procedures, if any
- 

#### **What the COR/QAE may do...**

The COR/QAE may be charged with any of the following:

- ◆ Receive and review contractor baseline plans and progress reports
  - ◆ Assist the Contracting Officer in subcontractor consent procedures
  - ◆ Monitor progress against baseline plans
  - ◆ Notify contractor and Contracting Officer of any deficiencies
  - ◆ Provide input to award fee committee and assist in evaluating the contractor for award fee payment
  - ◆ Keep records of all performance monitoring and evaluation activities
  - ◆ Conduct inspections
  - ◆ Assist in acceptance testing
-

## Performance Monitoring

---

### Surveillance

In performing surveillance, there are three main activities that must be accomplished:

1. Schedule surveillance
2. Observe contractor performance
3. Document Surveillance

#### **Scheduling Surveillance:**

The basis for building a schedule is the surveillance plan. The COR/QAE must develop a monthly schedule (DA Form 5475-R, Surveillance Schedule) of activities based on the surveillance plan and its requirements. After the monthly schedule is created, it must be reviewed and approved by the KO or their duly authorized representative.

The surveillance methods - random sample, 100% inspection, planned sampling, customer complaints – are used by the COR/QAE to maintain records of contractor's performance. Once the schedule is completed and filled in, it becomes a "FOR OFFICIAL USE ONLY" document, and the contractor must not be allowed to see it. A word of caution, the COR/QAE should keep documentation files secure and not open on their desks.

All COR/QAEs must be aware of the necessity to complete their monthly schedules in a timely manner. In most cases, monthly schedules are completed not later than 7 calendar days before the following months surveillance period. COR/QAEs are required to give one copy of the schedule to the contract administrator before the beginning of the period it covers.

#### **Observing contractor performance:**

Procedures for observing contractor performance can be found in the QASP. Each sample guide in the QASP lists the inspection procedures that are to be followed. Several key principles to follow as a COR/QAE are fairness, equality, and consistency. These principles are extremely important and critical for success as an effective COR/QAE.

#### **Documenting Surveillance:**

COR/QAEs will use 5476-R, Surveillance Activity Checklist, or equivalent, for documenting contractor's performance. By using the appropriate surveillance method, the COR/QAE may record their findings and furnished a copy to the KO to include in the official contract file.

---

**Subcontract monitoring**

In the interactions with the subcontractors, performance monitoring is generally limited to information gathering, with formal communication being directed to the prime.

The evaluation of the prime includes the effectiveness of the prime contractor in managing and overseeing the subcontractors.

In cases where the Government must consent to choice of a subcontractor, the COR/QAE may be asked to comment on the prime's evaluation of technical offers and cost proposals and on the adequacy of the specification the prime used in protecting the Government's interests.

---

**Methods of monitoring**

Much of the information required to monitor contractor performance should be available through observation and regular reporting data. This can be confirmed by one-on-one discussions, audits, and telephonic, facsimile, e-mail and written communication. CORs are encouraged to have an active presence and visibility where work is performed.

---

**Special areas of concern**

The COR/QAE may be confronted with questions about travel, perhaps as set forth in the Joint Travel Regulations. The COR/QAE may be asked to validate contractor travel charges when charged directly to the contract.

If there is a key personnel clause the COR/QAE should monitor any change in contractor personnel. The clause will indicate which positions can not be "downgraded". The clause, contained in many service contracts, ensures that the Government receives what it contracted for.

Overtime on a cost reimbursement contract may require Government approval in advance of its use.

Data deliverables as listed in the Contract Data Requirements List (CDRL) should be monitored. The frequency of the reports varies and the CDRL gives the particulars.

---

## **Evaluation of Performance-Based Contract**

---

**Incentive**

Performance-based contracts may well have a lengthy period of performance, specify labor categories, and specify minimum personnel

qualifications and a total level of effort. The contractor's ability to perform (technical and managerial competency) may have been the key evaluation factor for award.

In such contracts, the contractor needs to be informed of areas of deficiency in performance and shown the incentive for improving. By using results-oriented work statements and clear objective performance standards the COR/QAE can help the contractor see exactly what using results-oriented work statements and clear objective performance standards expect.

---

**Responsibilities**

The COR/QAE's potential role in performance measurement is to collect and verify data on the contractor's actual performance. This information is provided to an assigned evaluation team for the contract. The evaluation team will perform the analysis of this information and determine what is the appropriate fee for the actual results and what changes need to be made for future evaluations. The COR/QAE herself also may be a part of the team.

---

**Inspection**

The definition of *inspection* is the verification of contract performance against requirements specified in the statement of work.

The purpose of inspection is to determine whether the product or service conforms exactly to what the Government has ordered. The extent of inspection varies with the dollar value of the contract and the type of product or service. A contract may allow use of contractor self-inspection or may impose Government-directed inspection standards and procedures.

---

**Self-inspection**

Whenever possible the contractor's self-inspection systems are used. Normally the Government would merely do a count for standard off-the-shelf commercial items. If the contract indicates that this procedure will be followed, even though the Government reserves the right to inspect at any time, the COR/QAE does not have authority to impose a more stringent test prior to acceptance.

Even the standard Inspection clause relies on the contractor's inspection system but it requires the contractor to provide a system of inspection acceptable to the Government.

---

**Methods of inspection**

The most commonly used methods of inspection are

- Visual checks can reveal obvious defects
- Physical or performance tests (for example, requiring the running of a motor, or showing that an operating system performs at a certain level

for a specific period of time.

- Destructive tests to see if, in fact, a material can withstand a specific level of stress. For instance, the inspector tests fireproofing by heating the product until it burns.

Keep in mind that any test that imposes a stricter standard of performance than called for in the contract is improper and will not be supported in a dispute.

---

**Contractor obligations under standard inspection clause**

The Contractor must maintain and provide an inspection system acceptable to the Government. Additionally, the contractor is required to maintain records of these inspections and make them available to the Government.

---

**Government rights under standard inspection clause**

The Government has the right to inspect the goods and services. The Government may randomly sample the contractor's completed requirements. In performing this right the Government can not delay the contractor.

The Government also has the right to reject non-conforming goods or services and can require re-performance or replacement of the nonconforming requirement.

The Government also may deduct from the price (in fixed-price contracts) of a service contract if the contractor does not perform the services to the required quality. This is an area where performance-oriented work statements are helpful. In these the amount to be deducted is already contractually agreed to by both parties.

The Government also reserves the right to terminate the contract for default. This is discussed chapter XV.

In the Inspection of Construction clause the Government reserves the right to have the contractor tear out or remove a portion of the area in question. If the Government finds that the quality has not been met, after this tear out, the contractor must correct the deficiency and repair the area at her

own cost. On the other hand the Government has the obligation to compensate her if no defects are discovered.

---

**For complex or critical items**

For complex or critical items, the Government may require a more detailed inspection procedure. In this regard the definition of a *complex item* is one that would have to be disassembled for a complete inspection.

The Government may require the contractor to have an inspection system that meets a certain standard or specification. The Government can use MIL-I-45208 as a specification in accordance with a military standard. Directing the contractor to use a specific inspection procedure as opposed to one regularly used by the contractor and found acceptable to the Government is not the preferred method today; but there are times it can be justified.

The most stringent requirement is directing the contractor to have a specific quality control system - MIL-Q-9858. This directs continuous quality checks rather than just a final inspection in accordance with the Government specification. Using MIL-Q-9858 is even less preferred and the Government tends instead to rely on contractor certification under ISO-9000 or 9001.

---

**Acceptance**

**Definition** *Acceptance* means the Government takes title to the supplies or work and forms the basis for final payment.

---

**Standards** Acceptance is based on either strict compliance with the contract specifications or a subjective standard. The doctrine of economic waste can bring about the last. If the Government can live with the work and it is more expensive to tear out and replace it may be in the Government's interest to accept it as non-conforming at a reduced price.

---

**Time frame** Acceptance or rejection must be made as promptly as possible after delivery (or notice or readiness for acceptance). The Government's failure to perform within a reasonable time can result in implied acceptance.

A notice of rejection must be provided to the contractor when the performance has been found unacceptable.

A receiving report is the usual written evidence of final acceptance. An invoice copy signed by an authorized official can serve as an acceptance document only if the terms of the contract allow it.

---

**Acceptance is final unless...** Acceptance once declared is conclusive or final unless a clause in the contract conditions acceptance on the possible existence of latent defects or fraud. If the defects are obvious and the official authorized to accept signs off the Government generally is bound by the acceptance.

Latent defects are ones that are not observable by a reasonable inspection at the time of acceptance. The burden of proof is on the Government to show

that the defects were latent at the time of inspection.

Acceptance can be revoked if fraud is proven. Prosecution of fraud is the responsibility of the Justice Department and is not a civil or contractual matter. After a contractor is convicted of fraud, the Government can revoke the acceptance and require the contractor to reimburse it for all items fraudulently supplied and accepted under a fixed-price contract. If, however, the contract was a cost reimbursement contract, the Government must bear the cost of correcting the defective work.

---

## Rejection

- Responsibilities** The COR/QAE's responsibilities in rejecting for nonconformance include
- Gathering evidence for rejection (ensuring that acceptance has not already occurred or if so that the rejection is based on latent defects or fraud)
  - Documenting reasons for rejection and notifying the contractor and the Contracting Officer
  - Ensuring that no Government official directed changes that could have resulted in rejection

---

## Reviewing Invoices

- Responsibilities** It may be necessary for the COR/QAE to:
- Review and approve invoices in a timely fashion
  - Review direct costs for reasonableness and allocability
  - Ensure that terms and conditions for payments have been met (services/ supplies have been delivered on time, and are of acceptable quality)
  - Review travel costs
  - Check that capital equipment or other non-expendable equipment costs which are being claimed on an invoice had the required prior approvals

---

**Handling discrepancies** To the extent that problems arise with regard to appropriateness of invoice payment, approval of payment amounts not in question must be provided expeditiously and not be delayed due to questioning of other amounts.

---

**Summary** The most important role of the Contracting Officer's Representative and Quality Assurance Evaluator is the monitoring of contractor performance and communicating to the contractor and the Contracting Officer any deficiencies. The COR/QAE can keep the contractor mindful of the incentives to perform a quality job in a timely fashion at a reasonable price.

While the Government has the right to inspect at any time, the COR/QAE should be very familiar with the Inspection clause or inspection provisions of the contract to insure the Government neither waives its rights nor interferes with the performance of the contractor. The COR/QAE must also know his own limits in this area as many problems have been caused when the COR/QAE directs the contractor therefore going beyond monitoring performance.

The COR/QAE is often a help by being present to answer questions from the contractor on interpretations of the specifications and thereby promptly resolving otherwise complicated and often compounded problems. To perform this function the COR/QAE needs to be aware of a number of specialized areas but above all should refer to the contract.

Whatever the method of inspection, once the Government has accepted the item, i.e., taken title to it, the Government is bound by the decision unless the defect can be shown to be latent (hidden at time of inspection) or in case the contractor is convicted of fraud in court.

The right to have the contractor correct non-conforming items should not be exercised without thought. In a cost-reimbursement contract the cost is usually borne by the Government and not at the contractor's expense. In addition, the doctrine of economic waste may direct acceptance of a slightly non-conforming item at a reduced price to the Government.

Finally, following closely the terms of the contract will ensure the COR/QAE's performance and records to reflect it will stand the Government in good stead in case of a termination of default action or a claim against the Government.

## FAR 52-246-4 Inspection of Services – Fixed Price

As prescribed in 46.304, insert the following clause:

### INSPECTION OF SERVICES – FIXED PRICE (AUG 1996)

- (a) Definitions. “Services,” as used in this clause, includes services performed, workmanship, and material furnished or utilized in the performance of services.
- (b) The contractor shall provide and maintain an inspection system acceptable to the Government covering the services under this contract. Complete records of all inspection work performed by the contractor shall be maintained and made available to the Government during contract performance and for as long afterwards as the contract requires.
- (c) The Government has the right to inspect and test all services called for by the contract, to the extent practicable at all times and places during the term of the contract. The Government shall perform inspections and tests in a manner that will not unduly delay the work.
- (d) If the Government performs inspections or tests on the premises of the contractor or a subcontractor, the contractor shall furnish, and shall require subcontractors to furnish, at no increase in contract price, all reasonable facilities and assistance for the safe and convenient performance of these duties.
- (e) If any of the services do not conform to contract requirements, the Government may require the contractor to perform the services again in conformity with contract requirements, at no increase in contract amount. When the defects in services cannot be corrected by re-performance, the Government may (1) require the contractor to take necessary action to ensure that future performance conforms to contract requirements and (2) reduce the contract price to reflect the reduced value of the services performed.
- (f) If the contractor fails to promptly perform the services again or to take the necessary action to ensure future performance in conformity with contract requirements, the Government may (1) by contract or otherwise, perform the services and charge to the contractor any cost incurred by the Government that is directly related to the performance of such service or (2) terminate the contract for default.

(End of clause)

## FAR 52.246-12 Inspection of Construction.

As prescribed in 46.312, insert the following clause:

### INSPECTION OF CONSTRUCTION (AUG1996)

- (a) Definition. "Work" includes, but is not limited to, materials, workmanship, and manufacture and fabrication of components.
- (b) The Contractor shall maintain an adequate inspection system and perform such inspections as will ensure that the work performed under the contract conforms to contract requirements. The Contractor shall maintain complete inspection records and make them available to the Government. All work shall be conducted under the general direction of the Contracting Officer and is subject to Government inspection and test at all places and at all reasonable times before acceptance to ensure strict compliance with the terms of the contract.
- (c) Government inspections and tests are for the sole benefit of the Government and do not--
- (1) Relieve the Contractor of responsibility for providing adequate quality control measures;
  - (2) Relieve the Contractor of responsibility for damage to or loss of the material before acceptance;
  - (3) Constitute or imply acceptance; or
  - (4) Affect the continuing rights of the Government after acceptance of the completed work under paragraph (i) below.
- (d) The presence or absence of a Government inspector does not relieve the Contractor from any contract requirement, nor is the inspector authorized to change any term or condition of the specification without the Contracting Officer's written authorization.
- (e) The Contractor shall promptly furnish, at no increase in contract price, all facilities, labor, and material reasonably needed for performing such safe and convenient inspections and tests as may be required by the Contracting Officer. The Government may charge to the Contractor any additional cost of inspection or test when work is not ready at the time specified by the Contractor for inspection or test, or when prior rejection makes reinspection or retest necessary. The Government shall perform all inspections and tests in a manner that will not unnecessarily delay the work. Special, full size, and performance tests shall be performed as described in the contract.

(f) The Contractor shall, without charge, replace or correct work found by the Government not to conform to contract requirements, unless in the public interest the Government consents to accept the work with an appropriate adjustment in contract price. The Contractor shall promptly segregate and remove rejected material from the premises.

(g) If the Contractor does not promptly replace or correct rejected work, the Government may (1) by contract or otherwise, replace or correct the work and charge the cost to the Contractor or (2) terminate for default the Contractor's right to proceed.

(h) If, before acceptance of the entire work, the Government decides to examine already completed work by removing it or tearing it out, the Contractor, on request, shall promptly furnish all necessary facilities, labor, and material. If the work is found to be defective or nonconforming in any material respect due to the fault of the Contractor or its subcontractors, the Contractor shall defray the expenses of the examination and of satisfactory reconstruction. However, if the work is found to meet contract requirements, the Contracting Officer shall make an equitable adjustment for the additional services involved in the examination and reconstruction, including, if completion of the work was thereby delayed, an extension of time.

(i) Unless otherwise specified in the contract, the Government shall accept, as promptly as practicable after completion and inspection, all work required by the contract or that portion of the work the Contracting Officer determines can be accepted separately. Acceptance shall be final and conclusive except for latent defects, fraud, gross mistakes amounting to fraud, or the Government's rights under any warranty or guarantee.

(End of clause)