

CHAPTER 8. CONTRACTOR PROGRESS PAYMENT VOUCHERS

8.1 Introduction

a. Instructions in this chapter are intended to familiarize personnel with the Prompt Payment Act Amendments of 1988 and guide government personnel in processing the contractor's payment vouchers and supporting fiscal matters for fixed-price construction contracts. Phases II (CLIN 0002), III (CLIN 0003), and IV (CLIN 0004) of the Systems Contract are firm fixed-price. USAESCH, following the Memorandum of Agreement with IOC, has authority to administer construction covered by CLIN's 0002, 0003, and 0004. This relationship may change from site to site in the future. However, the construction administration of each project will generally follow this organizational arrangement.

b. Based on the contract type, prime contractor payments must follow certain procedures for cost-type contracts. Although Phases II, III, and IV are fixed price, the prime contractor can only be paid (reimbursed) for incurred costs as allowed by the PCO or the delegated COR. The prime contractor must have paid subcontractor costs in order to be paid for the recorded or incurred costs.

c. Payment processing is shown on the flow diagram in Exhibit 8*1. This diagram follows the contract requirements for the FFP and the CPFF phases. It is intended that the construction phases follow normal, routine Corps of Engineers procedures for fixed-price construction contracts. Huntsville's authority does not include any reporting requirements on daily observation of the progress of construction work. It is limited to the actual payment estimate preparation and matters pertaining thereto. The PCO/IOC is responsible for all other contract payments.

8.2 References .

- a. FAR Subpart 32.9, Prompt Payment.
- b. Public Law 100-496, Prompt Payment Act Amendments of 1988.
- c. OMB Circular No. A-125, revision dated 21 December 1989.

8.3 Prompt Payment Act Amendments of 1988 . The Prompt Payment Act (PPA) Amendments of 1988 significantly changed the bill paying practices of the Federal Government for contracts awarded, renewed, and options exercised after 31 March 1989. The Act established standards for invoice payments; clarified the definitions of invoice receipt dates and dates of government acceptance of goods or services; eliminated grace periods for late government payments; made interest penalties automatically payable; provided an additional penalty for interest owed but not paid; and extended PPA requirements to partial payments, construction progress payments and release of retained percentage, and construction subcontracts. The PPA Amendments of 1988 do not apply to contracts awarded before 1 April 1989.

8.4 PPA Procedures for Construction Contracts. The following operating procedures will insure that

contractor payments are promptly paid by the Government. For complete guidance on the Prompt Payment Act Amendments of 1988, see contract clauses, *Payments Under Fixed-Price Construction Contracts* (APR 1989), FAR 52.232-5, and *Prompt Payment for Construction Contracts* (AUG 1993) FAR 52.232-27, attached as Exhibits 8*2 and 8*3.

a. Preliminary Review of Invoice. Before a proper invoice is submitted, a preliminary review of the NAS schedule, or an alternate schedule, by government and contractor personnel will insure:

- that each payment item is related to the various elements of work required by the contract;
- that the work requested was performed (refer to work sheets, cross sections, etc.);
- how the percentage or amount paid was determined;
- why retainage was held or not held;
- why liquidated damages were assessed or not assessed;
- that an agreement between both parties.

The RE should substantiate the preliminary review, in writing, and place the documentation in the applicable file retained in the field office.

b. Proper Invoice. An invoice is the contractor's bill or written request for payment for work performed under the contract. In accordance with the PPA, a 'proper' invoice must include:

- (1) Name and address of the contractor.
- (2) Invoice date.
- (3) Contract number or other authorization (including order number and contract line item number).
- (4) Description of work or services performed.
- (5) Delivery and payment terms (e.g., prompt payment discount terms).

(6) Name and address of contractor official, or as otherwise directed by the contractor, in writing, to whom payment is to be sent (must be the same as that in the contract or in a proper notice of assignment).

(7) Name (where practicable), title, and telephone number of person to be notified in event of a defective invoice.

(8) Substantiation of the amounts requested (determined under preliminary review) and certification in accordance with the requirements of the *Payments Under Fixed-Price Construction Contracts Clause*.

(9) Total dollar amount reflected in each agreement between the contractor and subcontractor; amount included in current payment for each subcontractor; and total payments already made to each subcontractor (per revised OMB Circular No. A-125).

(10) Any other information or documentation required by the contract.

c. Designated Billing Office (DBO). This is the office designated to first receive the invoice. In most cases, this is the Resident Office administering the construction phases of the contract. There may be other contracts where the Resident Office will not be the DBO. These contracts will follow other instructions. An example may be Title II A-E or support contracts. The payment "clock" starts to run on the date that the proper invoice **is received** at the designated billing office. The proper invoice *must include the contractor's prompt payment certification*. The DBO office will take the following action to process the payment:

(1) Date stamp the face of the invoice and the CEHND Form 947, Prompt Payment Certification and Supporting Data for Contractor Payment Invoice, immediately upon receipt. Otherwise, the "clock" starts on the date of the invoice and the CEHND Form 947 (see Exhibit 8*4).

(2) Immediately review to determine if a 'proper' invoice has been submitted. If the invoice is 'proper', affix the date interest will start to accrue just below the date stamp on CEHND Form 947.

(3) All payment requests (estimates) must be signed in CEFMS no later than two working days prior to the payment due date. The payment due date is 14 days after the payment request is received by the DBO. However, the payment may have to be made earlier because the USACE Finance Center does not make payments on the first and last two days of the month and the first week in October. When the payment due date falls within these time periods, sign the payment estimate in CEFMS no later than two days before the early payment date.

d. Designated Payment Office (DPO). The DPO is the USACE Finance Center located in Millington, TN 38504-8001. The DPO is responsible for processing and certifying the receipt voucher and printing the check. This effort requires two working days.

e. Improper Invoice. An improper invoice is one that does not meet the conditions established by the PPA contract clause. Take special notice in the clause of the requirement for the prompt payment certification, where the contractor attests to the amounts requested for performance, makes timely payments to subcontractors and suppliers, and does not withhold or retain any amounts from a subcontractor or supplier in accordance with the terms and conditions of the subcontract. If the Prompt Payment certification (CEHND Form 947), Form 93 and 93a, Contractor Invoice, summary Tables or Supporting Data is not submitted, reject the invoice. An invoice is also improper when it incorporates a modification to the contract that has not been finalized or includes the Consent of Surety, when applicable. Do not finalize any modification for payment until the Government receives the executed Consent of Surety. Do not transmit an improper invoice for payment. When an invoice is found by the Resident Engineer to be improper or defective, the following actions must occur:

(1) Notify the contractor of the defective invoice within seven days after the invoice is received, initially by telephone, and then confirmed, **in writing**. If it takes more than seven days to notify the

contractor, then the due date for beginning interest accrual on the corrected invoice will be adjusted by subtracting the number of days taken beyond the prescribed notification of the defective period. For example, if the contractor is notified of defective invoice 10 days after receipt, the interest accrual date will start 11 days after receipt of the corrected invoice if payment is not made. Attach the corrected notification documentation (MFR format) to the applicable payment estimate.

(2) The designated government representative will cross out the date stamp on the invoice and certificate, initial, and date the same date of notification to the contractor of improper or defective invoice. The "clock" is effectively stopped upon notification.

(3) The whole process starts over with the resubmission of the corrected invoice and certification, date stamped, etc.

(4) Disagreement between the Government and the contractor over the payment amount, issues of contract compliance, or retainage does not form the basis for finding the invoice defective and requiring resubmission. However, since the PPA Clause states that interest penalties are not required on payment delays due to disagreement, it is imperative that written evidence be submitted with the payment estimate. The Prompt Payment Certification and Supporting Data for the contractor payment invoice will be annotated to document the delay and to alert the designated payment office not to pay interest during the delay period. The ideal position is to avoid this situation by substantiating and documenting agreements prior to the contractor submitting the invoice, as indicated in paragraph 8.4.

f. Interest (Contractor).

(1) The due date for interest on progress payments will be 14 days after receipt (beginning on the 15th day) of the **proper** invoice by the DBO. The interest due date on final payments will be either the 30th day after receipt (31st day) by DBO of a proper invoice, subject to contract settlement actions (e.g., release of claims), or the 30th day after government acceptance of the work completed by the contractor, whichever is later. Interest is due on retained percentage if the Government fails to release retained amounts in accordance with the terms of the contract, or if not specified in the contract, within 30 days after approval for release to the contractor by the Contracting Officer.

(2) If the contractor meets conditions and payment is not made by the due date, interest will automatically be paid by DPO without request from the contractor.

(3) The interest will be at the rate established by the Secretary of the Treasury that is in effect on the day after the due date of the payment.

(4) If a discount for prompt payment is taken improperly, interest will automatically be paid by DPO, without request from the contractor.

(5) Current DA policy mandates the payment of all interest penalties from operating funds of the agency. HQUSACE has defined these funds as Operation and Maintenance, Army, General Expense.

(6) Interest that may be payable relative to claims involving disputes will be resolved in accordance with the *Disputes Clause*, not the Prompt Payment Act. Claim payments, including interest, should be submitted on a separate payment estimate. Payments for adjudicated claims under the Contract Disputes Act are not reported as interest penalties under the Prompt Payment Act.

(7) For further reference on interest and details for calculations, see paragraphs A(3) and (4) of the PPA Clause, Exhibit 8*3.

g. Interest (Government). Under the law, the contractor will notify the Government when (s)he discovers that a portion or all of a current payment request covers work that does not conform to the contract. To the extent that payment has already been paid to the contractor, the Government is entitled to interest on "unearned" payments. See paragraph (e) of the PPA Contract Clause for specifics.

h. Penalty. In contracts awarded after 1 October 1989, a penalty amount, in addition to the interest amount, will be paid if the contractor is owed interest and is not paid the interest within 10 days after invoice payment, and if the contractor makes a written demand, not later than 40 days after payment of the invoice, that the agency pay such a penalty.

i. Subcontractors/Suppliers.

(1) The contractor, in accordance with the PPA, will include a payment clause and interest penalty clause in each subcontract, and a clause requiring each subcontractor to include the same clauses in each of its subcontracts.

(2) PPA Amendments obligates the contractor to pay subcontractor(s) for satisfactory performance under its subcontract not later than seven days after payment of such amounts is received by the contractor under the contract, or interest will be paid at the same rate the Government pays interest for late payment. Prime contractors must follow the "pay-when-paid" principle in dealing with subcontractors.

(3) As required by revision to Office of Management and Budget Circular No. A-125, the prime contractor's progress payment request must list the total amount reflected in each agreement between the contractor and subcontractor; the amount included in the current payment for each subcontractor; and total payments already made to each subcontractor. The contractor will submit this information, among other data needed for a proper invoice on CEHND Form 947. Do not process payment estimates if the certification is not included.

(4) Contractors may withhold or retain all or part of payments due subcontractors for good cause, including work that is in dispute, third-party claims, or alleged damages. The contractor may also retain a specified percentage of subcontract payments pending final completion of subcontract work, if allowed in his or her subcontract agreement, or withhold payment for Miller Act violations. If the contractor elects to deduct subcontractor earnings, follow the indicated procedures:

(a) The contractor will report full progress and earnings, including subcontractor work, in NAS or

by alternate means.

(b) The contractor will request deductions for subcontractor work by using CEHND Form 947.

(c) The RE will back out the "Subcontractor Deductions by Prime Contractor" in an added item to ENG Form 93.

(d) "Total Earnings to Date" on ENG Form 93 will only reflect earnings for which the contractor wishes payment, less normal retainages and deductions.

8.5 Payment for Preparatory Work and Mobilization. Contract Clause, *Payments Under Fixed-Price Construction Contracts (Apr 1989)*, states, in part: "In the preparation of estimates the Contracting Officer may authorize . . . preparatory work done to be taken into consideration." Preparatory work includes such items as cost of erection of batch plants, construction of haul roads, erecting fences, shops, etc. (less acquisition costs of equipment and materials not to be incorporated into the work, or mobilization costs.

8.6 Payment for Materials Delivered at Work Site . The same clause also permits payment to contractors for material delivered at the site, but not yet incorporated in the work. The clause gives the Contracting Officer wide latitude in determining whether or not to pay for material stored on the site and to determine what supporting documentation will be required. These determinations should be based on contract specific considerations such as job-site security conditions, the contractor's past record of paying subcontractors and suppliers, the value of the material and storage. The requirement for the contractor to acquire title is not mandatory, however, it may be appropriate to require the contractor to furnish a paid invoice as evidence of title. If conditions warrant payment for materials stored on site and adequate documentation to protect the Government's interest is otherwise furnished, then prepaid invoices should not be required. In each case, the duty to protect the Government's interest must be balanced against the obligation to provide the contractor with timely payment. The sums so included in payment estimates will be subject to withholding of appropriate percentage, if applicable.

8.7 Payment for Materials Delivered Offsite. The contract provides that materials delivered to the contractor at locations other than the site of the work will be considered in making payments, if all the conditions of the *payments under Fixed-Price Construction Contracts Clause* are fulfilled. Payments for items delivered to locations other than the work site will be limited to those materials which have been fabricated to the point where they are identifiable to an item of work required under the contract. Make such payment only after the contractor furnishes satisfactory evidence that he has acquired title to such material and that the material will be used to perform the specific contract. Satisfactory evidence should be in the form of receipts of paid invoices with canceled check.

8.8 Performance and Payment Bond.

a. Subparagraph (g) of the current *Payments Under Fixed-Price Construction Contracts Clause* in construction contracts provides as follows:

"(g) In making these progress payments, the Government shall, upon request, reimburse the contractor for the amount of premiums paid for performance and payment bonds (including coinsurance and reinsurance agreements, when applicable) after the contractor has furnished evidence of full payment to the surety. The retainage provisions in paragraph (e) of this clause shall not apply to that portion of progress payments attributable to bond premiums."

b. In implementing this clause, use the following procedures:

(1) The contractor must request in writing that he be reimbursed for bond premiums, inclosing a letter from the Surety stating the amount of the premium paid. Evidence of full payment to the Surety will also be submitted with the contractor's request, i.e., a paid invoice with canceled check, or a certified statement from the Surety. After the Resident Engineer has ascertained that the request for reimbursement of the bond premium is in order, include payment as an *added item* to ENG Form 93. Forward all original documents relative to the reimbursement with the payment estimate request. Reduce the item entry for bond premium monthly *in proportion to earnings* in the bid schedule until final payment under the contract.

(2) Reimbursement for bond premiums will be limited to those bonds of the prime contractor. Do not reimburse subcontractors or suppliers for bonds.

8.9 Liquidated Damages.

a. A flow chart for determination of the assessment of liquidated damages is shown at Exhibit 8*5.

b. When liquidated damages are determined to be assessed in accordance with the provisions of the contract, show the amount assessed on ENG Form 93 and explain the assessment on CEHND Form 973, Detailed Explanation and/or Remarks to ENG Form 93.

c. Liquidated damages are dependent upon the substantial completion date, not necessarily the acceptance date. Liquidated damages are not assessed as of the date of substantial completion.

d. If liquidated damages are not being assessed because of unresolved time extensions, punch list items, landscaping, testing, claims, etc., prepare a "Non-Assessment of Liquidated Damages" statement, CEHND Form 972.

8.10 Retained Percentage (Prime Contractor).

a. If satisfactory progress is achieved during any period for which a progress payment is to be made, payment will be made in full. If satisfactory progress is not achieved, the Contracting Officer may retain a maximum of 10 percent of the payment amount until satisfactory progress. Whenever the work is nearing

completion, the Contracting Officer may increase or decrease retainage to an amount he considers adequate for the Government's protection and will release all the remaining withheld funds. On completion and acceptance of each separate building or other division of the contract on which the price is stated separately in the contract, payment will be made for the completed work without retention of a percentage.

b. Note the following guidance in connection with retained percentage:

(1) Beginning with the first request for payment submitted by the contractor, the Contracting Officer must determine whether the contractor is making satisfactory progress. If satisfactory progress is indicated, the Contracting Officer should not require retention of any percentage of that particular progress payment. Thus, he may, for example, authorize payment of the first and second progress payment in full, retain up to the maximum percentage of the third and fourth progress payment on the basis of unsatisfactory progress and pay the fifth, sixth, and following payments in full (refunding previous deductions for retained percentage) because of resumption of satisfactory progress.

(2) For implementing this procedure, the Contracting Officer has approved a policy stating that progress will be considered satisfactory if the actual total job progress to date is not more than:

- 5 percent or 30 days behind the late finish schedule until the work is 75 percent complete;
- 2-1/2 percent or 15 days at 85 percent;
- will not be satisfactory unless progress at least meets the late finish schedule after the project is more than 85 percent complete.

c. Do not apply the retainage amount to that portion of progress payments attributable to bond premiums.

d. When release of retained percentage is determined to be appropriate, the Resident Engineer's signature on ENG Form 93 is sufficient authority for the Finance and Accounting Officer to release retained percentage to the contractor.

8.11 Payment for Accepted VECP's.

a. The Corps will not permit progress payments for the contractor's bonus share of Instant Contract Savings (ICS) in the next progress payment after definitizing the VECP and before the VE work is accomplished. This amounts to pre-financing or prepayment, which requires special authorization and special procedures for fixed-price construction contracts. No advance payment is authorized when the VECP involves modification to a system or facility, different work methods or equipment needs, or substitution of materials (e.g., the VECP replaces one contract requirement with another, less expensive equipment). No advance payment is authorized when the VECP simply deletes a contract requirement which is an integral part of other work (e.g., eliminates a step, procedure, material or equipment requirement, etc.). For any of the above situations, the contractor's bonus share of the VECP will be reflected in higher cost for the affected work activity or bid item in the contractor's schedule. The contractor earns the bonus as the affected work or bid item is *performed*, in place. As an example, the less expensive material must be installed before the contractor earns his or her ICS bonus.

b. In the rare situation, where a VECP deletes a completely separable contract bid item, leaving only the contractor's 55 percent share of ICS (no actual work to be performed), immediate payment could be appropriate and authorized. As stated, this will be rare because a VECP must provide function equivalent to the original contract requirement/design.

8.12 Procedures for Costing Inspection Services Included as Part of Construction Contracts.

a. Reference: ER 37-345-10, Military.

b. Charges processed on SF 1080, Voucher for Transfers Between Appropriation and/or Funds, from the South Atlantic Division Laboratory for the Anniston Project are costed as S&I (S&A) charges. Testing at other sites will follow similar procedures.

c. Charges for testing will be based on contract terms authorizing a fixed amount for acceptance tests. Deduct testing charges from the contractor's earnings. As work orders are issued to the Government Laboratory by the Resident Engineer, show as *deductions other than retained percentage* on ENG Form 93 and explain the deductions on CEHND Form 973.

8.13 Notice of Assignment.

a. Many contractors choose to assign the monies due under a contract to a financing institution. An assignment must meet the requirements set forth in FAR Subpart 32.8 and DFARS Subpart 232.8 in order to be approved for legal sufficiency. All assignments are processed by Office of Counsel. Suggested formats for use by contractors for a proposed assignment or release of assignment are shown at Exhibit 8*6. A contractor may use any format for the documents that meets the requirements.

b. In cases of assignment, show the contractor's name and address in Block 2 of ENG Form 93, Payment Estimate - Contract Performance and the assignee's name and address in the appropriate place on the face of ENG Form 93, as shown in Exhibit 8*7.

8.14 General Instructions for ENG Form 93 . Progress payments will be made monthly as work proceeds, or at more frequent intervals as determined by the Contracting Officer. The following general instructions pertain to the preparation of ENG Form 93. See Exhibit 8*7 for a sample estimate and supporting documents, including items and formats as referenced above.

a. Show the name and mailing address of the contractor as it appears on the contract. The contractor will submit to the **Designated Payment Office**, in writing, any request to mail checks to any address other than that shown in the contract. Show the new address on all subsequent estimates. If the contractor desires payments to be expressed mailed, he must provide his or her Express Mail Account Number and a physical address and telephone number.

b. Make sure all copies are legible.

c. The signature of the contractor on the original and one (1) copy of ENG Form 93 is optional for partial estimates. Typed or stamped names, titles and dates of both contractor and Government representatives must appear on all copies of the estimate. Note that Block 12 on ENG Form 93 states, "Presented for Payment." If government personnel type the ENG Form 93 from the contractor's proper invoice, the date in Block 12 will be the *same date the proper invoice was presented for payment, i.e., the receipt date by the Government evidenced by the date stamp on the invoice and the Prompt Payment Certification and Supporting Data for Contractor Payment Invoice, CEHND Form 947*. If the Resident Engineer elects to have the contractor sign the partial estimate, the contractor will affix his or her own date. However, the Government will only recognize the date that the proper invoice was presented, i.e., the receipt date stamp affixed by the Government on the contractor's certification, CEHND 947. If the Government fails to stamp the contractor's certification, the date received will be the date affixed to the certification by the contractor. ***Again, it is very important that the Prompt Payment Certification and Supporting Data for Contractor Payment Invoice be date-stamped by government personnel upon receipt.*** The original and one signature of the contractor must appear on the final estimate. Submit delegation of authority, in writing, to the Finance and Accounting Officer and CD-CA for persons other than company officials, such as project manager or engineer, to sign ENG Form 93 and the certification. Signatures of designated Government personnel will appear on the original and one copy of ENG Form 93.

d. Period covered by the estimate, Item 9 on ENG Form 93, will show the beginning and ending dates of the periods covered and the periods will run consecutively (Ex: 1 Sep 89 - 30 Sep 89; 1 Oct 89 - 31 Oct 89; 1 Nov 89 -30 Apr 90). The ending date will be inclusive and will not exceed the required completion date of the contract unless liquidated damages are assessed as stipulated in the contract, or CEHND Form 972, Non-Assessment of Liquidated Damages, is attached to the estimate.

e. Include all valid modifications on the applicable payment estimate. Attach a copy of any field-executed modification, including the consent of surety, where applicable, when the modification has not been distributed. For Directorate executed modifications, call the CD-CA procurement assistant for the status before finalizing the estimate.

f. Submit payment estimates and supporting documents to the Huntsville Center in the quantity as stated below:

(1) Estimates: **One (1) copy of each progress payment and one (1) copy of final payment estimates.**

(2) Supporting Data:

(a) Prompt Payment Certification and Supporting Data for Contractor Payment Invoice, CEHNC Form 947: **One (1) copy.**

(b) Detailed Explanation and/or Remarks to ENG Form 93, CEHND Form 973: **One (1) copy. (Exhibit 8*8).**

(c) Non-assessment of Liquidated Damages Statement, CEHND Form 972: **One (1) copy.**
(Exhibit 8*9)

g. Indicate the quantity and amount paid on each bid item in the following manner: Type each bid item number, description, quantity, and amount in the appropriate column of the ENG Form 93/93a.

8.15 Final Estimates.

a. In view of the contract type, the normal financial closeout procedures applicable to fixed-price construction contracts are not entirely applicable. The Corps' responsibility and delegated authority are restricted to Phases II, III, and IV of the contract. However, in view of the fixed-price for these phases, the normal or standard procedures for completion of work related to these phases are necessary to document completion and transfer or transition into the systemization phase, which is administered by the PCO. However, payments for modifications, added work, or perhaps disputes can be anticipated after the substantial completion of the construction phases.

b. When all work is completed and accepted in accordance with the applicable terms and conditions of the contract, including modifications and prior to the execution of the final payment on Phases II, III and IV, the contractor will furnish a Release of Claims against the Government arising by virtue of these contract phases. If the contractor's claim to amounts payable under these phases has been assigned under the Assignment of Claims Act of 1940, as amended, (31 U.S.C. 203, 41 U.S. C. 15), a release may also be required of the assignee. The Release of Claims and assignment, if any, will be coordinated with the Contracting Officer by the Center Counsel.

c. In addition to the normal payment estimate supporting documents, attach the following data to the final payment estimate (examples are included as Exhibit 8*10):

(1) Construction Release of Claims Statement

(2) Construction Completion Statement

"Please note that the statement distinguishes between the
"Substantial Complete Date," as determined by the Resident
Engineer, and the "Acceptance Date."

d. When preparing a final estimate, check the following and insure documentation and transfer to the Contracting Officer as applicable:

(1) All payrolls and "Payroll Record Cards," ENG Form 3180, of both prime and subcontractor personnel, properly executed. Annotate the last payroll "FINAL."

- (2) All "Standard Labor Interviews," DD Form 1567, for both prime and subcontractors.
- (3) All "Statements of Acknowledgment." SF Form 1413, for prime contractors and subcontractors.
- (4) Physical completion statement.
- (5) Construction Contractor Performance Evaluation Report, SF Form 1420.
- (6) Architect-Engineer Performance Evaluation Report, DD Form 1421, if applicable.

8.16 Disclosure of Information to Third Parties.

a. After coordination with Office of Counsel, the policy regarding disclosure of Payment Bonds, Payment Estimates (ENG Form 93, 93A) and supporting data (CEHND Form 947) information to any party other than the contractor applies to **Chemical Demilitarization** Directorate and to all field offices. The rationale for this policy is based on FAR 28.106-6 and DFARS 228.106-6. Upon an official request, orally or in writing, promptly furnish any of the requested information in accordance with the following guidelines:

(1) A copy of the Payment Estimate, backup, and CEHND Form 947 may be released to the Bonding Company.

(2) General information from ENG Form 93, only, concerning the work progress, payments made to the contractor, and the estimated percent complete may be provided to "persons who have provided labor or materials and have not been paid."

(3) Specific information from the CEHND Form 947 concerning a supplier or subcontractor may be released to *that* supplier or subcontractor only if (s)he is a "person" as defined above. Release only the information concerning the person involved, not any information concerning other subcontractors or suppliers. We want to stress the confidentiality of the supporting data shown on the CEHND Form 947.

(4) Do not release or discuss dollar information concerning specific bid items with subcontractors or suppliers, such as: total dollars to date or dollars this period. There are several reasons for this. More than one subcontractor may be included in a bid item. One subcontract may be priced under more than one bid item. The bid item price may not bear any direct relationship to the subcontract price (a loss item, unbalanced items, etc.). Discussions of dollars associated with specific bid items are matters between the prime contractor and his or her subs/suppliers, not between the Government and subcontractors or suppliers.

(5) Provide the subcontractor, supplier, or prospective subcontractor or supplier the name and address of the Surety or Sureties on the payment bond, the penal amount of the payment bond, and a copy of the payment bond.

b. Inform anyone requesting information, other than outlined above, that they may submit a "Freedom of Information Act" request to Office of Counsel.

c. This policy is not meant to supplant any other guidance regarding complaint of nonpayment, Miller Act questions, bonding questions, etc. Those complaints and questions should continue to be normally directed to Office of Counsel.

8.17 Actions to Take Upon Subcontractor/Supplier Allegations of Prime Contractor Nonpayment.

a. Defense Federal Acquisition Regulation Supplement (DFARS) 232.970 addresses actions to be taken when a subcontractor alleges nonpayment. However, DFARS is confusing as it covers all types of contracts, not just construction. It should be read in conjunction with the payment clauses included in contracts and other pertinent provisions of the FAR and DFARS, many of which are discussed below. Contact CD-CA for guidance and coordination with OC and CT.

b. Pre-award Surveys.

(1) Contracting officers are required by FAR Subpart 9.1 to make an affirmative determination of contractor responsibility prior to the award of a contract. DOD has established an extensive capability for performing pre-award surveys and determining responsibility. These determinations address matters such as the adequacy of financial resources, business ethics and integrity, and relations with vendors, trade creditors, and bankers. The responsibility for using this tool to protect the Government's interests rests upon the Contracting Officer making an award.

(2) In addition, when a Contracting Officer finds that a contractor failed to pay subcontractors properly due amounts, the cognizant pre-award survey monitor should be alerted to ensure the matter is considered in future contract award decisions.

(3) Field offices may influence the Contracting Officer on future awards by good documentation of problems and alerting the CO during pre-award activities. Field offices should accurately document the contractor evaluation (CCAS) where such practices were serious or recurring on a contract.

c. Administrative Contracting Officer Responsibility.

(1) Subcontractor/supplier complaints of nonpayment by prime contractors are not uncommon, particularly when small businesses involved in relatively large contracts begin to experience cash flow problems. However, the failure to pay may also be due to a prime/subcontractor dispute over the work accomplished, a Government delay in payment to the prime contractor which resulted in a delay in payment to the prime contractor which resulted in a delay in payment to the subcontractor, or an oversight.

(2) The ACO, or if necessary the CO, must take immediate action in response to subcontractor complaints of nonpayment. The ACO is primarily responsible for receiving subcontractor nonpayment

complaints and determining the validity of the complaint.

(3) The ACO should immediately inform the prime contractor of a subcontractor complaint of nonpayment, have the prime explain exactly what happened, determine the legitimacy of the complaint, and encourage the contractor to make timely payment. The ACO should also determine if any certifications made by the contractor were inaccurate in any material respect. See Exhibit 8*11 for a sample format letter to inform the contractor of a **subcontractor** nonpayment complaint. Also send a copy of the letter to the subcontractor.

(a) If it is determined that the reason for nonpayment is a prime/subcontractor dispute over the work accomplished, the ACO shall not become involved in the dispute because DOD does not have privity of contract with the subcontractor. However, the ACO should ensure that payments are made in accordance with payment provisions included in the prime contract. For example, the ACO should ensure the contractor didn't include the subcontractor's cost in progress payment requests if actual payment wasn't made to the subcontractor.

(b) If the contractor did include the cost in a progress payment request, but did not pay the supplier or subcontractor, the contractor should explain why not. If the contractor provides a reason why the subcontractor wasn't paid (e.g., the prime discovers he erroneously included overstated progress by the subcontractor subsequent to payment, but before disbursing the progress payment; the subcontractor needed to provide the prime some more paperwork before he could get paid, etc.), it means progress payment was not properly due at the time the prime requested it or when the Government paid it. The contractor owes the Government interest on the non-payable portion of the progress payment from the time the Government paid it until it is either repaid or deducted from the next payable invoice. The ACO should contact CD-CA for the applicable interest rate and deduct the interest amount from the next progress payment as "other than retained percentage" on the ENG 93. Explain the interest deduction in a short MFR.

(c) If the contractor has retained or withheld money due subcontractors or suppliers from the progress payments made by the Government, the ACO should, as a minimum for the first occurrence, warn the contractor of the requirements not to retain payments made by the Government. If the contractor continues to hold retainages from his subcontractors on payments made by the Government, the ACO should document the occurrences, previous discussions or explanations, then consult with CD-CA and OC about possible violations of the Prompt Payment Act, False Claims Act, False Statements Act, or could be debarred in accordance with DFARS 209.406-3.

(d) DFARS states that the ACO "should encourage the prime contractor to make timely payments." If the prime refuses to invoice the Government for progress properly due the subcontractors or suppliers, they can demand payment on the contractor's payment bond.

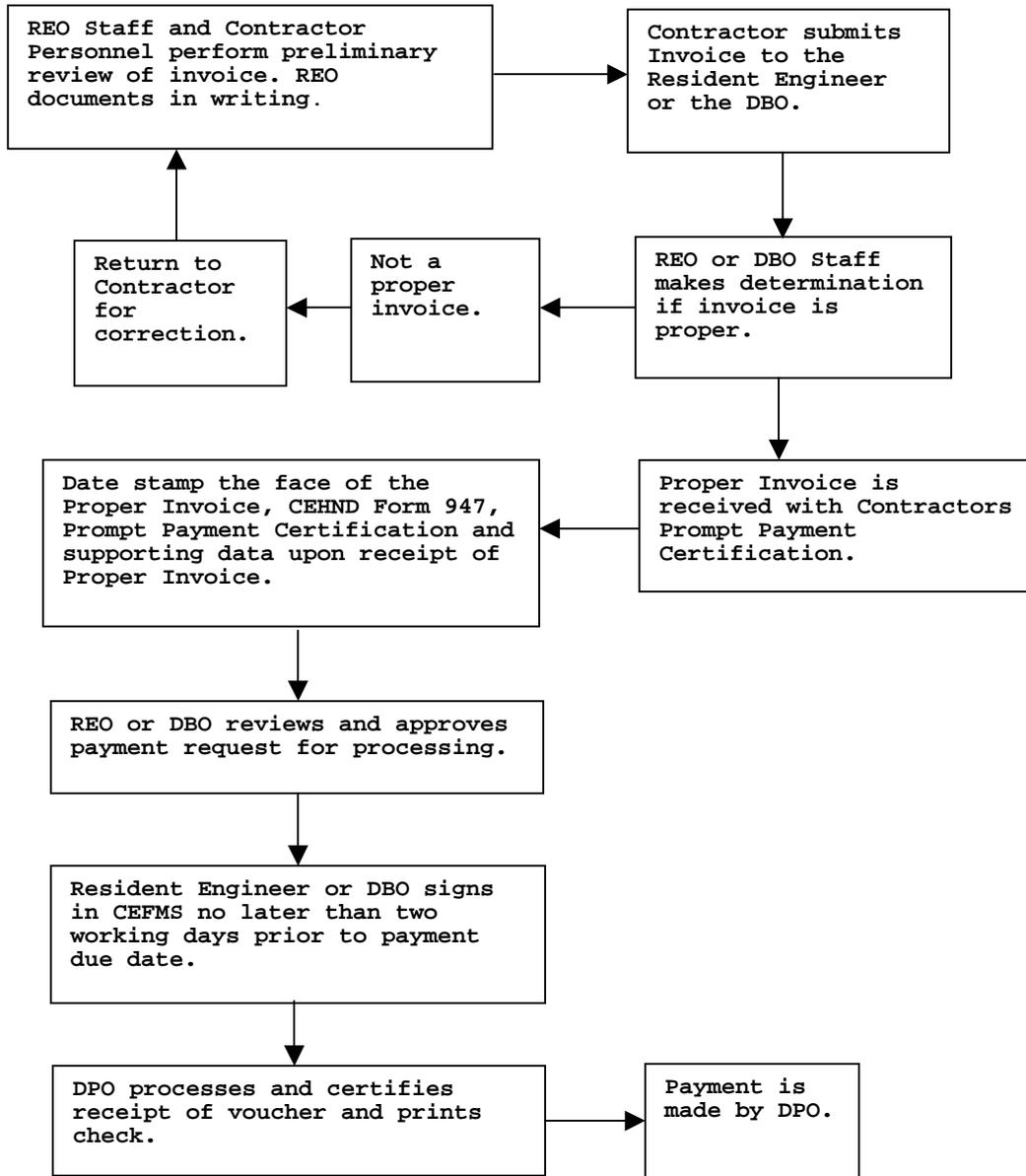
(e) When payment bonds have been required for a contract, such as a construction contract, the ACO is not authorized to withhold progress payments during contract performance because subcontractors have not been paid. However, the ACO may properly require the contractor to provide proof that his last certification was "correct" prior to the next payment, i.e., proof of payment to subcontractors and suppliers from previously paid progress payments.

- (4) The ACO should furnish those who allege nonpayment a copy of the Miller Act Statement, available from OC, and should also notify the surety of the nonpayment allegations (see FAR 28.106-6 and 28.106-7). See Exhibit 8*12 for the Miller Act Information Statement.

8.18 Exhibits.

- a. Exhibit 8*1 - Payment Processing (Flow Diagram)
- b. Exhibit 8*2 - Contract Clause (*Payments Under Fixed-Price Construction Contracts [Apr 89], FAR 52.232-5*)
- c. Exhibit 8*3 - Contract Clause (*Prompt Payment for Construction Contracts [Aug 93], FAR 52.232-27*)
- d. Exhibit 8*4 - CEHND Form 947, Prompt Payment Certification and Supporting Data for Contractor Payment Invoice
- e. Exhibit 8*5 - Determination of Assessment of Liquidated Damages (Flow Diagram)
- f. Exhibit 8*6 - Proposed Assignment or Release of Assignment (Suggested Formats for Use by Contractor)
- g. Exhibit 8*7 - ENG Form 93, Payment Estimate - Contract Performance
- h. Exhibit 8*8 - Detailed Explanation and/or Remarks to ENG Form 93, CEHND Form 973
- i. Exhibit 8*9 - Non-assessment of Liquidated Damages Statement, CEHND Form 972
- j. Exhibit 8*10 - Examples of Attachments to Final Payment Estimate (Additional Data)
- k. Exhibit 8*11 - Sample Format of Letter to Inform Contractor of **Subcontractor** Nonpayment Complaint
- l. Exhibit 8*12 - Miller Act Information Statement

PAYMENT ESTIMATE FLOW DIAGRAM



LEGEND

- 1. REO - RESIDENT ENGINEER OFFICE
- 2. DBO - DESIGNATED BILLING OFFICE
- 3. DPO - DESIGNATED PAYMENT OFFICE

Exhibit 8*1. Payment Processing (Flow Diagram)

PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (APR 1989) FAR 52.232-5

(a) The Government shall pay the Contractor the contract price as provided in this contract.

(b) The Government shall make progress payments monthly as the work proceeds, or at more frequent intervals as determined by the Contracting Officer, on estimates of work accomplished which meets the standards of quality established under the contract, as approved by the Contracting Officer. The Contractor shall furnish a breakdown of the total contract price showing the amount included therein for each principal category of the work, which shall substantiate the payment amount requested in order to provide a basis for determining progress payments, in such detail as requested by the Contracting Officer may authorize material delivered on the site and preparatory work done to be taken into consideration. Material delivered to the Contractor at locations other than the site may also be taken into consideration if:

(1) Consideration is specifically authorized by this contract; and

(2) The Contractor furnished satisfactory evidence that it has acquired title to such material and that the material will be used to perform this contract.

(c) Along with each request for progress payments, the contractor shall furnish the following certification, or payment shall not be made:

I hereby certify, to the best of my knowledge and belief, that:

(1) The amounts requested are only for performance in accordance with the specifications, terms, and conditions of the contract;

(2) Payments to subcontractors and suppliers have been made from previous payments received under the contract, and timely payments will be made from the proceeds of the payment covered by this certification, in accordance with subcontract agreements and the requirements of Chapter 39 of Title 31, United States Code; and

(3) This request for progress payments does not include any amounts that the prime contractor intends to withhold or retain from a subcontractor or supplier in accordance with the terms and conditions of the subcontract.

(Name)

(Title)

(Date)

Exhibit 8*2. Prompt Payment Act Amendments.

FAR 52.232-5

(d) If the Contractor, after making a certified request for progress payments, discovers that a portion or all of such request constitutes a payment for performance by the contractor that fails to conform to the specifications, terms, and conditions of this contract (hereinafter referred to as the "unearned amount"), the Contractor shall;

(1) Notify the Contracting Officer of such performance deficiency; and

(2) Be obligated to pay the Government an amount (computed by the Contracting Officer in the manner provided in 31 U.S.C. 3903 (c)(1) equal to interest in the unearned amount from the date of receipt of the unearned amount until:

(i) The date the Contractor notifies the Contracting Officer that the performance deficiency has been corrected; or

(ii) The date the Contractor reduces the amount of any subsequent certified request for progress payments by an amount equal to the unearned amount.

(e) If the Contracting Officer finds that satisfactory progress was achieved during any period for which a progress payment is to be made, the Contracting Officer shall authorize payment to be made in full. However, if satisfactory progress has not been made, the Contracting Officer may retain a maximum of 10 percent of the amount of the payment until satisfactory progress is achieved. When the work is substantially complete, the Contracting Officer may retain from previously withheld funds and future progress payments that amount the Contracting Officer considers adequate for protection of the government and shall release to the Contractor all the remaining withheld funds. Also, on completion and acceptance of each separate building, public work or other division of the contract, payment shall be made for the completed work without retention of a percentage.

(f) All material and work covered by progress payments made shall, at the time of payment, become the sole property of the Government, but this shall not construed as:

(1) Relieving the Contractor from the sole responsibility for all material and work upon which payments have been made or the restoration of any damaged work; or

(2) Waiving the right of the Government to require the fulfillment of all of the terms of the contract.

(g) In making these progress payments, the Government shall, upon request, reimburse the Contractor for the amount of premiums paid for performance and payment bonds (including coinsurance and reinsurance agreements, when applicable) after the Contractor has furnished evidence of full payment to the surety. The retainage provisions in paragraph (e) of this clause shall not apply to that portion of progress payments attributable to bond premiums.

(h) The Government shall pay the amount due the Contractor under this contract after:

(1) Completion and acceptance of all work;

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FAR 52-232-5

(2) Presentation of a properly executed voucher; and

(3) Presentation of release of all claims against the Government arising by virtue of this contract, other than claims, in stated amounts, that the Contractor has specifically excepted from the operation of the release. A release may also be required of the assignee if the Contractor's claim to amounts payable under this contract has been assigned under the Assignment of Claims Act of 1940 (31 U.S.C. 3727 and 41 U.S.C. 15).

(i) Notwithstanding any provision of this contract, progress payments shall not exceed 80 percent on work accomplished on undefinitized contract actions. A "contract action" is any action resulting in a contract, as defined in FAR Subpart 2.1, including contract modifications for additional supplies or services, but not including contract modifications that are within the scope and under the terms of the contract, such as contract modifications issued pursuant to the Changes clause, or funding and other administrative changes.

(End of Clause)

Exhibit 8*2. Prompt Payment Act Amendments (Cont'd).

PROMPT PAYMENT FOR CONSTRUCTION CONTRACTS (AUG 1993) FAR 52.232-27

Notwithstanding any other payment terms in this contract, the government will make invoice payments and contract financing payments under the terms and conditions specified in this clause. Payment shall be considered as being made on the day a check is dated or an electronic funds transfer is made. Definitions of pertinent terms are set forth in 32.902. All days referred to in this clause are calendar days, unless otherwise specified. The term "foreign vendor," means an incorporated concern not incorporated in the United States or an unincorporated concern having its principal place of business outside the United States.

(a) Invoice Payments. (1) For purpose of this clause, there are several types of invoice payments, which may occur under this contract, as follows:

(i) Progress payments, if provided for elsewhere in this contract, based on Contracting Officer approval of the estimated amount and value of work or services performed, including payments for reaching milestones in any project:

(A) The due date for making such payments shall be in 14 days after receipt of the payment requested by the designated billing office. However, if the designated billing office fails to annotate the payment request with the actual date of receipt, the payment due date shall be deemed to be the 14th day after the date the Contractor's payment request is dated, provided a proper payment request is received and there is no disagreement over quantity, quality, or Contractor compliance with contract requirements.

(B) The due date for payment of any amounts retained by the Contracting Officer in accordance with the clause at 52.232-5, Payments Under Fixed-Price Construction Contracts, shall be as specified in the contract or, if not specified, 30 days after approval for release to the contractor by the Contracting Officer.

(ii) Final payments based on completion and acceptance of all work and presentation of release of all claims against the Government arising by virtue of the contract, and payments for partial deliveries that have been accepted by the government (e.g., each separate building, public work, or other division of the contract for which the price is stated separately in the contract):

(A) The due date for making such payments shall be either the 30th day after receipt by the designated billing office of a proper invoice from the Contractor, or the 30th day after Government acceptance of the work or services completed by the Contractor, whichever is later. However, if the designated billing office fails to annotate the invoice with the date of actual receipt, the invoice payment due date shall be deemed to be the 30th day after the date the Contractor's invoice is dated, provided a proper invoice is received and there is no disagreement over quantity, quality, or Contractor compliance with contract requirements.

(B) On a final invoice where the payment amount is subject to contract settlement actions (e.g., release of claims), acceptance shall be deemed to have occurred in the effective date of the contract settlement.

Exhibit 8*3. Prompt Payment for Construction Contracts.

FAR 52.232-27

(2) An invoice is the Contractor's bill or written request for payment under the contract for work services performed to the designated billing office. A proper invoice must include the items listed in subdivisions (a)(2)(i) through (a)(2)(ix) of this clause. If the invoice does not comply with these requirements, the Contractor will be notified of the defect within 7 days after receipt of the invoice at the designated billing office. Untimely notification will be taken into account the computation of any interest penalty owed the Contractor the manner described in subparagraph (a)(4) of this clause:

- (i) Name and address of the Contractor.
- (ii) Invoice date.
- (iii) Contract number of other authorization for work or services performed (including order number and contract line item number).
- (iv) Description of work or services performed.
- (v) Delivery and payment terms (e.g., prompt payment discount terms).
- (vi) Name and address of Contractor official to whom payment is to be sent (must be the same as that in the contract or in a proper notice of assignment).
- (vii) Name (where practicable), title, phone number, and mailing address of person to be notified in event of a defective invoice.
- (viii) For payments described in subdivision (a)(1)(i) of this clause, substantiation if the amounts requested and certification in accordance with the requirements of the clause at 52.232-5, Payments Under Fixed-Price Construction Contracts.
- (ix) Any other information or documentation required by the contract.

(3) An interest penalty shall be paid automatically by the designated payment office, without request from the Contractor, if payment is not made by the due date and the conditions listed in subdivision (a)(3)(i) through (a)(3)(iii) of this clause are met, if applicable. An interest penalty shall not be paid on contracts awarded to foreign vendors outside the United States for work performed outside the United States.

- (i) A proper invoice was received by the designated billing office.
- (ii) A receiving report or other Government documentation authorizing payment was processed and there was no disagreement over quality. Contractor compliance with contract term or condition, or requested progress payment amount.

Exhibit 8*3. Prompt Payment for Construction Contracts (Cont'd).

FAR 52.232-27

(iii) In the case of a final notice for invoice for any balance of funds due the Contractor for work or services performed, the amount was not subject to further contract settlement actions between the Government and the Contractor.

(4) The interest penalty shall be at the rate established by the Secretary of the Treasury under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) that is in effect on the day after the due date, except where the interest penalty is prescribed by other governmental authority. This rate is referred to as the "Re-negotiation Board Interest Rate," and it is published in the Federal Register semiannually on or about January 1 and July 1. The interest penalty shall accrue daily on the invoice payment amount approved by the Government and be compounded in 30-day increments inclusive from the first day after the due date through the payment date. That is, interest accrued at the end of any 30-day period will be added to the approved invoice payment amount and be subject to interest penalties if not paid in the succeeding 30-day period. If the designated billing office failed to notify the Contractor of a defective invoice within the periods prescribed in subparagraphs (a)(2) of this clause, then the due date on the corrected invoice will be adjusted by subtracting the number of days taken beyond the prescribed notification of defects period. Any interest penalty owed the Contractor will be based on this adjusted due date. Adjustments will be made by the designated payment office for errors in calculating interest penalties, if requested by the Contractor.

(i) For the sole purpose of computing an interest penalty that might be due the Contractor for payments described in subdivision (a)(1)(ii) of this clause, Government acceptance or approval shall be deemed to have occurred constructively on the 7th day after the Contractor has completed the work or services in accordance with the terms and conditions of the contract. In the event that actual acceptance or approval occurs within the constructive acceptance or approval period, the determination of an interest penalty shall be based on the actual date of acceptance or approval. Constructive acceptance or constructive approval requirements do not apply if there is a disagreement over quantity, quality, or Contractor compliance with a contract provision. These requirements also do not compel Government officials to accept work or services, approve Contract estimates, perform contract administration functions, or make payment prior to fulfilling their responsibilities.

(ii) The following periods of time will not be included in the determination of an interest penalty:

(A) The period taken to notify the Contractor of defects in invoices submitted to the government, but this may not exceed 7 days.

(B) The period between the defects notice and resubmission of the corrected invoice by the Contractor.

(iii) Interest penalties will not continue to accrue after the filing of a claim for such penalties under the clause at 52.233-1, Disputes, or for more than 1 year. Interest penalties of less than \$1.00 need not be paid.

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Exhibit 8*3. Prompt Payment for Construction Contracts (Cont'd).

FAR 52.232-27

(iv) Interest penalties are not required on payment delays due to disagreement between the Government and Contractor over the payment amount or other issues involving contract compliance, or on amounts temporarily withheld or retained in accordance with the terms of the contract. Claims involving disputes, and any interest that may be payable, will be resolved in accordance with the clause at 52.233-, Disputes.

(5) An interest penalty shall also be paid automatically by the designated payment office, without request from the Contractor, if a discount for prompt payment is taken improperly. The interest penalty will be calculated on the amount of discount taken for the period beginning with the first day after the end of the discount period through the date when the Contractor is paid.

(6) If this contract was awarded in or after October 1, 1989, a penalty amount, calculated in accordance with regulations issued by the Office of Management and Budget, shall be paid in addition to the interest penalty amount if the Contractor--

(i) Is owed an interest penalty;

(ii) Is not paid the interest penalty within 10 days after the date the invoice amount is paid; and

(iii) Makes a written demand, not later than 40 days after the date the invoice amount is paid, that the agency pays such a penalty.

(b) Contract Financing Payments. (1) for purpose of this clause, if applicable, "contract financing payments" means a Government disbursement of monies to a Contractor under a contract clause or other authorization prior to acceptance of supplies or services by the Government, other than progress payments based on estimates of amount and value of work performed. Contract financing payments include advance payments and interim payments under cost-type contracts.

(2) If this contract provides for contract financing, requests for payment shall be submitted to the designated billing office as specified in this contract or as directed by the Contracting Officer. Contract financing payments shall be made on the 30th day after receipt of a proper contract financing request by the designated billing office. In the event that an audit or other review of a specific financing request is required to ensure compliance with the terms and conditions of the contract, the designated payment office is not compelled to make payments, loans, or other arrangements that do not involve recurrent submission of contract financing requests, payment shall be made in accordance with the corresponding contract terms or as directed by the Contracting Officer. Contract financing payments shall not be assessed an interest penalty for payment delays.

(c) The Contractor shall include in each subcontract for property or services (including a material supplier) for the purpose or services (including a material supplier) for the purpose of performing this contract, the following:

(1) A payment clause which obligates the Contractor to pay the subcontractor for satisfactory performance under its subcontract not alter than 7 days from receipt of payment out of such amounts as are paid to the Contractor under the Contract.

(2) An interest penalty clause obligates the Contractor to pay to the subcontractor an interest penalty for each payment not more in accordance with the payment clause--

(i) For the period beginning on the day after the required payment date and ending on the date on which payment of the amount due is made; and

(ii) Computed at the rate of interest established by the Secretary of the treasury, and published in the federal Register, for interest payments under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) in effect at the time the contractor accrues the obligations to pay an interest penalty.

(3) A clause requiring each subcontractor to include a payment clause and an interest penalty clause confirming to the standards set forth in subparagraphs (c)(1) and (c)(2) of this clause in each of its subcontracts, and to require each of its subcontractors to include such clauses in their subcontracts with each lower-tier subcontractor or supplier.

(d) The clauses required by paragraph (c) of this clause shall not be constructed to impair the right of Contractor or a subcontractor at any tier to negotiate, and to include in their subcontract, provisions which--

(1) Permit the Contractor of a subcontractor to retain (without cause) a specified percentage of each progress payment otherwise due to a subcontractor for satisfactory performance under the subcontract without incurring any obligation to pay a late payment interest penalty, in accordance with terms and conditions agreed to by the parties to the subcontract, giving such recognition as the parties deem appropriate to the ability of a subcontractor to furnish a performance bond and a payment bond.

(2) Permit the Contractor or subcontractor to make determination that part or all of the subcontractor's request for payment may be withheld in accordance with the subcontract agreement; and

(3) Permit such withholding without incurring any obligation to pay a late payment penalty if--

(i) A notice conforming to the standards of paragraph (g) of this clause has been previously furnished to the subcontractor, and

(ii) A copy of any notice issued by a contractor pursuant to subdivision (d)(3)(i) of this clause has been furnished to the Contracting Officer.

(e) If a Contractor, after making a request for payment to the Government but before making a payment to a subcontractor for the subcontractor's performance covered by the payment request,

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Exhibit 8*3. Prompt Payment for Construction Contracts (Cont'd).

FAR 52.232-27

discovers that all or a portion of the payment otherwise due such subcontractor is subject to withholding from the subcontractor in accordance with the subcontract agreement, then the Contractor shall--

(1) Furnish to the subcontractor a notice conforming to the standards of paragraph (g) of this clause as soon as practicable upon ascertaining the cause giving rise to a withholding, but prior to the due date for subcontractor payment;

(2) Furnish to the Contracting Officer, as soon as practicable, a copy of the notice furnished to the subcontractor pursuant to subparagraph (e)(1) of this clause;

(3) Reduce the subcontractor's progress payment by an amount not to exceed the amount specified in the notice of withholding furnished under subparagraph (e)(1) of this clause;

(4) Pay the subcontractor as soon as practicable after the correction of the identified subcontract performance deficiency,

(i) Make such payment within--

(A) Seven days after correction of the identified subcontract performance deficiency (unless the funds therefore must be recovered from the Government because of a reduction under subdivision (e)(5)(i) of this clause; or

(B) Seven days after the Contractor recovers such funds from the Government; or

(II) Incur an obligation to pay a late payment interest penalty computed at the rate of interest established by the Secretary of Treasury, and published in the Federal Register, for interest payments under section 12 of the contracts Disputes Act of 1978 (41 U.S.C. 611) in effect at the time the Contractor accrues the obligation to pay an interest penalty;

(5) Notify the Contracting Officer upon--

(i) Reduction of the amount of any subsequent certified application for payment; or

(ii) Payment to the subcontractor of any withheld amounts of a progress payment,

(A) The amounts withheld under subparagraph (e)(1) of this clause; and

(B) The dates that such withholding began and ended; and

(6) Be obligated to pay to the Government an amount equal to interest in the withheld payments (computed in the manner provided in 31 U.S.C 3903 (c)(1), from the 8th day after receipt of the withheld amounts from the Government until--

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Exhibit 8*3. Prompt Payment for Construction Contracts (Cont'd).

FAR 52.232-27

(i) The day the identified subcontractor performance deficiency is corrected; or

(ii) The date that any subsequent payment is reduced under subdivision (e)(5)(i) of this clause.

(f) (1) If a Contractor, after making payment to a first-tier subcontractor, receives from a supplier or subcontractor of the first-tier subcontractor (hereafter referred to as a "second-tier subcontractor") a written notice in accordance with section 2 of the Act of August 24, 1935 (40 U.S.C. 270b, Miller Act), asserting a deficiency in such first-tier subcontractor's performance under the contract for which the Contractor may be ultimately liable, and the contractor determines that all or a portion of future payments otherwise due such first-tier subcontractor agreement, then the Contractor may, without incurring an obligation to pay an interest penalty under subparagraph (e)(6) of this clause--

(i) Furnish to the first-tier subcontractor a notice conforming to the standards of paragraph (g) of this clause as soon as practicable upon making such determination; and

(ii) Withhold from the first-tier subcontractor's next available progress payment or payments an amount not to exceed the amount specified in the notice of withholding furnished under subdivision (f)(1)(i) of this clause.

(2) As soon as practicable, but not later 7 days after receipt of satisfactory written notification that the identified subcontract performance deficiency has been corrected, the Contractor shall pay the amount withheld under subdivision (f)(1)(ii) of this clause to such first-tier subcontractor, or shall incur an obligation to pay a late payment interest penalty to such first-tier subcontractor computed at the rate of interest established by the Secretary of the Treasury, and published in the federal Register, for interest payments under section 12 of the Contracts Disputes Act of 1978 (41 U.S.C 611) in effect at the time the Contractor accrues the obligation to pay an interest penalty.

(g) A written notice of any withholding shall be issued to a subcontractor (with a copy to the Contracting Officer of any such notice issued by the Contractor), specifying--

(1) The amount to be withheld;

(2) The specific causes for withholding under the terms of the subcontract; and

(3) The remedial actions to be taken by the subcontractor in order to receive payment of the amounts withheld.

(h) The Contractor may not request payment from the Government of any amount withheld or retained in accordance with paragraph (d) of this clause until such time as the Contractor has determined and certified to the Contracting Officer that the subcontractor is entitled to the payment of such amount.

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FAR 52.232-27

(i) A dispute between the Contractor and subcontractor relating to the amount or entitlement of a subcontractor to a payment or a late payment interest penalty under a clause included in the subcontract pursuant to paragraph (c) of this clause does not constitute a dispute to which the United States is a party. The United States may not be interpleaded in any judicial or administrative proceeding involving such a dispute.

(j) Except as provided in paragraph (i) of this clause, this clause shall not limit or impair any contractual, administrative, or judicial remedies otherwise available to the Contractor or a subcontractor in the event of a dispute involving late payment or nonpayment by the Contractor or deficient subcontract performance or nonperformance by a subcontractor.

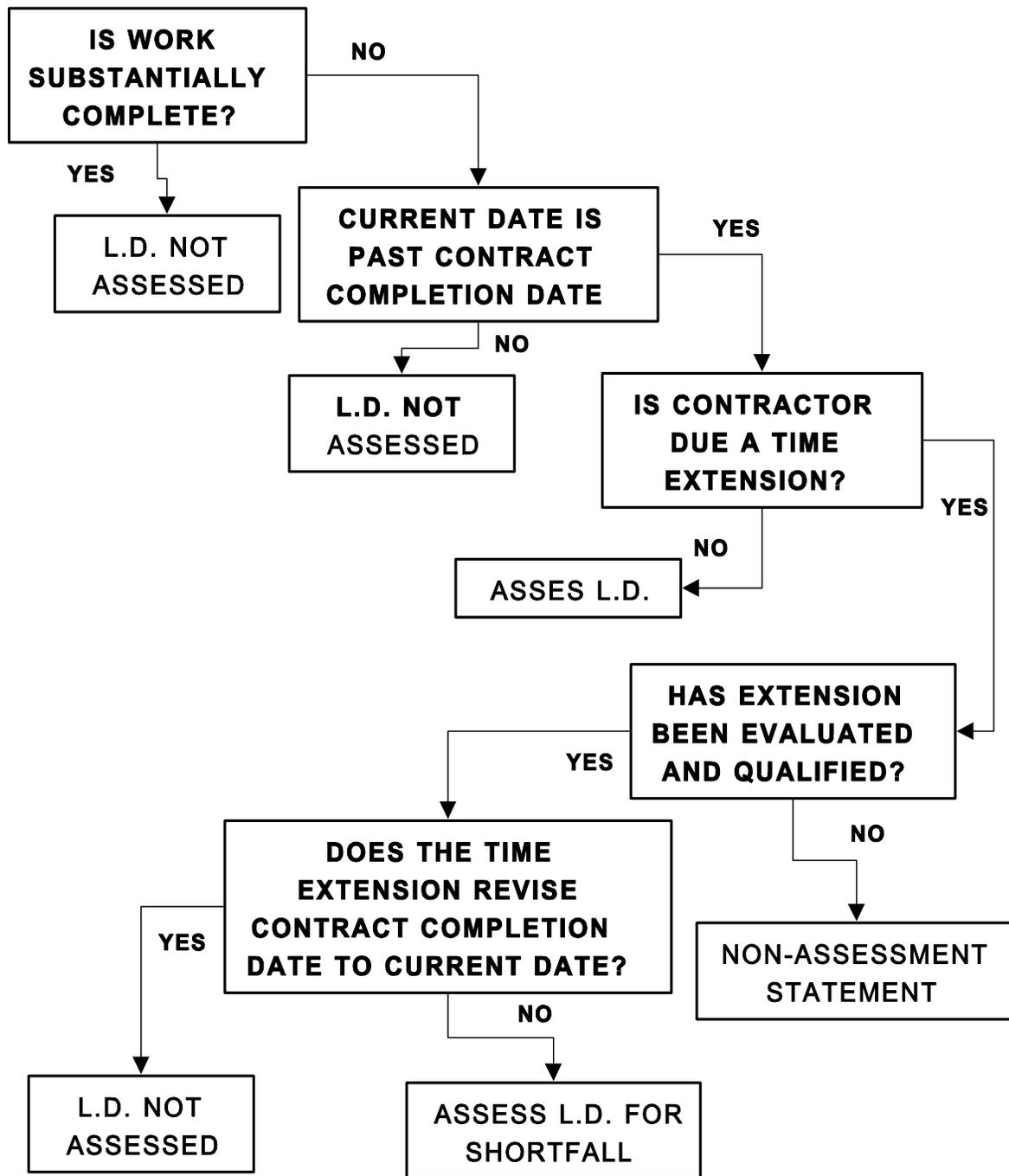
(k) The contractor's obligation to pay an interest penalty to a subcontractor pursuant to the clauses included in a subcontract under paragraph (c) of this clause shall not be construed to be an obligation of the United States for such interest penalty. A cost reimbursement claim may not include any amount for reimbursement of such interest penalty.

(End of Clause)

PROMPT PAYMENT CERTIFICATION AND SUPPORTING DATA FOR CONTRACTOR PAYMENT INVOICE				
Contractor Name and Address	Contract No.	Est. No.	Date	Discount Terms
	Designated Contractor Official and Address for Payment		Defective Invoice Notification (Name, Title, Telephone)	
Description and Location of Work				
Subcontractor Name	Total Amount Subcontracted	Subcontractor Amount Included This Payment Est.	Previous Subcontractor Payments	Subcontractor Earnings Deducted by Contractor (Total to Date)
				\$
<p>I hereby certify, to the best of my knowledge and belief, that:</p> <p><input type="checkbox"/> The amounts requested are only for performance in accordance with the specifications, terms and conditions of the contract;</p> <p><input type="checkbox"/> Payments to subcontractors and suppliers have been made from previous payments received under the contract, and timely payments will be made from the proceeds of the payment covered by this certification, in accordance with subcontract agreements and the requirements of Chapter 89 of Title 31, United States Code; and</p> <p><input type="checkbox"/> This request for progress payments does not include any amounts which the prime contractor intends to withhold or retain from a subcontractor or supplier in accordance with the terms and conditions of the subcontract.</p>				
Name and Title		Signature		Date

CEHND FORM 947
1 Nov 92

Exhibit 8*4. CEHND Form 947
(Prompt Payment Certification and Supporting Data for Contractor Payment Invoice)



Liquidated Damages Assessment Flow Diagram

Exhibit 8*5. Liquidated Damages Assessment

INSTRUMENT OF ASSIGNMENT

KNOW ALL MEN BY THESE PRESENTS, that (name of contractor), of (city),
(county), for value received and in accordance with the Assignment of Claims Act of 1940, as amended,
31 U.S.C. 3727, 41 U.S.C. 15, does hereby assign, set over and transfer unto (name of bank or
institution), of (city), state or country), (address), all right, title and interest to all monies due
or to become due from Contract No. _____, for (describe nature of contract), entered
into between (contractor's name), and (name of Government Agency), dated _____.

(NAME OF CONTRACTOR)

DATE: _____ BY: _____
(Name)

[IMPRESS SIGNATURE WITH CORPORATE SEAL]

I, (name), secretary (name of contractor), do hereby affirm that (name), who signed this
instrument is (title) of (name of contractor), and is fully authorized and empowered to sign said
instrument of assignment.

DATE: _____
(Name) (Title)

PLEASE NOTE THAT IF THERE IS NO CORPORATE SEAL, THEN A CERTIFIED COPY OF THE RESOLUTION OF THE
BOARD OF DIRECTORS AUTHORIZING THE ASSIGNMENT AND SIGNATURES, MUST BE ATTACHED.

Exhibit 8*6. Proposed Assignment or Release of Assignment
(Suggested Formats for Use by Contractor).

TO :

DATE:

NOTICE OF ASSIGNMENT

PLEASE TAKE NOTICE that monies due or to become under Contract No.

_____, For (describe nature of contract) _____, has been assigned, by _____ (contractor) _____, to the undersigned pursuant to the Assignment of Claims Act.

A true copy of the instrument of assignment is attached.

Payment due to or become due under such contract should be made to the undersigned assignee.

(Name of Assignee Bank or Institution)

BY: _____
(Name)
(Title)

Receipt is hereby acknowledged of the above notice and a copy of the mentioned instrument of assignment. They were received _____ (a.m. or p.m.) on _____, 19____.

Exhibit 8*6. Proposed Assignment or Release of Assignment (Cont'd)
(Suggested Formats for Use by Contractor).

RELEASE OF ASSIGNMENT

WHEREAS, Contract No. _____, for the _____ (description of contract) _____, was entered into between _____ (contractor) _____, and the _____ (Government Agency) _____; and,

WHEREAS, on or about _____ (date) _____, 19_____, _____ (contractor) _____, executed as instrument of assignment wherein all monies due or to become due under Contract No. _____ were assigned to _____ (assignee bank or institution) _____; and,

WHEREAS, on or about _____, 19_____, _____ (contractor) _____ and _____ (assignee bank or institution) _____, entered into an agreement wherein _____ (contractor) _____, was released by _____ (bank/institution) _____ from said assignment;

NOW, THEREFORE, _____ (bank/institution) _____ does hereby release _____ (contractor) _____, from all obligations arising under that said assignment of _____, 19_____, and further states that all monies due as of _____, 19_____, and all monies to become due under Contract No. _____ should be paid to _____ (contractor name) _____.

(BANK/INSTITUTION)

BY: _____

(Name)

(Title)

Sworn and subscribed before me on this _____ day of _____, 19_____.

Notary Public

My Commission Expires

Exhibit 8*6. Proposed Assignment or Release of Assignment (Cont'd)
(Suggested Formats for Use by Contractor).

PAYMENT ESTIMATE CONTRACT PERFORMANCE (Continue if)		CONTRACT NO.		SHEET 8 of 3		
CONTRACTOR and ADDRESS		PERIOD COVERED BY THE ESTIMATE		To:		
ITEM NO.	DESCRIPTION	QUANTITY AND UNIT	CONTRACT UNIT PRICE	AMOUNT	TOTAL TO DATE QUANTITY AND UNIT	AMOUNT
a.	b.	c.	d.	e.	f.	g.
0004	CONSTRUCTION (INSTALLATION) (PRICED FUNDED)					
0004AA	Pollution Abatement System	1 JOB		\$		
0004AB	DUN PVS	1 JOB		\$		
0004AC	Material Handling Equipment	1 JOB		\$		
0004AD	Specialized Dismal Machines	1 JOB		\$		
0004AE	Electrical	1 JOB		\$		
0004AF	Brine Reduction Area	1 JOB		\$		
0004AG	CDS/BCS	1 JOB		\$		
0004AH	Air Systems (LSS, IAS, PLA)	1 JOB		\$		
0004AJ	Cooling Water System	1 JOB		\$		
0004AK	ACS/SDS	1 JOB		\$		
0004AL	Emergency Gen With Oil Sig.	1 JOB		\$		
0004AM	LFG Storage	1 JOB		\$		
0004AN	Process Water System	1 JOB		\$		
0004AP	Exterior Pipe Supls & Tranchies	1 JOB		\$		
0004AQ	Interior Pipe Supports	1 JOB		\$		
0004AR	Funnaces	1 JOB		\$		
0004AS	Filters	1 JOB		\$		
0004AT	Instrument Control System	1 JOB		\$		
0004AU	Hydraulic Piping	1 JOB		\$		
0004AV	URA PVS	1 JOB		\$		
0004AW	Other (See Measurement and Payment)	1 JOB		\$		
	Specification 1025/Machiment 1B and Section C, Para 3.1.2)					
	SUB-TOTAL CLIN 0004			\$		
	TOTAL PRICE CLINs 0002, 0003, & 0004			\$		

Exhibit 8*7. ENG Form 93 - Payment Estimate, Contract Performance(Cont'd)

NON-ASSESSMENT OF LIQUIDATED DAMAGES

Reference is made to Estimate No. _____

Contract No. _____

covering the period _____ to _____ inclusive.

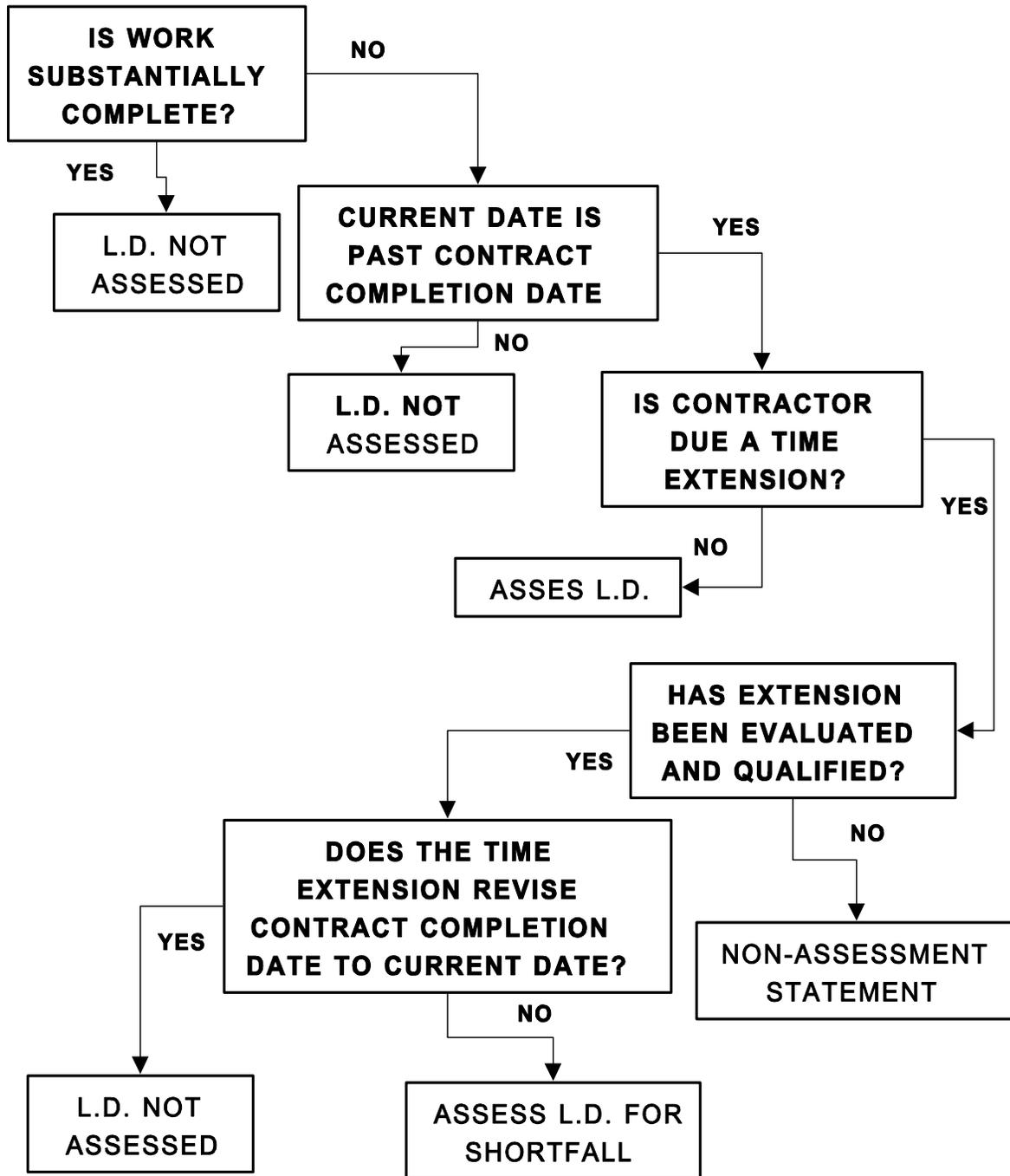
[] No liquidated damages are being assessed since request(s) for extension(s) to time have been received but not as yet resolved. If these requests are denied in whole or in part, there are sufficient monies still due the contractor under contract line items on the construction phases and/or in the retained percentage to cover assessment of liquidated damages, if any are determined to be due.

[] No liquidated damages are being assessed since acceptance of the contract work on Phases II, III, and IV (construction) on behalf of the Government was accomplished on _____. However, still pending completion, but not subject to liquidated damages are the following items:

[Examples] Testing

- Punch list items
- Submittal of payrolls
- Administrative items
- Settlement of Claims
- Finalization of Modifications

Chief, Construction Directorate



Liquidated Damages Assessment Flow Diagram

Exhibit 8*5. Liquidated Damages Assessment

FINAL COMPLETION STATEMENT

Estimate No. _____

I certify that the date fixed for completion of work for Phases III and IV under Contract No.

_____ as modified through Modification No. _____ is

_____ ; and that this work was substantially completed on _____, 19____. I accepted the work on behalf of the Government on _____ 19_____.

The contractor has been assessed damages, as follows:

Liquidated damages from _____ through _____

being _____ days at \$ _____ per day, or \$ _____.

Those remaining items not subject to liquidated damages, _____,

have been accomplished as of _____, 19_____.

All modifications have now been formalized and all administrative requirements of the work under Phases III and IV have been satisfied. It is recommended that the final estimate for this work be approved for payment.

RESIDENT ENGINEER

APPROVED:

Chief, Construction Directorate
Contracting Officer's Rep.

Date:

Exhibit 8*10. Completion Statements (Final Construction Completion Statement)

RELEASE OF CLAIMS

The undersigned contractor under Contract No. _____ dated
 _____, 199 ____ between the United States of America and said contractor for
 _____ [Describe the work] _____
 _____ at _____; in accordance with paragraph (h) (3) of contract
 clause, "Payments Under Fixed-Price Construction Contracts" hereby releases the United States, its
 officers, agents, and employees from any and all claims arising under or by virtue of Phases III and IV of said
 contract or any modification or change thereof.

(Date)

(Contractor's name exactly as shown on
the face of the contract.)

Exhibit 8*10. Completion Statements (Release of Claims).

26 May, 1994

SUBJECT: Contractor No. XXXXXXXXXXXX, Payment of Subcontractors

Gov't Contractor, Inc.
7500 Old Georgetown Road
Bethesda, Maryland 20814-5122

Dear Mr. (Or Ms. _____):

We have received the attached letter from XXXXXXXXXXXX, stating that payment has not been made for supplies or services on your contract, Contract No. XXXXXXXXXXXX. Please review this complaint and fully explain the situation to me, in writing NLT XX XXX XXXX. I also wish to remind you of your obligations under your federal contract.

You should be aware that failure to pay for supplies or services may subject you and your bonding company to suit under the Miller Act.

You should also be aware of your obligations under several provisions of your contract. FAR 52.232-5, Payments under Fixed-Price Construction Contracts, which is part of your contract, requires that when you made a request for progress payments: (1) you certify that payments to subcontractors and suppliers have been made from the proceeds of the payment covered by this certification, in accordance with subcontract agreements and the requirements of 31 USC, chapter 39; and (2) your request for progress payments does not include any amounts which the prime contractor intends to withhold or retain from a subcontractor or supplier in accordance with the terms and conditions of the subcontract.

Please be advised that a false certification may subject you and your company to civil and criminal liability under federal law.

Furthermore, the Payments clause also provides that:

If the Contractor, after making a certified request for progress payments, discovers that a portion or all of such request constitutes a payment for performance by the Contractor that fails to conform to the specifications, terms, and conditions of this contract (hereinafter referred to as the unearned amount), the Contractor shall - (1) Notify the Contracting Officer of such performance deficiency; and (2) Be obligated to pay the Government an amount (computed by the Contracting Officer in the manner provided in 31 USC 3903 (c)(1) equal to interest on the unearned amount until - (I) The date the contractor notifies the Contracting Officer that the performance deficiency has been corrected; or (ii) The date the Contractor reduces the amount of any subsequent certified request for progress payments by an amount equal to the unearned amount.

Furthermore, a contractor fails to meet the obligations of timely payment to suppliers and subcontractors may be liable for interest to both the US and to the subcontractor or supplier in accordance with the provisions of FAR52.232.27, Prompt Payment for Construction Contracts. This clause is also part of your contract.

Also, the Prompt Payment Clause requires contractors to give notice to subcontractors and suppliers and to the Government in the event that progress payments are withheld from a subcontractor. Section (g) of the Prompt Payment clause requires the contractor to give written notice of any withholding to a subcontractor, with a copy to the Contracting Officer, specifying (1) the amount to be withheld, (2) the specific causes for the withholding under the terms of the subcontract, and (3) the remedial actions to be taken by the subcontractor in order to receive payment of the amounts withheld.

You should also note that section (f) of the Prompt Payment clause places obligations on the contractor in the event that second tier subcontractors or suppliers notify the prime contractor of payment deficiencies under the Miller Act.

Also, DOD Authorization Act of 1992, Public law 102-190, section 806 provides that when a subcontractor or supplier of a DOD prime contractor asserts that it has not been paid by the prime in accordance with the terms of its agreement with the prime, the Contracting Officer may determine (1) whether the prime has made progress payments or final payment to the subcontractor or supplier, and (2) the accuracy of any prime contractor certification of payment to the sub or supplier which accompanies the prime's own Prompt Payment request for progress payment by the Government.

Finally, if the Contracting Officer determines that the prime has not complied with such things as subcontract payment provisions, he or she may (a) encourage the prime to make timely payment to the sub, or (b) reduce or suspend progress payments owed to the prime. Also, if the Contracting Officer finds that a prime's payment certification is inaccurate in any material respect, then he or she is required to take appropriate...remedial action under implementing regulations.

This letter should not be construed as an opinion by the Government on the merits of subcontractor/ supplier claims against your company. It is merely a reminder of your obligations under your federal contract.

Sincerely,

/s/

Authorized Representative
of the Contracting Officer

Exhibit 8*11. Sample Letter to Inform Contractor of Subcontractor Nonpayment Complaint
(Cont'd)

DEPARTMENT OF THE ARMY
ENGINEERING AND SUPPORT CENTER, HUNTSVILLE
P.O. BOX 1600
HUNTSVILLE, ALABAMA 35807-4301

REPLY TO
ATTENTION OF:

This statement is issued for the information of persons interested in claims for material and labor supplied and used in the prosecution of work on United States buildings and public works under the control of U.S. Army Engineering and Support Center, Huntsville District.

MECHANICS LIEN

Federal buildings and public works are not subject to mechanics' liens. There is no United States law permitting such a lien. The lien laws of the States are not applicable.

THE MILLER ACT

A remedy for the protection of any person, company, or corporation who has furnished labor and/or materials used in the prosecution of the work provided for in any contract, exceeding \$25,000.00 in amount, for the construction, alteration, or repair of any public buildings or public work of the United States, and payment for which has not been made, is provided by the Act of August 24, 1935, 49 Stat. 793 (U.S. code, Title 40, Sections 270a, 270b, 270c, and 270d; as amended August 4, 1959 - P.L. 86-135, 73 Stat. 279, November 2, 1966, P.L. 89-719, Title 1, Section 105(b), 80 Stat. 1139, known as the Miller Act. This Act is applicable to all contracts exceeding \$25,000 in amount, awarded pursuant to any invitation for bids issued on or after October 25, 1935, and is set forth in the United States Code, as follows:

Section 270a.

(a) Before any contract, exceeding \$25,000 in amount, for the construction, alteration or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as contractor:

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than \$1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than \$1,000,000 and not more than \$5,000,000, the said payment bond shall be in a sum of forty (40) percent of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms on the contract shall be more than \$5,000,000 the said payment bond shall be in the sum of \$2,500,000.

Exhibit 8*12. The Miller Act Information Sheet

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

(d) Every performance bond required under this section shall specifically provide coverage for taxes imposed by the United States which are collected, deducted, or withheld from wages paid by the contractor in carrying out the contract with respect to which such bond is furnished. However, the United States shall give the surety or sureties on such bond written notice, with respect to any such unpaid taxes attributable to any period, within ninety days after the date when such contractor files a return for such period, except that no such notice shall be given more than one hundred and eighty days from the date when a return for the period was required to be filed under Title 26. No suit on such bond for such taxes shall be commenced by the United States unless notice is given as provided in the preceding sentence, and no such suit shall be commenced after the expiration of one year after the day on which such notice is given.

Section 270b. (a) Every person who has furnished labor or material in the prosecution of the work provided for in such sections 270a to 270d of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgement for the sum or sums justly due him: PROVIDED, HOWEVER, that a person having direct contractual relationship with a subcontractor, but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, starting with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit.

Section 270c. The department secretary or agency head of the contracting agency is authorized and directed to furnish, to any person making application therefor who submits an affidavit that he has supplied labor or materials for such work and payment therefor has not been made or that he is being sued on any such bond, a certified copy of such bond and the contract for which it was given, which copy shall be prima facie evidence of the contents, execution, and delivery of the original. Applicants shall pay for such certified copies such fees as the department secretary or agency head of the contracting agency fixes to cover the cost of preparation thereof.

Section 270d. The term person and the masculine pronoun as used in sections 270a and 270d of this title shall include all persons whether individuals, associations, co-partnerships, or corporations.

MINOR JOBS

It will be noted that the above law does not require performance and payment bonds where the contract price does not exceed \$25,000.00.

EXTENT TO PROTECTION

The protection of the payment bond extends not only to the immediate subcontractors for the contractor but to any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor relationship express or implied with the contractor furnishing the payment bond, provided notice is given to the contractor as required by Section 270b(a) of the Act as set forth above.

PRIVITY

The Act does not establish any privity between the United States and laborers, material men, subcontractors, etc., so as to authorize the officers of the Government to satisfy their claims from monies due to contractor; nor does the contract authorize the Government to withhold earned payments from the contractor because of his failure to pay subcontractors.

SUITS

When it becomes necessary to institute suit on a contractor's payment bond, such suit is brought in the name of the United States for the use of the person suing, in the United States District Court for the district in which the work is located. Suit may be instituted ninety days after the last of the labor was performed or material was furnished for which such claim is made, but no suit may be commenced after the expiration of one year after the work is completed or material is furnished. Such suit is an action at law.

Persons wishing to know whether any suit has been instituted upon the contractor's payment bond in a given case should inquire of the clerk of the United States District Court for the district in which the contract work is located.

CERTIFIED COPIES - AFFIDAVIT

Under the Miller Act the department secretary or agency head of the contracting agency is authorized and directed to furnish, to any person who makes application therefore, certified copies of the payment bond and the contract for which it was given, provided such person shall submit an affidavit that he has supplied labor or material for the contract work and payment therefore has not been made. Such applicants are required to pay for such certified copies such fees as fixed to cover the cost of preparation thereof. No particular form of affidavit for use in such cases has been prescribed.

LEGAL ADVICE

The Government cannot undertake to adjust differences or determine controversies between contractors or sub-contractors and persons furnishing material or labor, nor will it give advice as to the best method of securing or collecting claims. Claimants must consult their attorneys for answers to questions involving the determination of legal points or procedures.

Exhibit 8*12. The Miller Act Information Sheet (Cont'd).