About the Author

Stan Uhlig, founder and owner of Federal Construction Consultants, is a leading expert who began his extensive career as a Seabee in Vietnam. His experience spans from teaching civil engineering technology to working in federal construction contracting around the world. During his 37 years as a contractor to the Department of Defense, Stan worked as a chief engineer, project manager, senior project manager, and general manager of operations. The founder of a multimillion-dollar construction business, Stan has successfully completed some of the biggest and most complex government contracts ever conceived at home or abroad. They include underground aircraft hangars, nuclear weapon storage facilities, fire stations, air traffic control towers, operations facilities, barracks, dining facilities, high-rise bridges, historic renovations (including the first YMCA building west of the Mississippi River), rebuilding of dry docks (the West Coast’s largest), and an underground hospital (again, the world’s largest).

All of these projects not only presented unique engineering challenges but also involved intricate contractual complexities and operational difficulties. Stan has expertise in successfully managing such contracts in a way that not only delivers quality and on-time results but also avoids lawsuits, delays, added costs, and loss of credibility. For the past five years, Stan has managed an average of 40 projects and up to 1,500 employees. He has also taught construction contracting at the college level and mentored a large general contractor. He is an engaging speaker in his interactive workshops.
Contents

Preface........................................................................................................................................1
Shop Drawings...........................................................................................................................3
Accident Prevention...................................................................................................................6
Liquidated Damages..................................................................................................................8
Order of Precedence..................................................................................................................10
Davis-Bacon Act (Prevailing Wages) .........................................................................................13
Buy American Act....................................................................................................................16
Disputes........................................................................................................................................26
Work by the Contractor...............................................................................................................29
Differing Site Conditions............................................................................................................32
Site Investigations and Conditions Affecting the Work...............................................................34
Use and Possession Prior to Completion......................................................................................36
Schedules......................................................................................................................................37
Suspension of Work......................................................................................................................40
Changes.........................................................................................................................................43
Government-Furnished Property.................................................................................................45
Inspection of Construction............................................................................................................47
Warranty of Construction.............................................................................................................50
Default..........................................................................................................................................52
Requests for Equitable Adjustment..............................................................................................55
Documentation Required for a Claim...........................................................................................57
Notice Checklist...........................................................................................................................58
Preface

The project superintendent is arguably the most important person on the job site. He is tasked with the day-to-day responsibility for making sure that the project gets built correctly, on time, and within budget. He must understand all the safety, quality control, and environmental requirements. On a federal government construction project, the superintendent has additional responsibilities. Federal laws take precedence over state laws on a federal reservation or installation; because federal laws differ significantly from state laws, they can be confusing. Issues such as notifications and documentation, order of precedence, and what constitutes a change are handled differently under federal law than under state law.

*Federal Construction Contracting Made Easy: A Field Guide to the FAR* is a quick reference guide designed to help you solve problems in the field quickly and successfully. It weeds through the legalese of the most common Federal Acquisition Regulation (FAR) clauses that a superintendent needs to understand to complete a successful construction project. Use this quick reference guide with *Federal Construction Contracting Made Easy* to understand all the federal construction contracting rules, regulations, and processes.

Over the span of my career, I have worked with many superintendents who would encounter field situations on federal government construction projects that appeared to be similar to situations they had encountered in the past on commercial projects. Even though they were very good at their jobs, the superintendents would handle the federal field situations in the same way they had handled similar situations previously, unaware that they needed to use very different processes and procedures when performing work for the federal government. The result was confusion and frustration.

This guide focuses on the FAR clauses that a superintendent should know and understand to perform his day-to-day duties—and protect his company’s legal rights—when performing a federal construction project. Only the most important clauses that will affect the superintendent’s daily work are included.

I have always recommended that work on a federal project be handled as though a claim will have to be filed against the government. When work is handled in this manner, if a changed condition occurs, the contractor’s team will have the necessary procedures in place and will be ready to respond. This approach ensures that all legal requirements will be met.

Throughout this field guide I often mention notifications and documentation. That is because all requests for equitable adjustment and claims require that proper notifications be given to the government and that convincing documentation be submitted. Key to making the FAR clauses work for you is understanding when you must give notifications to the government to preserve your rights—and then providing the in-depth and accurate documentation needed to prove your case. Set up your systems and procedures to make notifications and documentation a standard operating procedure.
What This Guide Will Do for You

*Federal Construction Contracting Made Easy: A Field Guide to the FAR* is designed to be your on-site reference guide to the FAR clauses that govern the rules, regulations, procedures, and processes of doing business with the federal government in construction contracting. The guide is designed around how the U.S. Army Corps of Engineers operates and its rules, processes, and procedures; the other federal government agencies operate under the same laws and regulations but might have slightly different processes and requirements. This guide will equip you to handle problems in the field when they arise.

*Federal Construction Contracting Made Easy: A Field Guide to the FAR* includes a full, unedited version of each pertinent FAR clause as well as an explanation of what it means. Information and guidance are included about when to invoke the clause, how to use it, the notification required, and to whom the notification must be given.

This field guide is your complete, quick reference to:

- Determining when a change order is required, which FAR clause should be used, and what notifications and documentation will be required
- Identifying the potential claim and how to protect your rights
- Understanding how the specific process works
- Ensuring you use the process, regulation, or procedure for your benefit and protection
- Deciphering notification timeframes and consequences
- Protecting your company from potential claim situations
- Identifying and accessing the federal government forms you need
- Recognizing that the federal government must deal with you as an equal and not as an adversary.

It is my hope that this book will provide you with the tools and knowledge you need to succeed as a project superintendent in the federal construction contracting marketplace. Please be in touch if you’d like to share your success stories or if I can help in your efforts.

—Stan Uhlig

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Shop Drawings

Shop drawings are required by FAR Clause 52.236-21, Specifications and Drawings for Construction, and may also be required by other sections of the contract. The contract considers them an extension of design, and therefore the designer of record must approve them. The contractor also has the responsibility to make sure the shop drawings are in full compliance with the design drawings because the design drawings will supersede the shop drawings for legal import.

In a design-bid-build project, the government requires that the shop drawings be approved before the related work is performed. The contractor may proceed with the work before the drawings are approved, but the contractor is taking the chance that the work or some parts of the work will have to be torn out and redone, and payment will not be made until the shop drawings are approved. The government generally takes 30 days to approve these drawings, so they must be prepared and submitted with sufficient lead time to get them approved and the items fabricated and then installed. In addition, the government quite often requires that the shop drawings be resubmitted with changes. Depending on what the changes required are and your time constraints, you might want the fabrication to start without the shop drawings being fully approved. That can be quite chancy, so the decision should be made after careful thought.

Shop drawings for a government design-build project very seldom require government approval but usually are provided to the government “For Information Only.” Government design-bid-build contracts typically require numerous superfluous shop drawings; however, through the design-build process the contractor can limit the number to only those deemed necessary for construction, quality, or liability reasons. This is a huge advantage over the design-bid-build process because the contractor and specifically the superintendent can work with the architect or engineers to get them exactly what they need. This can save quite a bit of time and money. The shop drawings approved by the designer of record will then have to be given to the government. These are “For Information Only,” however, and the government will review them for compliance with the request for proposal (RFP) and proposal.

For a design-build project, the design drawings are considered “shop drawings,” and they are “accepted” by the government, not “approved.” In other words, the design drawings belong to the contractor for his use in constructing the facility. During the design process the government performs a conformance review to ensure conformance of the design drawings to the RFP and the proposal. The drawings and specifications represent the contractor’s means and methods of constructing the facility in accordance with the RFP and the proposal. This is another advantage for the contractor because if a change to the drawings or specifications needs to be made for any reason, the superintendent may request the designer of record to change it. Maybe you have found something that costs significantly less than what is shown (heaven forbid that an architect would specify a gold-plated item) or what is shown is more complicated than it needs to be.
Through the “design clarification” process, the superintendent can get this all worked out very simply with the designers.

The superintendent should work closely with the designers to limit the number of shop drawings and tests required to only those dictated by the RFP and to limit the liability of the contractor and designer. Requiring more than is needed only costs the contractor more money and opens the door for more government review.

**FAR Clause 52.236-21, Specifications and Drawings for Construction**

As prescribed in 36.521, insert the following clause:

**SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (FEB 1997)**

(a) The Contractor shall keep on the work site a copy of the drawings and specifications and shall at all times give the Contracting Officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In case of discrepancy in the figures, in the drawings, or in the specifications, the matter shall be promptly submitted to the Contracting Officer, who shall promptly make a determination in writing. Any adjustment by the Contractor without such a determination shall be at its own risk and expense. The Contracting Officer shall furnish from time to time such detailed drawings and other information as considered necessary, unless otherwise provided.

(b) Wherever in the specifications or upon the drawings the words “directed,” “required,” “ordered,” “designated,” “prescribed,” or words of like import are used, it shall be understood that the “direction,” “requirement,” “order,” “designation,” or “prescription,” of the Contracting Officer is intended and similarly the words “approved,” “acceptable,” “satisfactory,” or words of like import shall mean “approved by,” or “acceptable to,” or “satisfactory to” the Contracting Officer, unless otherwise expressly stated.

(c) Where “as shown,” “as indicated,” “as detailed,” or words of similar import are used, it shall be understood that the reference is made to the drawings accompanying this contract unless stated otherwise. The word “provided” as used herein shall be understood to mean “provide complete in place,” that is “furnished and installed.”

(d) Shop drawings means drawings, submitted to the Government by the Contractor, subcontractor, or any lower tier subcontractor pursuant to a construction contract, showing in detail (1) the proposed fabrication and assembly of structural elements, and (2) the installation (i.e., fit, and attachment details) of materials or equipment. It includes drawings, diagrams, layouts, schematics, descriptive literature, illustrations, schedules, performance and test data, and similar materials furnished by the contractor to explain in detail specific portions of the work required by the contract. The Government may duplicate, use, and disclose in any manner and for any purpose shop drawings delivered under this contract.

(e) If this contract requires shop drawings, the Contractor shall coordinate all such drawings, and review them for accuracy, completeness, and compliance with contract requirements and shall indicate its approval thereon as evidence of such coordination and review. Shop drawings submitted to the Contracting Officer without evidence of the Contractor’s approval may be returned for resubmission. The Contracting Officer will indicate an approval or disapproval of the shop drawings and if not approved as submitted shall indicate the Government’s reasons therefore. Any work done before such approval shall be at the Contractor’s risk. Approval by the Contracting Officer shall not relieve the Contractor from responsibility for any errors or omissions in such drawings, nor from responsibility for complying with the
requirements of this contract, except with respect to variations described and approved in accordance with (f) of this clause.

(f) If shop drawings show variations from the contract requirements, the Contractor shall describe such variations in writing, separate from the drawings, at the time of submission. If the Contracting Officer approves any such variation, the Contracting Officer shall issue an appropriate contract modification, except that, if the variation is minor or does not involve a change in price or in time of performance, a modification need not be issued.

(g) The Contractor shall submit to the Contracting Officer for approval four copies (unless otherwise indicated) of all shop drawings as called for under the various headings of these specifications. Three sets (unless otherwise indicated) of all shop drawings, will be retained by the Contracting Officer and one set will be returned to the Contractor.

(End of clause)

Alternate I (Apr 1984). When record shop drawings are required and reproducible shop drawings are needed, add the following sentences to paragraph (g) of the basic clause:

Upon completing the work under this contract, the Contractor shall furnish a complete set of all shop drawings as finally approved. These drawings shall show all changes and revisions made up to the time the equipment is completed and accepted.

Alternate II (Apr 1984). When record shop drawings are required and reproducible shop drawings are not needed, the following sentences shall be added to paragraph (g) of the basic clause:

Upon completing the work under this contract, the Contractor shall furnish _____ [Contracting Officer complete by inserting desired amount] sets of prints of all shop drawings as finally approved. These drawings shall show changes and revisions made up to the time the equipment is completed and accepted.
Accident Prevention

The importance of FAR Clause 52.236-13, Accident Prevention, to the superintendent is that paragraph (c) requires the use of the U.S. Army Corps of Engineers’ Safety and Health Requirements Manual, EM 385-1-1, for all federal government construction projects. This manual, which is more than 1,000 pages long, is the government’s way of complying with 29 CFR part 1926 and 29 CFR part 1910. The superintendent needs to learn the requirements shown in this manual because it will govern all safety on the construction site. The manual very closely follows OSHA requirements, but it might vary in some areas and is generally stricter.

The superintendent must ensure, either by himself or through an on-site company safety officer, that all workers at the site comply with the requirements of the EM 385-1-1 manual. This includes all subcontractor personnel as well as the prime contractor’s personnel. Paragraph (d) of the clause also gives the contracting officer the authority to orally issue a notice of noncompliance when he deems that the infraction poses a serious or imminent danger to the health and safety of the workers and to require that immediate corrective action be taken to rectify the situation. The superintendent should never argue with this direction but instead should comply with it as quickly as possible. The consequences of not immediately complying can be devastating. Not only might someone be seriously injured (the notice of noncompliance would imply this), but the contracting officer might shut the project down and not allow it to start up until he is satisfied that the conditions that led up to the notice of noncompliance have been corrected. This could take days, and the contractor would not be entitled to any compensation or time extension.

The superintendent should be aware that projects on federal installations do not fall under the legal authority of state safety and health agencies but do fall under the rules and regulations of OSHA. Some states offer programs that consult with contractors on federal projects, and I have found them to be of great value. The superintendent or site safety officer should explore such programs if offered.

FAR Clause 52.236-13, Accident Prevention

As prescribed in 36.513, insert the following clause:

ACCIDENT PREVENTION (NOV 1991)

(a) The Contractor shall provide and maintain work environments and procedures which will—
(1) Safeguard the public and Government personnel, property, materials, supplies, and equipment exposed to Contractor operations and activities;
(2) Avoid interruptions of Government operations and delays in project completion dates; and
(3) Control costs in the performance of this contract.
(b) For these purposes on contracts for construction or dismantling, demolition, or removal of improvements, the Contractor shall—
(1) Provide appropriate safety barricades, signs, and signal lights;
(2) Comply with the standards issued by the Secretary of Labor at 29 CFR Part 1926 and 29 CFR Part 1910; and

(3) Ensure that any additional measures the Contracting Officer determines to be reasonably necessary for the purposes are taken.

(c) If this contract is for construction or dismantling, demolition or removal of improvements with any Department of Defense agency or component, the Contractor shall comply with all pertinent provisions of the latest version of U.S. Army Corps of Engineers Safety and Health Requirements Manual, EM 385-1-1, in effect on the date of the solicitation.

(d) Whenever the Contracting Officer becomes aware of any noncompliance with these requirements or any condition which poses a serious or imminent danger to the health or safety of the public or Government personnel, the Contracting Officer shall notify the Contractor orally, with written confirmation, and request immediate initiation of corrective action. This notice, when delivered to the Contractor or the Contractor’s representative at the work site, shall be deemed sufficient notice of the noncompliance and that corrective action is required. After receiving the notice, the Contractor shall immediately take corrective action. If the Contractor fails or refuses to promptly take corrective action, the Contracting Officer may issue an order stopping all or part of the work until satisfactory corrective action has been taken. The Contractor shall not be entitled to any equitable adjustment of the contract price or extension of the performance schedule on any stop work order issued under this clause.

(e) The Contractor shall insert this clause, including this paragraph (e), with appropriate changes in the designation of the parties, in subcontracts.

(End of clause)
Liquidated Damages

Most federal government contracts contain FAR Clause 52.211-12 Liquidated Damages—Construction. Liquidated damages are a contractual amount worked up by the government so that if you're late on a project, the requirement to use actual costs to determine damages to the government will be eliminated. This method is used throughout the construction industry as a way to alleviate having to do battle with a client over what actual costs were incurred by the client. It helps you to avoid going to court. The courts have held that once you sign a contract that includes liquidated damages, any other remedy is gone. The result is that nobody has another remedy—neither the client nor the contractor.

A dining hall that I worked on at Ft. Lewis in 2009 is a classic example of when liquidated damages can and cannot be used. The contract said that everything had to be completed, including as-built drawings, O&M manuals, etc. prior to the scheduled project completion date. However, the Corps of Engineers tried to demand that these documents be accepted before the scheduled completion date; otherwise, they would assess liquidated damages. I let them know that under the law, and case law in particular, the beneficial occupancy date is the actual termination of liquidated damages. How can you possibly do as-built drawings and O&M manuals until the project is complete? I let them know that beneficial occupancy occurs when the government can occupy the premises for the purpose of its intended use, and because they could use the dining hall without any problems (all of the inspections and acceptance tests having been done), they could occupy the buildings. That allowed beneficial occupancy, so by case law that was the date that liquidated damages or the possibility of assessing liquidated damages would have to stop. That's important because the government can drag things out, especially with as-built drawings and O&M manuals. The superintendent needs to be cognizant of the date on which all the tests have been completed, all corrections have been accepted, and the facility can be used for its intended purpose. The superintendent should make sure that he makes a note in his daily reports showing what date he considers the beneficial occupancy date because if the government decides to play games, the daily report could be a determining factor in court.

Beneficial occupancy means the point at which the facility can be occupied by the actual user of the facility. Let's say you have a barracks. If it is obvious that people can sleep in the barracks and that you have all the systems working and approved (the sprinkler system is working and systems like the electrical system and HVAC system have all passed the fire codes and everything has been approved by the fire marshal), the facility meets the definition of a complete and usable facility. That is the determining factor for beneficial occupancy.

It is also important to be aware that some government inspectors might try to drag things out on a project for any number of reasons. Understanding this FAR clause will help to protect your rights.
FAR Clause 52.211-12, Liquidated Damages—Construction

As prescribed in 11.503(b), insert the following clause in solicitations and contracts:

LIQUIDATED DAMAGES—CONSTRUCTION (SEPT 2000)

(a) If the Contractor fails to complete the work within the time specified in the contract, the Contractor shall pay liquidated damages to the Government in the amount of ____________ [Contracting Officer insert amount] for each calendar day of delay until the work is completed or accepted.

(b) If the Government terminates the Contractor’s right to proceed, liquidated damages will continue to accrue until the work is completed. These liquidated damages are in addition to excess costs of repurchase under the Termination clause.

(End of Clause)
Order of Precedence

**FAR Clause 52.214-29, Order of Precedence—Sealed Bidding**, is used to determine which documents will govern in a contract when there is a conflict. This is of paramount importance to a superintendent because there are always conflicts in the documents. The order of precedence for a sealed-bid project is generally different from that for a design-build project.

The sealed-bid project is governed strictly by **FAR Clause 52.214-29, Order of Precedence—Sealed Bidding**. All the documents referred to in the FAR clause are part of the solicitation and include the drawings and specifications, contract clauses, schedule (including the schedule of prices), and representations and instructions. The contract will generally have another clause that provides in more detail the order of precedence for the contract.

There are usually many conflicts in any contract. One section might say to do this while another section says to do that, and you can't do both. For instance, the specifications might say to use aluminum windows, but the drawings say to use wooden windows. Which one governs is what the order of precedence is all about. If you have a sealed-bid contract or a design-bid-build contract, the FAR clauses clearly state that specifications govern over drawings; even if there is something missing from the drawings (the specifications mention a certain thing, but it's not shown on the drawings), you still have to do what is said in the specifications. Also, if something is not in the specifications and it is in the drawings, it's the drawings that govern. This is because the order of precedence will state that in a sealed-bid or design-bid-build project, if something is not in the drawings or not in the specifications but is in the other, you still have to do that work item because it's in one or the other.

The second part of the order of precedence for sealed-bid or design-bid-build projects states that specifications overrule drawings when there is a conflict. For instance, if aluminum windows are required in the specs but the drawings show wood windows, you have to put in the aluminum windows because the specifications take precedence over the drawings. You should always request a clarification from the contracting officer, but he will state that the specifications override the drawings and will direct you to use the aluminum ones. That's important for a couple of reasons. First, when you're estimating and bidding the project, if you notice that there is an error in the documents, you need to know which one governs and you have to bid it that way. Second, it's incredibly important for the superintendent to understand that when there is this type of conflict, the order of precedence is to refer to the specifications throughout the project. These legal precedents go back over 100 years and are well known in construction.

Another instance might be where the specifications don't mention putting handrails around a loading dock but the drawings show handrails on the loading dock. You would still be required to put the handrails on the loading dock; if something is not in the specs but it is in the drawings, you must provide the item. This happens frequently because often different people write the specifications and prepare the drawings and sometimes things are missed.
The order of precedence for design-build projects is generally different. It is normally included in the general conditions of the contract. Betterments are first. The solicitation or RFP requirements are second. The contractor's proposal is third, and design drawings are fourth. A betterment is something that is determined to be equal to or of higher quality than what the solicitation requires. For instance, in 2008 I ran into a betterment situation with a design-build barracks and dining hall project that I was building at Ft. Lewis. The RFP allowed for aluminum electric conductors throughout, but the government preferred copper conductors. In our proposal we said that we would give the government copper conductors, but then the electrical engineer designed the system for aluminum conductors. Because we had stated in our proposal that we would use copper conductors, which would be of higher quality that what was required by the solicitation, the government considered them a betterment. We were required to remove the aluminum conductors and replace them with copper conductors. That cost us over $110,000 because we had already installed the aluminum conductors when the government noticed them. The government said, “Take them up and replace them,” even though we were willing to give a credit back. The government argued that the copper conductors were considered a betterment, which put them at the very top of the order of precedence.

The superintendent should also understand that because the RFP or solicitation overrides both the contractor's proposal and the design drawings, conflicts can arise in the field that will require either the government or the contractor to go back to the RFP or solicitation to determine what is actually required. This happens frequently. Sometimes the designers interpret the RFP differently from the government. The only way to iron out this type of problem is for the superintendent or his project manager to request a clarification from the contracting officer; the government field personnel do not have the authority to make this clarification. The contractor's proposal is how the contractor interprets the RFP. The designer also interprets the RFP, but the interpretation might not always be correct. Whatever clarification you request from the contracting officer should be in writing, and you should be directed by the contracting officer to perform the work in the manner that he has prescribed. If you do not agree with the contracting officer’s decision, you can request an equitable adjustment; however, you must still perform the work as directed. This situation is not uncommon, but it must be dealt with within required notification timeframes. (See the Notice Checklist on page 58.)

The order of precedence is not always the same, so the superintendent should familiarize himself with his specific contract. Do not assume that all contracts are the same. The order of precedence for a design-build contract is:

1. Betterments: Any portions of the accepted proposal that both conform to and exceed the provisions of the solicitation. Betterment is defined as any component or system that exceeds the minimum requirements stated in the RFP.

2. The provisions of the solicitation (RFP).
3. All other provisions of the accepted proposal.

4. Any design products, including, but not limited to, plans, specifications, engineering studies and analyses, shop drawings, and equipment installation drawings. These are “deliverables” under the contract and are not part of the contract itself. Design products must conform to all provisions of the contract, in the order of precedence specified in the contract.

The contractor must advise the contracting officer in writing of any potential conflict and ask him for a determination of which direction to use. Sometimes the government will simply say, “There is no conflict. Proceed as currently shown or specified.” If this happens, the contractor should make a decision on his own based on what the courts have determined “a reasonably intelligent contractor that normally performs this type of work” would do.

**FAR Clause 52.214-29 Order of Precedence—Sealed Bidding**

Any inconsistency in a solicitation or contract shall be resolved by giving precedence in the following order:

(a) The Schedule (excluding the specifications);
(b) Representations and other instructions;
(c) Contract clauses;
(d) Other documents, exhibits, and attachments; and
(e) The specifications.
Davis-Bacon Act (Prevailing Wages)

The **Davis-Bacon Act** of 1931 is a U.S. law that established the requirement for paying prevailing wages on public works projects. All federal government construction contracts, and most contracts for federally assisted construction over $2,000, must include provisions for paying workers on-site no less than the locally prevailing wages and benefits paid on similar projects. The U.S. Department of Labor determines these wages. The FAR clauses listed here are not shown in their full text version because of their length.

The Davis-Bacon Act is extremely complicated, but there's no reason that a superintendent must understand all of it. There are a couple of things the superintendent needs to understand. Number one is that the prevailing wage shown on the wage determination is what is paid throughout the entire term of the contract. It doesn't change during the contract. This might differ from other public contracts because some states allow changes during the execution of the contract. These wages are the minimum that a contractor must pay; he may pay more if he wishes. The base wages must be paid, and the fringe benefits must be either added to the base wages for payment to the craftsman or broken out as prescribed by law.

The second thing a superintendent needs to understand is what constitutes a “secondary site of the work.” This is important for a contractor and a superintendent because Davis-Bacon wage rates also apply to the secondary site. A secondary site is a site that is set up for the purpose of fabricating items that will go directly into the project. To illustrate this, suppose a contractor has to supply concrete piles for a project. If the piles are manufactured at a yard that supplies concrete piles for other companies, not just the contractor’s, it is not a “secondary site of the work.” If, however, the yard is set up to produce concrete piles exclusively for the contractor’s project, it is a “secondary site of the work.”

Prevailing wages must be paid on any contract over $2,000. The prevailing wage determination must be a part of the contract, and it will be provided to the contractor by the contracting officer. Sometimes a prevailing wage for a craftsman such as a plumber or painter will not be in the wage determination. The superintendent may proceed with the work, but he should request that the contractor’s administrative staff ask the U.S. Department of Labor for a wage determination. The contractor or subcontractor should pay the craftsmen what he believes is the prevailing wage until the U.S. Department of Labor has rendered a decision. The superintendent and any foremen do not have to be paid prevailing wages unless at least 20 percent of their time during the week is spent doing hands-on work.

Most contractors and subcontractors get into trouble with prevailing wages by misclassifying workers as apprentices or laborers or in another lower-paying job classification. Apprentices must be in a state- or federally approved apprenticeship program, and the employer must be able to produce documentation to show that the worker is enrolled in such a program. Laborers may not do layout, use power tools, or perform work that a journeyman would normally perform. The
superintendent must pay attention to these requirements because the financial consequences of failing to do so can be enormous. The prime contractor will be made to pay the back wages even for a subcontractor. Getting this straightened out can take weeks or even months.

To illustrate just how complicated and time-consuming this process can be, I had a recent case with a subcontractor on a barracks project. We found that he was using prevailing wages from a state job. He wasn't trying to claim apprentices or misclassify workers, but he was using the wrong wage determination and we caught it. He had to go back over the whole job and do an accounting for every worker. He owed almost $13,000 in additional back pay to his workers. The problem is that you have to find each person and give him or her a cashier’s checks. The cashier’s check has to be canceled before the government will accept the fact that the worker was paid back wages. If the contractor can’t show the government that all the workers have been paid the correct amount, he may be fined 100 percent of the back wages owed. If it happens more than once, the contractor may be debarred from working with the government.

General requirements. The following FAR clauses (all offshoots from the Davis-Bacon Act of 1931) constitute the requirements for labor, labor payroll/reporting, and penalties incurred in all federally funded construction projects: FAR clauses 52.222-3, Convict Labor; 52.222-4, Contract Work Hours and Safety Standards Act—Overtime Compensation; 52.222-5, Davis-Bacon Act—Secondary Site of the Work; 52.222-6, Davis-Bacon Act; 52.222-7, Withholding of Funds; 52.222-8, Payrolls and Basic Records; 52.222-9, Apprentices and Trainees; 52.222-11, Subcontracts.

Who is allowed to work. All persons except convicts (see FAR clause 52.222-3, Convict Labor) may work. As long as a person has served his sentence, is out of prison on parole or probation, is in a work-release program, has been pardoned, or is otherwise legally authorized to work, he is allowed to work.

Site of the work

1. The primary site of the work. The physical place or places where the construction called for in the contract will remain when work on it is completed.

2. The secondary site of the work, if any. Any other site where a significant portion of the building or work is constructed, provided that such site—
   a. Is located in the United States.
   b. Is established specifically for the performance of the contract or project. This includes any fabrication plants, mobile factories, batch plants, borrow pits, job headquarters, tool yards, etc., provided they are dedicated exclusively, or nearly so, to performance of the contract or project.
c. Does not include permanent home offices, branch plant establishments, fabrication plants, or tool yards of a contractor or subcontractor whose locations and continuance in operation are determined wholly without regard to a particular federal contract or project. In addition, fabrication plants, batch plants, borrow pits, job headquarters, yards, etc., of a commercial or material supplier that are established by a supplier of materials for the project before opening of bids and not on the project site are not included in the “site of the work.” Such permanent, previously established facilities are not a part of the “site of the work” even if the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract.

The contractor (the superintendent should appoint the person) should perform random weekly labor interviews of subcontractors and lower-tier subcontractors. These should be used as a check against the certified payroll to eliminate potential fraud. Remember, the prime contractor is ultimately responsible for payment of all workers. When the workers aren’t paid properly, the paperwork alone can be a nightmare.
Buy American Act

The Buy American Act is one of the most misunderstood of all the FAR clauses with which a superintendent has to deal. The reason it is misunderstood is there are actually five FAR clauses plus four other implementing clauses (which refer back to one of the five clauses). There used to be only three Buy American Act clauses, but the American Recovery and Reinvestment Act raised the number to five. About the only thing you can do is understand which one of these Buy American Acts is in your contract and what countries it will let you buy products from. Projects that are designated as Recovery Act projects are the most restrictive; however, because the Recovery Act projects are almost all complete, we will not discuss them here.

The three basic Buy American Act clauses are what you can expect to find in a federal government project: FAR clause 52.225-9, Buy American Act—Construction Materials; FAR clause 52.225-3, Buy American Act—Free Trade Agreements—Israeli Trade Act; and FAR clause 52.225-11, Buy American Act—Construction Materials under Trade Agreements.

The Buy American Act—Construction Materials clause means that everything must be made in the United States, although you can obtain a written waiver from the contracting officer under what is called the “6 percent clause.” This means that you have to show either that the product is not made in the United States or that a suitable product can be purchased in another country for at least 6 percent less than the cost of the American-made product. The next clause is the Buy American Act—Free Trade Agreements—Israeli Trade Act, which allows you to buy products made in Israel, Bahrain, and a few other Middle East countries; it also includes the NAFTA countries such as Mexico and Canada. The third clause is the Buy American Act—Construction Materials under Trade Agreements. This one allows products made in almost any country in the world except places like Iran, China, North Korea, Somalia, and Cuba. It specifically allows you to use products made in any World Trade Organization (WTO) country.

The Buy American Act—Construction Materials limits you to only American-made—nothing from Mexico, Canada, etc.—and because of this, it causes a real paper chase. Unfortunately, as we all know, so much is made in Mexico, Canada, and China today. This has become a major problem because a lot of construction products are made in these countries. For instance, Mexico makes a lot of electrical items such as panel boards and fluorescent lights, and many wood products come from Canada. To make matters worse, most vendors can’t tell you where a product is made. None of the acts allow the use of products made in China, so if a product made there shows up at your job site, you have only three recourses: you can send the product back to the vendor; you can try to show that there is no comparable product made in the United States or in a trade agreements country, as applicable; or you can try to prove to the contracting officer that the product is at least 6 percent less expensive than the comparable American-made product. There is one other instance that can help you: If the product is assembled in the United States and the cost of its U.S.-manufactured components exceeds 50 percent, it does not violate the Buy
American Act. This allows you to have some systems assembled off-site that otherwise would not meet the requirements of the Buy American Act. I have had to do this several times.

For example, we built an air traffic control tower for the Navy, and we had to supply a fire suppression system that included a new fire pump complete with panel board and all kinds of piping and valves. The pump and a couple of the valves were not made in the United States, and the contract was under the Buy American Act—Construction Materials. The only way we could get the system passed was to take the panel board, which was the most expensive part of the total assembly and was made in the United States, and attach it to the pumps, the valves, and all the piping to make one assembled unit. We had to do all of this off-site because the assembly must come to the site already put together. We put it all on pallets and brought it on a tractor-trailer truck. We lifted it off and put it straight into the building, closed up the building, and then disassembled the parts and put them all back together again in the building just as they had to be configured—all just to meet the Buy American Act requirements. It was considered an assembly because the system would not work without all the pieces.

The Buy American Act FAR clauses contain a procedure that must be followed to obtain a waiver. That procedure is as follows: Any contractor that requests the use of foreign construction material must include adequate information for government evaluation of the request, including:

- A description of the foreign and domestic construction materials
- Unit of measure
- Quantity
- Cost
- Time of delivery or availability
- Location of the construction project
- Name and address of the proposed supplier
- Detailed justification of the reason for use of foreign construction materials.

A request based on unreasonable cost must include a reasonable survey of the market and a completed cost comparison table (see FAR excerpt below). The cost of construction material must include all delivery costs to the construction site and any applicable duty. Any contractor request for a determination submitted after contract award must explain why the contractor could not reasonably foresee the need for such a determination and could not have requested the determination before contract award. If the contractor does not submit a satisfactory explanation, the contracting officer need not make a determination.

The Buy American Act clauses are as follows:

FAR Clause 52.225-9, Buy American Act—Construction Materials

As prescribed in 25.1102(a), insert the following clause:
BUY AMERICAN ACT—CONSTRUCTION MATERIALS (SEP 2010)

(a) **Definitions.** As used in this clause—

“Commercially available off-the-shelf (COTS) item”—

(1) Means any item of supply (including construction material) that is—

(i) A commercial item (as defined in paragraph (1) of the definition at FAR 2.101);

(ii) Sold in substantial quantities in the commercial marketplace; and

(iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products.

“Component” means an article, material, or supply incorporated directly into a construction material.

“Construction material” means an article, material, or supply brought to the construction site by the Contractor or a subcontractor for incorporation into the building or work. The term also includes an item brought to the site preassembled from articles, materials, or supplies. However, emergency life safety systems, such as emergency lighting, fire alarm, and audio evacuation systems, that are discrete systems incorporated into a public building or work and that are produced as complete systems, are evaluated as a single and distinct construction material regardless of when or how the individual parts or components of those systems are delivered to the construction site. Materials purchased directly by the Government are supplies, not construction material.

“Cost of components” means—

(3) For components purchased by the Contractor, the acquisition cost, including transportation costs to the place of incorporation into the construction material (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or

(4) For components manufactured by the Contractor, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (1) of this definition, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the construction material.

“Domestic construction material” means—

(1) An unmanufactured construction material mined or produced in the United States;

(2) A construction material manufactured in the United States, if—

(i) The cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic; or

(ii) The construction material is a COTS item.

“Foreign construction material” means a construction material other than a domestic construction material.

“United States” means the 50 States, the District of Columbia, and outlying areas.

(b) Domestic preference.

(1) This clause implements the Buy American Act (41 U.S.C. 10a - 10d) by providing a preference for domestic construction material. In accordance with 41 U.S.C. 431, the component test of the Buy American Act is waived for construction material that is a COTS item (See FAR 12.505(a)(2)). The Contractor shall use only domestic construction material in performing this contract, except as provided in paragraphs (b)(2) and (b)(3) of this clause.

(2) This requirement does not apply to information technology that is a commercial item or to the construction materials or components listed by the Government as follows:
(3) The Contracting Officer may add other foreign construction material to the list in paragraph (b)(2) of this clause if the Government determines that—

(i) The cost of domestic construction material would be unreasonable. The cost of a particular domestic construction material subject to the requirements of the Buy American Act is unreasonable when the cost of such material exceeds the cost of foreign material by more than 6 percent;

(ii) The application of the restriction of the Buy American Act to a particular construction material would be impracticable or inconsistent with the public interest; or

(iii) The construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality.

(c) Request for determination of inapplicability of the Buy American Act.

(1)(i) Any Contractor request to use foreign construction material in accordance with paragraph (b)(3) of this clause shall include adequate information for Government evaluation of the request, including—

(A) A description of the foreign and domestic construction materials;
(B) Unit of measure;
(C) Quantity;
(D) Price;
(E) Time of delivery or availability;
(F) Location of the construction project;
(G) Name and address of the proposed supplier; and
(H) A detailed justification of the reason for use of foreign construction materials cited in accordance with paragraph (b)(3) of this clause.

(ii) A request based on unreasonable cost shall include a reasonable survey of the market and a completed price comparison table in the format in paragraph (d) of this clause.

(iii) The price of construction material shall include all delivery costs to the construction site and any applicable duty (whether or not a duty-free certificate may be issued).

(iv) Any Contractor request for a determination submitted after contract award shall explain why the Contractor could not reasonably foresee the need for such determination and could not have requested the determination before contract award. If the Contractor does not submit a satisfactory explanation, the Contracting Officer need not make a determination.

(2) If the Government determines after contract award that an exception to the Buy American Act applies and the Contracting Officer and the Contractor negotiate adequate consideration, the Contracting Officer will modify the contract to allow use of the foreign construction material. However, when the basis for the exception is the unreasonable price of a domestic construction material, adequate consideration is not less than the differential established in paragraph (b)(3)(i) of this clause.

(3) Unless the Government determines that an exception to the Buy American Act applies, use of foreign construction material is noncompliant with the Buy American Act.

(d) Data. To permit evaluation of requests under paragraph (c) of this clause based on unreasonable cost, the Contractor shall include the following information and any applicable supporting data based on the survey of suppliers:

<table>
<thead>
<tr>
<th>FOREIGN AND DOMESTIC CONSTRUCTION MATERIALS PRICE COMPARISON</th>
</tr>
</thead>
<tbody>
<tr>
<td>Construction Material Description</td>
</tr>
<tr>
<td>-----------------------------------</td>
</tr>
<tr>
<td>Item 1:</td>
</tr>
<tr>
<td>Foreign construction material</td>
</tr>
<tr>
<td>Domestic construction material</td>
</tr>
</tbody>
</table>
FAR Clause 52.225-3, Buy American Act—Free Trade Agreements—Israeli Trade Act

As prescribed in 25.1101(b)(1)(i), insert the following clause:

BUY AMERICAN ACT—FREE TRADE AGREEMENTS—ISRAELI TRADE ACT (JUNE 2009)

(a) Definitions. As used in this clause—

“Bahrainian, Moroccan, Omani, or Peruvian end product” means an article that—

(1) Is wholly the growth, product, or manufacture of Bahrain, Morocco, Oman, or Peru; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Bahrain, Morocco, Oman, or Peru into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

“Commercially available off-the-shelf (COTS) item”—

(1) Means any item of supply (including construction material) that is—

(i) A commercial item (as defined in paragraph (1) of the definition at FAR 2.101);

(ii) Sold in substantial quantities in the commercial marketplace; and

(iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products.

“Component” means an article, material, or supply incorporated directly into an end product.

“Cost of components” means—

(3) For components purchased by the Contractor, the acquisition cost, including transportation costs to the place of incorporation into the end product (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or

(4) For components manufactured by the Contractor, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (1) of this definition, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the end product.

“Domestic end product” means—

(1) An unmanufactured end product mined or produced in the United States;

(2) An end product manufactured in the United States, if—

(i) The cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind as those that the agency determines are not mined, produced, or manufactured in sufficient and reasonably available commercial quantities of a satisfactory quality are treated as domestic. Scrap generated, collected, and prepared for processing in the United States is considered domestic; or
(ii) The end product is a COTS item.

"End product" means those articles, materials, and supplies to be acquired under the contract for public use.

"Foreign end product" means an end product other than a domestic end product.

"Free Trade Agreement country" means Australia, Bahrain, Canada, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Morocco, Nicaragua, Oman, Peru, or Singapore.

"Free Trade Agreement country end product" means an article that—

1. Is wholly the growth, product, or manufacture of a Free Trade Agreement country; or
2. In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a Free Trade Agreement country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

"Israeli end product" means an article that—

1. Is wholly the growth, product, or manufacture of Israel; or
2. In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Israel into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.

"United States" means the 50 States, the District of Columbia, and outlying areas.

(b) Components of foreign origin. Offerors may obtain from the Contracting Officer a list of foreign articles that the Contracting Officer will treat as domestic for this contract.

(c) Delivery of end products. The Buy American Act (41 U.S.C. 10a - 10d) provides a preference for domestic end products for supplies acquired for use in the United States. In accordance with 41 U.S.C. 431, the component test of the Buy American Act is waived for an end product that is a COTS item (See 12.505(a)(1)). In addition, the Contracting Officer has determined that FTAs (except the Bahrain, Moroccan, Omani, and Peruvian FTAs) and the Israeli Trade Act apply to this acquisition. Unless otherwise specified, these trade agreements apply to all items in the Schedule. The Contractor shall deliver under this contract only domestic end products except to the extent that, in its offer, it specified delivery of foreign end products in the provision entitled "Buy American Act—Free Trade Agreement country end product." If the Contractor specified in its offer that the Contractor would supply a Free Trade Agreement country end product (other than a Bahrainian, Moroccan, Omani, or Peruvian end product) or an Israeli end product, then the Contractor shall supply a Free Trade Agreement country end product (other than a Bahrainian, Moroccan, Omani, or Peruvian end product), an Israeli end product or, at the Contractor’s option, a domestic end product.

Alternate I (Jan 2004). As prescribed in 25.1101(b)(1)(ii), add the following definition to paragraph (a) of the basic clause, and substitute the following paragraph (c) for paragraph (c) of the basic clause:

"Canadian end product" means an article that—

1. Is wholly the growth, product, or manufacture of Canada; or
2. In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Canada into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

(c) Delivery of end products. The Contracting Officer has determined that NAFTA applies to this acquisition. Unless otherwise specified, NAFTA applies to all items in the Schedule. The Contractor shall deliver under this contract only domestic end products except to the extent that, in its offer, it specified delivery of foreign end products in the provision entitled "Buy American Act—Free
Trade Agreements—Israeli Trade Act Certificate.” If the Contractor specified in its offer that the Contractor would supply a Canadian end product, then the Contractor shall supply a Canadian end product or, at the Contractor's option, a domestic end product.

Alternate II (Jan 2004). As prescribed in 25.1101(b)(1)(iii), add the following definition to paragraph (a) of the basic clause, and substitute the following paragraph (c) for paragraph (c) of the basic clause:

“Canadian end product” means an article that—

(1) Is wholly the growth, product, or manufacture of Canada; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Canada into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

(c) Delivery of end products. The Contracting Officer has determined that NAFTA and the Israeli Trade Act apply to this acquisition. Unless otherwise specified, these trade agreements apply to all items in the Schedule. The Contractor shall deliver under this contract only domestic end products except to the extent that, in its offer, it specified delivery of foreign end products in the provision entitled “Buy American Act—Free Trade Agreements—Israeli Trade Act Certificate.” If the Contractor specified in its offer that the Contractor would supply a Canadian end product or an Israeli end product, then the Contractor shall supply a Canadian end product, an Israeli end product or, at the Contractor's option, a domestic end product.

FAR Clause 52.225-11, Buy American Act—Construction Materials under Trade Agreements

As prescribed in 25.1102(c), insert the following clause:

Buy American Act—Construction Materials under Trade Agreements (Aug 2009)

(a) Definitions. As used in this clause—

“Caribbean Basin country construction material” means a construction material that—

(1) Is wholly the growth, product, or manufacture of a Caribbean Basin country; or

(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a Caribbean Basin country into a new and different construction material distinct from the materials from which it was transformed.

“Commercially available off-the-shelf (COTS) item”—

(1) Means any item of supply (including construction material) that is—

(i) A commercial item (as defined in paragraph (1) of the definition at FAR 2.101);

(ii) Sold in substantial quantities in the commercial marketplace; and

(iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products.

“Component” means an article, material, or supply incorporated directly into a construction material.

“Construction material” means an article, material, or supply brought to the construction site by the Contractor or subcontractor for incorporation into the building or work. The term also includes an item brought to the site preassembled from articles, materials, or supplies. However, emergency life safety systems, such as emergency lighting, fire alarm, and audio evacuation systems, that are discrete systems incorporated into a public building or work and that are produced as complete systems, are evaluated as a single and distinct construction material regardless of when or how the individual parts or components of those systems are delivered to the construction site. Materials purchased directly by the Government are supplies, not construction material.

“Cost of components” means—
(1) For components purchased by the Contractor, the acquisition cost, including transportation costs to the place of incorporation into the construction material (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or

(2) For components manufactured by the Contractor, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (1) of this definition, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the construction material.

“Designated country” means any of the following countries:

(1) A World Trade Organization Government Procurement Agreement country (Aruba, Austria, Belgium, Bulgaria, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan, or United Kingdom);

(2) A Free Trade Agreement country (Australia, Bahrain, Canada, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Morocco, Nicaragua, Oman, Peru, or Singapore);

(3) A least developed country (Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, East Timor, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, Tanzania, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia); or

(4) A Caribbean Basin country (Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, British Virgin Islands, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Netherlands Antilles, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, or Trinidad and Tobago).

“Designated country construction material” means a construction material that is a WTO GPA country construction material, an FTA country construction material, a least developed country construction material, or a Caribbean Basin country construction material.

“Domestic construction material” means—

(1) An unmanufactured construction material mined or produced in the United States;

(2) A construction material manufactured in the United States, if—

(i) The cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic; or

(ii) The construction material is a COTS item.

“Foreign construction material” means a construction material other than a domestic construction material.

“Free Trade Agreement country construction material” means a construction material that—

(1) Is wholly the growth, product, or manufacture of a Free Trade Agreement (FTA) country; or

(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a FTA country into a new and different construction material distinct from the materials from which it was transformed.

“Least developed country construction material” means a construction material that—

(1) Is wholly the growth, product, or manufacture of a least developed country; or

(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a least developed country into a new and different construction material distinct from the materials from which it was transformed.

“United States” means the 50 States, the District of Columbia, and outlying areas.
“WTO GPA country construction material” means a construction material that—
(1) Is wholly the growth, product, or manufacture of a WTO GPA country; or
(2) In the case of a construction material that consists in whole or in part of materials from another
country, has been substantially transformed in a WTO GPA country into a new and different construction
material distinct from the materials from which it was transformed.

(b) Construction materials.
(1) This clause implements the Buy American Act (41 U.S.C. 10a-10d) by providing a preference for
domestic construction material. In accordance with 41 U.S.C. 431, the component test of the Buy
American Act is waived for construction material that is a COTS item (See FAR 12.505(a)(2)). In addition,
the Contracting Officer has determined that the WTO GPA and Free Trade Agreements (FTAs) apply to
this acquisition. Therefore, the Buy American Act restrictions are waived for designated county
construction materials.

(2) The Contractor shall use only domestic or designated country construction material in performing
this contract, except as provided in paragraphs (b)(3) and (b)(4) of this clause.

(3) The requirement in paragraph (b)(2) of this clause does not apply to the construction materials or
components listed by the Government as follows:

[Contracting Officer to list applicable excepted materials or indicate “none”]

(4) The Contracting Officer may add other foreign construction material to the list in paragraph (b)(3)
of this clause if the Government determines that—
   (i) The cost of domestic construction material would be unreasonable. The cost of a particular
domestic construction material subject to the restrictions of the Buy American Act is unreasonable when
the cost of such material exceeds the cost of foreign material by more than 6 percent;
   (ii) The application of the restriction of the Buy American Act to a particular construction material
would be impracticable or inconsistent with the public interest; or
   (iii) The construction material is not mined, produced, or manufactured in the United States in
sufficient and reasonably available commercial quantities of a satisfactory quality.

(c) Request for determination of inapplicability of the Buy American Act.
(1)(i) Any Contractor request to use foreign construction material in accordance with
paragraph (b)(4) of this clause shall include adequate information for Government evaluation of the
request, including—
   (A) A description of the foreign and domestic construction materials;
   (B) Unit of measure;
   (C) Quantity;
   (D) Price;
   (E) Time of delivery or availability;
   (F) Location of the construction project;
   (G) Name and address of the proposed supplier; and
   (H) A detailed justification of the reason for use of foreign construction materials cited in
accordance with paragraph (b)(3) of this clause.
   (ii) A request based on unreasonable cost shall include a reasonable survey of the market and a
completed price comparison table in the format in paragraph (d) of this clause.
   (iii) The price of construction material shall include all delivery costs to the construction site and
any applicable duty (whether or not a duty-free certificate may be issued).
   (iv) Any Contractor request for a determination submitted after contract award shall explain why
the Contractor could not reasonably foresee the need for such determination and could not have
requested the determination before contract award. If the Contractor does not submit a satisfactory explanation, the Contracting Officer need not make a determination.

(2) If the Government determines after contract award that an exception to the Buy American Act applies and the Contracting Officer and the Contractor negotiate adequate consideration, the Contracting Officer will modify the contract to allow use of the foreign construction material. However, when the basis for the exception is the unreasonable price of a domestic construction material, adequate consideration is not less than the differential established in paragraph (b)(4)(i) of this clause.

(3) Unless the Government determines that an exception to the Buy American Act applies, use of foreign construction material is noncompliant with the Buy American Act.

(d) Data. To permit evaluation of requests under paragraph (c) of this clause based on unreasonable cost, the Contractor shall include the following information and any applicable supporting data based on the survey of suppliers:

<table>
<thead>
<tr>
<th>Construction Material Description</th>
<th>Unit of Measure</th>
<th>Quantity</th>
<th>Price (Dollars)*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Item 1:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Foreign construction material</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Domestic construction material</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Item 2:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Foreign construction material</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Domestic construction material</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

[List name, address, telephone number, and contact for suppliers surveyed. Attach copy of response; if oral, attach summary.]  
[Include other applicable supporting information.]  
[* Include all delivery costs to the construction site and any applicable duty (whether or not a duty-free entry certificate]
Disputes

FAR Clause 52.233-1, Disputes, is implemented whenever (and for whatever reason) you've had a claim or a request for equitable adjustment (REA) that was actually denied by the contacting officer. Even though you didn't file a claim under the Disputes clause, the important part of this for the superintendent is that you are probably the one who raised the question to begin with and by doing so the only way you can uphold your claim is (1) making timely notification to the contracting officer and (2) proving your case that you were “damaged,” meaning that the government directed you to do something that you believe was not in accordance with the contract. You then have to prove that you incurred costs above and beyond your contract in time and added work.

The burden of proof that the contractor was damaged is on the contractor and the superintendent, and they will be at the center of the dispute. Once you notice a problem, you have to make sure you get your project manager to file a claim with the contracting officer. For instance, the problem might be an unforeseen site condition. Let’s say you found a concrete vault under the surface of the ground that nobody knew was there. For it to be considered an unforeseen site condition, you have to notify the contracting officer within the notification time period (see Notice Checklist, page 58) in writing, such as an e-mail, request for information (RFI), or general correspondence. Other documentation might also be required, such as photographs (which I highly recommend), daily reports that specifically talk about the problem uncovered, the date you notified the contracting officer, etc. (see “Documentation Required for a Claim” on page 57). You then have to be able to capture the costs. The government requires that you separate the costs associated with the dispute, so a separate account is the only legal way to capture the costs.

The superintendent needs to understand that anything that's in question on the job site could wind up in a dispute, so the correspondence and daily report documentation for everything you do has to be up to snuff. The schedule might be impacted, so keep it up-to-date with respect to what is being impacted and how it's being impacted. Later on you will probably need to have a fragmented network analysis done on the project schedule to prove that extra time was required.

I’ve reviewed many claims disputes for contractors, and the first thing I look for is any documentation they might have. I then check to see if they made the proper notification and then see how they collected costs. The contractors that win their cases have always been able to show that they notified the contracting officer within the required timeframe, set up a separate account to capture costs, and clearly documented time impact.

In 2010 I helped one of my clients to successfully negotiate a $500,000 claim that the contracting officer had denied. I reviewed the documentation and found that he had notified the contracting officer within the required timeframe but his costs and impact were scattered and hard to understand. We redid all of the documentation and requested a contracting officer’s final

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decision. After seeing the proof presented in a different way, the contracting officer decided to negotiate the claim and awarded almost all of what the contractor had requested. *Remember: The burden of proof is on the contractor, and it all starts with the superintendent.*

**FAR Clause 52.233-1, Disputes**

As prescribed in 33.215, insert the following clause:

**DISPUTES (JULY 2002)**

(a) This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613).

(b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved under this clause.

(c) “Claim,” as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. However, a written demand or written assertion by the Contractor seeking the payment of money exceeding $100,000 is not a claim under the Act until certified. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the Act. The submission may be converted to a claim under the Act, by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

(d)(1) A claim by the Contractor shall be made in writing and, unless otherwise stated in this contract, submitted within 6 years after accrual of the claim to the Contracting Officer for a written decision. A claim by the Government against the Contractor shall be subject to a written decision by the Contracting Officer.

(2)(i) The Contractor shall provide the certification specified in paragraph (d)(2)(iii) of this clause when submitting any claim exceeding $100,000.

(ii) The certification requirement does not apply to issues in controversy that have not been submitted as all or part of a claim.

(iii) The certification shall state as follows: “I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the Contractor.”

(3) The certification may be executed by any person duly authorized to bind the Contractor with respect to the claim.

(e) For Contractor claims of $100,000 or less, the Contracting Officer must, if requested in writing by the Contractor, render a decision within 60 days of the request. For Contractor-certified claims over $100,000, the Contracting Officer must, within 60 days, decide the claim or notify the Contractor of the date by which the decision will be made.

(f) The Contracting Officer’s decision shall be final unless the Contractor appeals or files a suit as provided in the Act.

(g) If the claim by the Contractor is submitted to the Contracting Officer or a claim by the Government is presented to the Contractor, the parties, by mutual consent, may agree to use alternative dispute resolution (ADR). If the Contractor refuses an offer for ADR, the Contractor shall inform the Contracting Officer, in writing, of the Contractor’s specific reasons for rejecting the offer.
(h) The Government shall pay interest on the amount found due and unpaid from (1) the date that the Contracting Officer receives the claim (certified, if required); or (2) the date that payment otherwise would be due, if that date is later, until the date of payment. With regard to claims having defective certifications, as defined in FAR 33.201, interest shall be paid from the date that the Contracting Officer initially receives the claim. Simple interest on claims shall be paid at the rate, fixed by the Secretary of the Treasury as provided in the Act, which is applicable to the period during which the Contracting Officer receives the claim and then at the rate applicable for each 6-month period as fixed by the Treasury Secretary during the pendency of the claim.

(i) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.

(End of clause)

Alternate I (Dec 1991). As prescribed in 33.215, substitute the following paragraph (i) for paragraph (i) of the basic clause:

(i) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under or relating to the contract, and comply with any decision of the Contracting Officer.
Work by the Contractor

FAR Clause 52.236-1, Performance of Work by the Contractor, requires the contractor to perform a certain amount of the work with his own in-house forces. The contracting officer will normally put a clause in the contract requiring that 12 to 15 percent of the work be done with the contractor’s own people. This is based on total labor hours and is included with all the labor hours of everyone else, such as subcontractors. At a big job, it can be a substantial amount of labor hours. Depending on how the contract is written, the labor hours may or may not include the contractor’s on-site management staff. The superintendent needs to review this clause in the contract to determine whether he will need to use more in-house craftsmen or whether the man-hours of the management staff will be enough. The contractor needs to just keep track of these man-hours on his daily reports. How many hours his own people are putting in will have to be added to the hours for his subcontractors and a total obtained. This is what the contracting officer will look at to determine whether the requirement has been met. If you don't meet the required percentage, the contracting officer may fine you. In my experience, I have never been fined as long as I could show that I had made a “good faith” effort to meet the requirement—although I have had to prove to the contracting officer that I did meet the requirement. You need to make sure that on your daily reports you actually note the number of hours in the correct area. I recommend that you track this information on a weekly basis so that you can determine whether you need to add in-house craftsmen.

FAR Clause 52.236-1, Performance of Work by the Contractor

As prescribed in 36.501(b), insert the following clause: [Complete the clause by inserting the appropriate percentage consistent with the complexity and magnitude of the work and customary or necessary specialty subcontracting (see 36.501(a)).]

PERFORMANCE OF WORK BY THE CONTRACTOR (APR 1984)

The Contractor shall perform on the site, and with its own organization, work equivalent to at least _______ [insert the appropriate number in words followed by numerals in parentheses] percent of the total amount of work to be performed under the contract. This percentage may be reduced by a supplemental agreement to this contract if, during performing the work, the Contractor requests a reduction and the Contracting Officer determines that the reduction would be to the advantage of the Government.

(End of clause)

FAR Clause 52.236-5, Material and Workmanship, requires that all material be “new”; determines that references to product names, makes, or catalog numbers only establish a level of quality and should not be construed as limiting competition; requires material and equipment (including samples) to be submitted when required by the contract or at any other time that the contracting officer determines and that payment will not be made for this work until the submittal is approved; requires that all work be accomplished in a skillful and workmanlike
manner; and allows the contracting officer to remove from the work any employee that he/she deems incompetent, careless, or otherwise objectionable. The most important part of this clause is that it allows the use of equipment, materials, or patented processes that meet the level of quality of the equipment/materials, etc. shown on the drawings or in the specifications using proprietary brand names. That is why this clause is sometimes called the “or equal” clause. To prove that the product you propose to use is an “equal,” you must show that your product has all the same salient characteristics (the most important and significant characteristics). This actually gives the superintendent some latitude in which materials and equipment he can use. Remember, using material or equipment before it has been approved is at the risk of the contractor.

**FAR Clause 52.236-5, Material and Workmanship**

As prescribed in 36.505, insert the following clause:

**MATERIAL AND WORKMANSHIP (APR 1984)**

(a) All equipment, material, and articles incorporated into the work covered by this contract shall be new and of the most suitable grade for the purpose intended, unless otherwise specifically provided in this contract. References in the specifications to equipment, material, articles, or patented processes by trade name, make, or catalog number, shall be regarded as establishing a standard of quality and shall not be construed as limiting competition. The Contractor may, at its option, use any equipment, material, article, or process that, in the judgment of the Contracting Officer, is equal to that named in the specifications, unless otherwise specifically provided in this contract.

(b) The Contractor shall obtain the Contracting Officer’s approval of the machinery and mechanical and other equipment to be incorporated into the work. When requesting approval, the Contractor shall furnish to the Contracting Officer the name of the manufacturer, the model number, and other information concerning the performance, capacity, nature, and rating of the machinery and mechanical and other equipment. When required by this contract or by the Contracting Officer, the Contractor shall also obtain the Contracting Officer’s approval of the material or articles which the Contractor contemplates incorporating into the work. When requesting approval, the Contractor shall provide full information concerning the material or articles. When directed to do so, the Contractor shall submit samples for approval at the Contractor’s expense, with all shipping charges prepaid. Machinery, equipment, material, and articles that do not have the required approval shall be installed or used at the risk of subsequent rejection.

(c) All work under this contract shall be performed in a skillful and workmanlike manner. The Contracting Officer may require, in writing, that the Contractor remove from the work any employee the Contracting Officer deems incompetent, careless, or otherwise objectionable.

(End of clause)

**FAR Clause 52.236-6, Superintendence by the Contractor**, requires that the contractor have on the job site at all times a superintendent who is satisfactory to the contracting officer. The superintendent is arguably the most important person on the job site because he directs all the on-
site day-to-day activities and is responsible for the overall quality and on-time completion of the project. Most government solicitations require that proposals include the name and resume of the person who will supervise the project, and the government expects to see that person on the job. If there is to be a substitution at any time during the project, the contractor must submit the substitute’s name and resume, in writing, to the contracting officer for approval. Generally, this person must have at least the same or more experience. It is always good to appoint an alternate superintendent so that the superintendent can be away from the site when necessary.

**FAR Clause 52.236-6 Superintendence by the Contractor**

As prescribed in 36.506, insert the following clause:

SUPERINTENDENCE BY THE CONTRACTOR (APR 1984)

At all times during performance of this contract and until the work is completed and accepted, the Contractor shall directly superintend the work or assign and have on the worksite a competent superintendent who is satisfactory to the Contracting Officer and has authority to act for the Contractor.

(End of clause)
Differing Site Conditions

FAR Clause 52.236-2, Differing Site Conditions, must be used when a physical condition that was not visible and known to exist at the time of bidding and that is materially different from conditions believed to exist at the time of bidding is encountered in performing the work. Just about every project will have a differing site condition of some sort. Therefore, the superintendent needs to know that when he runs into this problem, he must document the changed condition and send something in writing to the contracting officer advising him of a changed site condition and asking what he wants the superintendent to do about it. This changed condition is one of the major causes of disputes in the construction industry.

*The use of this FAR clause actually places the risk of differing site conditions on the government.* The superintendent must show that the physical condition encountered was not a condition that a “reasonably intelligent contractor, experienced in the particular field of work involved, could be expected to discover upon a reasonable site investigation.” Because the contractor states that the condition could not have been discovered upon a reasonable site investigation and thus constitutes a differing site condition, if the condition could have been seen at the time of bidding the project by visiting the site, the claim will be denied. However, if the site condition could not have been seen prior to bidding, the claim should be upheld.

The contracting officer will sometimes try to invoke contract terms such as “miscellaneous underground concrete obstacles may be encountered” and “contractor to verify prior to starting work.” The superintendent should be aware that these terms carry very little legal import. At one project site our backhoe operator once discovered an old abandoned concrete steam vault underground. It measured about 8 feet by 8 feet by 6 feet deep and had been totally covered up. The contracting officer tried to claim that this was “miscellaneous” because the contract stated that we could expect to find miscellaneous concrete pieces under the surface because the site was formerly a transportation facility that the government had demolished under a separate contract. I argued that no one could reasonably consider the vault “miscellaneous,” and finally he agreed. Before commencing work, we had taken pictures, which supported our claim that there had been nothing visible nor anything a “reasonably intelligent contractor” that specialized in this type of work could have anticipated.

The superintendent is encouraged to take pictures (video is even better) of the project site prior to commencing work to support any future claim for differing site conditions. The pictures should have the date on them, and a copy should be given to the government for its files. The contractor should also take pictures of all locates that were performed, including distances to objects that will not be disturbed by the work, to show differing site conditions should the locates be wrong.
The contractor must be careful to follow the notification procedures in this clause (see Notice Checklist, page 58) in order to receive compensation. The work must be stopped; the contracting officer must be promptly notified, in writing; and the contracting officer must be given sufficient time to inspect and evaluate the conditions. If the contracting officer finds that the condition constitutes a differing site condition, the contractor must request an “equitable adjustment” in accordance with DFARS clause 252.243-7002.

**FAR Clause 52.236-2, Differing Site Conditions**

As prescribed in 36.502, insert the following clause:

**DIFFERING SITE CONDITIONS (APR 1984)**

(a) The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of—

(1) Subsurface or latent physical conditions at the site which differ materially from those indicated in this contract; or

(2) Unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.

(b) The Contracting Officer shall investigate the site conditions promptly after receiving the notice. If the conditions do materially so differ and cause an increase or decrease in the Contractor’s cost of, or the time required for, performing any part of the work under this contract, whether or not changed as a result of the conditions, an equitable adjustment shall be made under this clause and the contract modified in writing accordingly.

(c) No request by the Contractor for an equitable adjustment to the contract under this clause shall be allowed, unless the Contractor has given the written notice required; provided, that the time prescribed in paragraph (a) of this clause for giving written notice may be extended by the Contracting Officer.

(d) No request by the Contractor for an equitable adjustment to the contract for differing site conditions shall be allowed if made after final payment under this contract.

(End of clause)
Site Investigations and Conditions Affecting the Work

FAR Clause 52.236-3, Site Investigations and Conditions Affecting the Work, is almost always included in a federal government construction solicitation. When bidding a project, the contractor has a requirement to investigate the site of the work and must look at what's there. The contractor must be aware of what the conditions are, but he doesn’t have to observe anything that's underground or cannot be easily reached. For example, when renovating a building, the contractor doesn’t have to look above the suspended ceiling or open up the crawlspaces. Only things that can easily be seen are to be investigated. This is important because the courts have said that you have no claim if there is a site condition that should have been seen during the site visit. A contractor should always have a representative present at the initial site visit before bidding a job. The courts have determined that without attending the site visit, the contractor can lose his legal rights under the Differing Site Conditions clause.

In case of a dispute under this clause, all information gathered from the original site investigation must be presented as a part of the dispute. The federal courts have held that a review of these documents (i.e., as-built drawings, soil boring logs, dredging reports) carries the same importance as a site investigation even if they are made available to the contractor only at the site. Although there appear to be no court decisions dealing with this issue, it is imperative that the contractor request a copy of the documents upon award of the contract. If the request is denied, the contractor should notify the contracting officer of this fact when requesting a change under the Differing Site Conditions clause.

One of the most important aspects of this clause is the potential for inaccuracy when the government provides soil reports/borings, as-built drawings, etc. These documents are often inaccurate. The documents might show soil borings for areas that are not in the area of the work, or as-built drawings might show underground pipes that are not where they are shown on the drawings. In most cases, if the bid was based on this information, it can be considered a "Differing Site Condition." However, the clause makes it clear that the contractor must make sure he understands the conditions that will affect the work, such as utilities, laydown areas, haul roads, ingress and egress, cost of handling, and other such items. This clause also makes it clear that unless clarifications to questions are provided in writing and included as part of the contract, they are not binding on the government. This is why all questions from a site visit should be provided in writing to the contracting officer.

FAR Clause 52.236-3, Site Investigation and Conditions Affecting the Work

As prescribed in 36.503, insert the following clause:

SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984)

(a) The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local
conditions which can affect the work or its cost, including but not limited to (1) conditions bearing upon transportation, disposal, handling, and storage of materials; (2) the availability of labor, water, electric power, and roads; (3) uncertainties of weather, river stages, tides, or similar physical conditions at the site; (4) the conformation and conditions of the ground; and (5) the character of equipment and facilities needed preliminary to and during work performance. The Contractor also acknowledges that it has satisfied itself as to the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Government, as well as from the drawings and specifications made a part of this contract.

Any failure of the Contractor to take the actions described and acknowledged in this paragraph will not relieve the Contractor from responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to the Government.

(b) The Government assumes no responsibility for any conclusions or interpretations made by the Contractor based on the information made available by the Government. Nor does the Government assume responsibility for any understanding reached or representation made concerning conditions which can affect the work by any of its officers or agents before the execution of this contract, unless that understanding or representation is expressly stated in this contract.

(End of clause)
Use and Possession Prior to Completion

FAR Clause 52.236-11, Use and Possession Prior to Completion, allows the government to take partial possession of a facility prior to its completion. However, the one thing that the superintendent must understand is that he needs to have the government do a punch list inspection prior to possession, and then he needs to complete the punch list and have it signed off as completed once it's done. Once the punch list is done, the government cannot come back at the contractor for any damages to the work. This happens frequently on federal government contracts because the government has users who want to get into the facility early. (The whole facility might not be ready, but they want to use part of it anyway.) The legal requirement is that it must be a “complete and usable facility” as intended for the purpose.

The superintendent must insist that the government make a final punch list for the contractor prior to the government’s taking possession. This is to make sure that nothing else can be claimed as contractor damage.

You must notify the contracting officer in writing if a delay in the progress of the work or any otherwise additional expenses, such as added cost due to workarounds, are incurred. You also must be up front with these added costs and not make them seem like an afterthought. The contracting officer will then make an equitable adjustment to the contract price or time of completion through a contract modification.

FAR Clause 52.236-11, Use and Possession Prior to Completion

As prescribed in 36.511, insert the following clause:

USE AND POSSESSION PRIOR TO COMPLETION (APR 1984)

(a) The Government shall have the right to take possession of or use any completed or partially completed part of the work. Before taking possession of or using any work, the Contracting Officer shall furnish the Contractor a list of items of work remaining to be performed or corrected on those portions of the work that the Government intends to take possession of or use. However, failure of the Contracting Officer to list any item of work shall not relieve the Contractor of responsibility for complying with the terms of the contract. The Government’s possession or use shall not be deemed an acceptance of any work under the contract.

(b) While the Government has such possession or use, the Contractor shall be relieved of the responsibility for the loss of or damage to the work resulting from the Government’s possession or use, notwithstanding the terms of the clause in this contract entitled “Permits and Responsibilities.” If prior possession or use by the Government delays the progress of the work or causes additional expense to the Contractor, an equitable adjustment shall be made in the contract price or the time of completion, and the contract shall be modified in writing accordingly.

(End of clause)
Schedules

FAR Clause 52.236-15, Schedules for Construction Contracts, mandates the requirement for project schedules, and various sections of the contract describe the requirements for those schedules in detail. The government puts a high level of importance on properly done schedules. Generally, the requirements are such that only a true professional scheduler should attempt to create and update schedules for the government. It is highly recommended that any software you choose be compatible with the government’s software. Government personnel are highly trained in the use and analysis of schedules, and they will perform a very detailed review of all schedules. The government uses the schedule for progress payments and to ensure that the contract can be completed on time.

Five types of schedules are submitted as required:

- **Preliminary Project Schedule**, which includes all activities up to 90 calendar days after notice to proceed (NTP).
- **Initial Project Schedule**, which includes all activities including design and construction.
- **Design Package Schedule**, which is a FRAGNET schedule extracted from the current Preliminary, Initial, or Updated Schedule that covers all activities associated with that design package.
- **Updated Schedule**, which is submitted as requested by the contracting officer but no less than monthly and is an update of the Current Schedule.
- **FRAGNET Schedule**, which is used to document changes to the schedule caused by specific events such as a change order request. FRAGNET stands for “fragmented network analysis.” The FRAGNET schedule is most commonly used for change order work when you have to break up pieces of the schedule and then reconnect them. The superintendent is the person most responsible for the schedule. He needs to make sure that the schedule is kept up-to-date. Anytime there is a change, he needs to figure out the impact on the schedule and needs to determine the input for a FRAGNET schedule. The superintendent has a requirement to keep the schedule up-to-date. He needs to understand that if he doesn't keep it up-to-date properly by including all of the contractor's missteps and all of the government’s missteps, if he ever has to go to court with the schedule as evidence, he could face problems. The courts have ruled that you have to show everybody's missteps to show a proper schedule.

All these schedules becomes progress schedules, which are cost-loaded schedules. Accordingly, great care should be exercised to balance the cost and duration of each activity to make it a useful tool for completing the project.

Whenever a change is contemplated by the government or a request for equitable adjustment (REA) or claim is submitted by the contractor, a FRAGNET schedule should be submitted with the request to clearly show the impact on the critical path of the schedule. The FRAGNET
Analysis (sometimes called a Time Impact Analysis or a Window Analysis) is a schedule that factors the delaying events into the current schedule or updates to evaluate the effect on the project critical path. The FRAGNET schedule must clearly show the as-planned critical path and the as-built critical path and the effect that the change had or could have.

The superintendent must keep accurate records, specifically accurate daily reports, because the courts consider these evidence of the work performed for each day and the delays that may have happened. These will then be used to build the FRAGNET schedule.

The project manager must then determine whether the delay is:

- **Non-excusable**—It’s the contractor’s problem, and it is his responsibility to straighten it out.
- **Excusable, but non-compensable**—It is neither the contractor’s fault nor the government’s fault; e.g., excessive rainfall, union strike.
- **Excusable and compensable**—It is not the contractor’s fault; it is the government’s fault. The contractor has the burden to prove this.

The government will not consider a time extension or time-related costs for a REA or claim unless a FRAGNET schedule is submitted along with the REA or claim. The Armed Services Board of Contract Appeals (ASBCA) will not entertain a claim based on delay unless the FRAGNET schedule is submitted with the claim and it clearly shows that the government was at fault. The daily reports will be carefully scrutinized, so it is very important that they clearly show the details of what the contractor is trying to show. Remember, the information shown in a daily report can never be too much, but not providing enough information can hurt you.

**FAR Clause 52.236-15, Schedules for Construction Contracts**

As prescribed in 36.515, insert the following clause:

**SCHEDULES FOR CONSTRUCTION CONTRACTS (APR 1984)**

(a) The Contractor shall, within five days after the work commences on the contract or another period of time determined by the Contracting Officer, prepare and submit to the Contracting Officer for approval three copies of a practicable schedule showing the order in which the Contractor proposes to perform the work, and the dates on which the Contractor contemplates starting and completing the several salient features of the work (including acquiring materials, plant, and equipment). The schedule shall be in the form of a progress chart of suitable scale to indicate appropriately the percentage of work scheduled for completion by any given date during the period. If the Contractor fails to submit a schedule within the time prescribed, the Contracting Officer may withhold approval of progress payments until the Contractor submits the required schedule.

(b) The Contractor shall enter the actual progress on the chart as directed by the Contracting Officer, and upon doing so shall immediately deliver three copies of the annotated schedule to the Contracting
Officer. If, in the opinion of the Contracting Officer, the Contractor falls behind the approved schedule, the Contractor shall take steps necessary to improve its progress, including those that may be required by the Contracting Officer, without additional cost to the Government. In this circumstance, the Contracting Officer may require the Contractor to increase the number of shifts, overtime operations, days of work, and/or the amount of construction plant, and to submit for approval any supplementary schedule or schedules in chart form as the Contracting Officer deems necessary to demonstrate how the approved rate of progress will be regained.

(c) Failure of the Contractor to comply with the requirements of the Contracting Officer under this clause shall be grounds for a determination by the Contracting Officer that the Contractor is not prosecuting the work with sufficient diligence to ensure completion within the time specified in the contract. Upon making this determination, the Contracting Officer may terminate the Contractor’s right to proceed with the work, or any separable part of it, in accordance with the default terms of this contract.

(End of clause)
Suspension of Work

FAR Clause 52.242-14, Suspension of Work, allows the contracting officer to suspend or delay the work for the convenience of the government at any time during the work. The suspension could be for any number of reasons, and there's no way to tell what it might be for. The one thing the contractor and superintendent need to understand is that all costs associated with the suspension can be claimed against the government, so the contractor has to get the suspension of work in writing from the contracting officer. This clause clearly states that the suspension must be in writing and may not be verbal, so that means that you shouldn’t stop work just because a contracting officer “thinks” something could happen. Also, remember that only the contracting officer may suspend work.

One of the biggest problems I've seen occurs when the contracting officer talks about possibly suspending the work and then the contractor slows the work down, thinking that the work might change and he will have to do some rework or make some changes. Just keep doing the planned work in accordance with your schedule until you are directed to do otherwise in writing. You can’t assume that the work will be stopped. Unless the contracting officer issues you a “suspension of work” order in writing, you're still on the hook for the work. Never take a suspension verbally because it's not yet legally binding. The contracting officer may, however, issue a verbal directive to declare an emergency, which you must follow. For example, let's say you're doing a pipe job and you put a pipe in the ground, and you come across a pipe or series of pipes or vaults or other kinds of obstacles in the ground that you didn’t know about. The contracting office may issue a verbal suspension of work order to preclude an emergency. This happens quite a bit.

Sometimes you will have a problem in the field that requires you to stop the work and seek direction from the contracting officer. So you tell this to the contracting officer, and you send an e-mail to the contracting officer immediately because of the notification requirements for this clause. You tell him that you have stopped the work and you cannot proceed because of a problem, and then you wait for a formal suspension of work order from the contracting officer because the government now has to make some kind of a preparation to do something. The government might have to have that pipe changed or those valves turned off or have the gas company do something, and it wants you to submit a proposal to do a change order. The situation that I see contractors get into—which really comes back to bite them—is that they actually have more work that could be done. You have to continue performing whatever work can be done that will not be affected by the stoppage. That is because this clause also states that if you can do other work, you have to do that work and the contracting officer doesn't have to give you a suspension of work order. The amount of time that the government has to react is not fixed in this clause, so you need to start collecting the costs as soon as the work is stopped. This is very important because this clause specifically says that you may collect actual costs but you may not get profit for the additional work. If you incur additional costs—for instance, from keeping your
field force on-site for a week or two weeks anticipating that the change will be quick—those would be reasonable costs. If you keep the field force out there for two months when you know it’s going to be six months before the government can correct the situation, that is considered an unreasonable cost. There's no set time because every situation is different.

So, it’s important for the contractor to understand that he needs to get a suspension of work order in writing from the contracting officer. Don't let the contracting officer say, “Let's wait till next week” and or “We will change this” or “We will do that.” Put the contracting officer on notice if he does this. Something that people would not normally think about is when the government wants a change in the design on a design-build project. For instance, I was working a case for a contractor where he had proposed a certain design on a dining hall. The design submitted to the government was as per his proposal. The government representative decided, however, that he wanted to make a change. As it turned out, the change had significant cost impact, but the contractor, trying to partner with the government, did not request any additional compensation at the time. He then resubmitted the design as per the changes requested by the government, and the government then changed the design again. The contractor noticed that this change was going to cause a significant increase in the cost—not only in the design but in the construction. The contractor brought this to the attention of the contracting officer and requested an equitable adjustment, but the contracting officer denied the request. He stated that the contractor should have given him notice at the time of the first change request. When I held discussions with the contracting officer, I told him that he had known about the change from the very beginning and that he should have issued a suspension of work order. He then could have asked for a request for proposal from the contractor for the additional work and costs incurred. He agreed with me that that was the proper procedure and that the government had known about the change at the time and that a suspension of work order should have been issued and the changes negotiated with the contractor. The contractor and the government then proceeded to negotiate the costs and time for the change.

The contractor should never stop work until a suspension of work order, in writing, has been received.

FAR Clause 52.242-14, Suspension of Work

As prescribed in 42.1305(a), the following clause must be inserted in solicitations and contracts when a fixed-price construction or architect-engineer contract is contemplated:

SUSPENSION OF WORK (APR 1984)

(a) The Contracting Officer may order the Contractor, in writing, to suspend, delay, or interrupt all or any part of the work of this contract for the period of time that the Contracting Officer determines appropriate for the convenience of the Government.

(b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted (1) by an act of the Contracting Officer in the administration of the contract, or (2) by the Contracting Officer's failure to act within the time specified in the contract (or within a
reasonable time if not specified), an adjustment shall be made for any increase in the cost of performance of the contract (excluding profit) necessarily caused by the unreasonable suspension, delay, or interruption, and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor, or for which an equitable adjustment is provided for or excluded under any other term or condition of the contract.

(c) A claim under this clause shall not be allowed—

(1) For any costs incurred more than 20 days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved (but this requirement shall not apply as to a claim resulting from a suspension order); and

(2) Unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of the suspension, delay, or interruption, but not later than the date of final payment under the contract.

(End of Clause)
Changes

FAR Clause 52.243-4, Changes, is used to authorize changes as the contracting officer deems necessary. The thing about this clause, though, is that he can issue the change verbally or in writing. If he issues it verbally, the superintendent and/or the project manager should send an e-mail to the contracting officer confirming that this direction was given to them; if he orders it in writing, that's obvious. If a cost is associated with the change, the contracting officer needs to know that immediately. It could be a cost for construction or due to a schedule change. For instance, if the contracting officer decides to compress the schedule, the contractor has an added cost. You might have a user that has to get into a facility before the scheduled completion date. That would require compressing the schedule, which would cost more money for overtime to get the facility ready sooner. You are entitled to the money. If, however, the contracting officer refuses to give a change order or request a proposal at that time, you have to put the contracting officer on notice within 30 days of his issuing the order for which you intend to request an equitable adjustment. This is critical because if you don't notify the contracting officer within 30 days, you lose all rights to collect on whatever order he gave you. This also should be followed up with the change order from the contract contracting officer.

The superintendent needs to understand that no one other than the contracting officer may give this order for change. It is paramount not to listen to anyone else—not the contracting officer’s representative, the project engineers, or anyone other than the contracting officer. They might tell you to make a change, but you can just take their request under advisement and tell them that you will make the change only when the contracting officer gives you formal direction. Don’t take direction from anyone other than the contracting officer. Contractors continually get into trouble by doing something that was not directed by the contracting officer. Don’t expect to be paid for such changes. The contracting officer will just thank you for the change and then deny all costs associated with it.

If the contracting officer directs you to make a change, you must do it. If he denies any costs associated with the change, then immediately notify him that you intend to request an equitable adjustment. Always reserve your rights under this clause for a future claim.

FAR Clause 52.243-4, Changes

As prescribed in 43.205(d), insert the following clause: The 30-day period may be varied according to agency procedures.

Changes (June 2007)

(a) The Contracting Officer may, at any time, without notice to the sureties, if any, by written order designated or indicated to be a change order, make changes in the work within the general scope of the contract, including changes—
   (1) In the specifications (including drawings and designs);
   (2) In the method or manner of performance of the work;
(3) In the Government-furnished property or services; or
(4) Directing acceleration in the performance of the work.

(b) Any other written or oral order (which, as used in this paragraph (b), includes direction, instruction, interpretation, or determination) from the Contracting Officer that causes a change shall be treated as a change order under this clause; Provided, that the Contractor gives the Contracting Officer written notice stating—

(1) The date, circumstances, and source of the order; and
(2) That the Contractor regards the order as a change order.

(c) Except as provided in this clause, no order, statement, or conduct of the Contracting Officer shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment.

(d) If any change under this clause causes an increase or decrease in the Contractor’s cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any such order, the Contracting Officer shall make an equitable adjustment and modify the contract in writing. However, except for an adjustment based on defective specifications, no adjustment for any change under paragraph (b) of this clause shall be made for any costs incurred more than 20 days before the Contractor gives written notice as required. In the case of defective specifications for which the Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with the defective specifications.

(e) The Contractor must assert its right to an adjustment under this clause within 30 days after (1) receipt of a written change order under paragraph (a) of this clause or (2) the furnishing of a written notice under paragraph (b) of this clause, by submitting to the Contracting Officer a written statement describing the general nature and amount of the proposal, unless this period is extended by the Government. The statement of proposal for adjustment may be included in the notice under paragraph (b) of this clause.

(f) No proposal by the Contractor for an equitable adjustment shall be allowed if asserted after final payment under this contract.

(End of clause)
Government-Furnished Property

FAR Clause 52.245-2, Government Property Installation Operation Services, commonly called the Government-Furnished Property (GFP) clause, requires the contractor to accept certain property that the government puts in the contract as being furnished by the government and installed by the contractor and gives title to the contractor of property that might be abandoned by the government during demolition or renovation of a facility. The demolition could be anything from furnishings to boilers. For instance, it might be refrigerators or stoves or whatever for a barracks, or it might be a big special A/C condensing unit. The contract will state exactly what is being furnished to the contractor. In the case of demolition or renovation, the contract must clearly state exactly what will not be given to the contractor.

This clause requires that you accept the property “as-is, where is,” so you have the responsibility to make sure where you are receiving it and what condition it is in before accepting it. In the case of the demolition or renovation of a facility, the “where is” will be the location of the facility and the “as-is” will be the existing condition. In the case of the government supplying property for a facility that you are contracted to work on, you must ensure that you understand where it will be delivered and what condition it will be in when you receive it. Always check the contract to ascertain the delivery point of the equipment. You could have additional delivery charges depending on where it is delivered in relation to the location of your project.

Also, because the government requires you to pay taxes on anything for which taxes are due, and leaves this totally to you, you must verify that taxes such as sales taxes or use taxes have already been paid. This varies greatly from state to state, so you must check with the state Department of Revenue to determine how much, where, and the type of tax to be paid. I once had a contract with the Navy under which it was to provide a 500-ton condensing unit for a facility we were remodeling. We asked the Navy to show us that the taxes had been paid on this unit and found out that they had not been paid even though the Navy had originally said that the taxes had been paid. We then requested a copy of the invoice showing the amount paid for the unit and determined the tax to be paid. The Navy then had to make a change order to us for the additional tax.

The contractor is also required to make sure that the government-furnished property is adequate for its intended use in that it is in proper working condition. Remember, you still have to maintain the unit during the warranty period, so be very aware of inspecting the equipment at the point of acceptance, where the government delivers it. Then you need to check it all out, including uncrating it to make sure that every part is there. Quite often government-furnished property comes crated up, and then you have to check to make sure that all the widgets, belts, etc. are there and in working order because if the item doesn't work, you’ll have to pay to fix it. When you sign for the item, make sure you note that the item has not yet been started up and that
you cannot confirm that it actually works. If the government doesn’t want to agree to this, ask them to start it up in front of you and prove to you that it works.

FAR Clause 52.245-2, Government Property Installation Operation Services

As prescribed in 45.107(b), insert the following clause:

GOVERNMENT PROPERTY INSTALLATION OPERATION SERVICES (JUNE 2007)

(a) This Government Property listed in paragraph (e) of this clause is furnished to the Contractor in an “as-is, where is” condition. The Government makes no warranty regarding the suitability for use of the Government property specified in this contract. The Contractor shall be afforded the opportunity to inspect the Government property as specified in the solicitation.

(b) The Government bears no responsibility for repair or replacement of any lost, damaged or destroyed Government property. If any or all of the Government property is lost, damaged or destroyed or becomes no longer usable, the Contractor shall be responsible for replacement of the property at Contractor expense. The Contractor shall have title to all replacement property and shall continue to be responsible for contract performance.

(c) Unless the Contracting Officer determines otherwise, the Government abandons all rights and title to unserviceable and scrap property resulting from contract performance. Upon notification to the Contracting Officer, the Contractor shall remove such property from the Government premises and dispose of it at Contractor expense.

(d) Except as provided in this clause, Government property furnished under this contract shall be governed by the Government Property clause of this contract.

(e) Government property provided under this clause:

__________________________________________
__________________________________________

(End of clause)
Inspection of Construction

FAR Clause 52.246-12, Inspection of Construction, requires that the contractor provide proper quality control on the job. It also has a requirement that if the government suspects that some work might not have been done properly, it has the right to reinspect it at any time. It's kind of obvious that you have to be responsible for your own work, but the kicker comes in when the federal government asks for reinspection on something and, let’s say, wants you to tear a wall out just to reinspect it. The government can require this reinspection, and if it finds that the work was done improperly, the contractor has the full responsibility to repair or replace it in the proper manner at his own cost. The clause also states, however, that if the government finds that the work was done properly by the contractor, the government must pay him all costs for the reinspection, including time lost.

This is a big issue because quite often the government inspector will not see something done at the time and will want a reinspection later. First, you have to go back to whether it was a requirement that he see the work performed and give a notification that you were ready for him to inspect it. If you gave a notification and he didn’t show up within 48 hours, then you can proceed past that point and cover it up. *If you have given the government the opportunity to inspect your work as required by the contract and the government has either declined to inspect it or ignored the opportunity, you are correct to cover it up.* When the government says it wants to inspect something and that you should open something up, you need to let the government know in writing that you are invoking the Inspection of Construction clause and that if the work was done properly, you expect to be paid for the cost of the reinspection, including time lost. The government then has a couple of things to think about. The first is “What's the chance it was done properly?” The thing is “If I'm not right, how much will I have to pay the contractor?” This really makes the government hesitant about requiring reinspections if it believes there is a good chance that the work was done properly. It's a good deterrent just to state, “I’m going to invoke the Inspection of Construction clause.” Sometimes the government will want to see the work anyway, but remember to always have the contracting officer provide the direction in writing.

This happened to me on a dry dock. We were injecting cracks with epoxy throughout the whole dry dock. It was a multimillion-dollar project, and the government had an inspector on the job. He was inspecting as we were going along, and he said everything was fine. But the project engineer for the government didn't see any of the work himself and didn't believe his inspector, so he decided that he wanted to have a reinspection. He was adamant with the contracting officer, and finally the contracting officer gave in. When she told me that she wanted to have a reinspection of all of this completed work and wanted us to pull out all of our equipment and start reinjecting the epoxy, which was quite a task, I invoked the Inspection of Construction clause in writing and let them know that if the work was found to be done properly, the government would owe us for every single penny that we had spent. The government found that
the work was done properly and had to pay us $165,000 for all the extra work performed just because the government project engineer didn't believe his own inspector.

When, through an inspection, the government finds work that must be corrected, you have to correct it in a timely manner. In addition, you have to correct the work within the original contract duration. If the reinspection finds that you did the work properly, however, you can demand a contract time extension because the government was at fault. You are also allowed to collect your entire field overhead and all of the corporate overhead involved with that; because it's added revenue, you can legitimately collect profit as well.

So it's very advantageous to understand that any time the government wants to reinspect your work, you should invoke this clause immediately. *Remember, you must have the contracting officer give you the direction in writing, and you must collect all of your costs accurately.*

**FAR Clause 52.246-12, Inspection of Construction**

As prescribed in 46.312, insert the following clause:

**INSTRUCTION OF CONSTRUCTION (AUG 1996)**

(a) *Definition.* "Work" includes, but is not limited to, materials, workmanship, and manufacture and fabrication of components.

(b) The Contractor shall maintain an adequate inspection system and perform such inspections as will ensure that the work performed under the contract conforms to contract requirements. The Contractor shall maintain complete inspection records and make them available to the Government. All work shall be conducted under the general direction of the Contracting Officer and is subject to Government inspection and test at all places and at all reasonable times before acceptance to ensure strict compliance with the terms of the contract.

(c) Government inspections and tests are for the sole benefit of the Government and do not—

1. Relieve the Contractor of responsibility for providing adequate quality control measures;
2. Relieve the Contractor of responsibility for damage to or loss of the material before acceptance;
3. Constitute or imply acceptance; or
4. Affect the continuing rights of the Government after acceptance of the completed work under paragraph (i) of this section.

(d) The presence or absence of a Government inspector does not relieve the Contractor from any contract requirement, nor is the inspector authorized to change any term or condition of the specification without the Contracting Officer's written authorization.

(e) The Contractor shall promptly furnish, at no increase in contract price, all facilities, labor, and material reasonably needed for performing such safe and convenient inspections and tests as may be required by the Contracting Officer. The Government may charge to the Contractor any additional cost of inspection or test when work is not ready at the time specified by the Contractor for inspection or test, or when prior rejection makes reinspection or retest necessary. The Government shall perform all inspections and tests in a manner that will not unnecessarily delay the work. Special, full size, and performance tests shall be performed as described in the contract.

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

(g) If the Contractor does not promptly replace or correct rejected work, the Government may—

(1) By contract or otherwise, replace or correct the work and charge the cost to the Contractor; or
(2) Terminate for default the Contractor’s right to proceed.

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

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

(End of clause)
Warranty of Construction

FAR Clause 52.246-21, Warranty of Construction, requires that the contractor be responsible for any repairs or defects on any of the facilities for which work was done under the contract. The warranty period is for one year from the final acceptance of the facility or item that was completed and accepted by the government. The clause also requires that if manufacturers have extended warranties, those warranties must be given to the government in the government's name. It requires that everything be fixed or repaired by the contractor at no expense to the government during this one-year period, and it also requires that if during the year something fails, it has to be repaired. Then the one-year warranty for that item starts again on the date of repair (so your warranty could potentially last longer than one year). The clause also states, which is very interesting, that if any repair or failure is due to negligence by the government, such as lack of maintenance, the contractor is not liable for fixing the problem.

It might also be that the government gave you an improper design and/or improper criteria. The design portion of an RFP for a government design/build project is very important because it delineates what you must meet in your design. This is important to remember. For example, I had an incident recently where we had a failure of a large heat exchanger unit during the warranty period. We determined that the reason the heat exchange unit had failed was that the government, in the RFP, had given us the wrong design settings. That had caused the whole unit to freeze up, forcing us to replace the unit. I showed the government where in the RFP it had told us what settings to use. The government then admitted that the problem was its fault and recognized the error in the RFP.

So, this paragraph in the Warranty of Construction clause actually can help the contractor if he pays attention to it because government maintenance is often lacking. This is well known throughout the whole government contracting community. You could have a failure due to not changing filters, for instance, or not greasing bearings on the proper schedules. If something fails, the first thing the superintendent or whoever is in charge at that time needs to do is have the government show him all the maintenance records to make sure that the item was maintained according to the schedule given to the government by the contractor. The second thing the person in charge needs to do is to look at the design of something major that fails. You might need to look at the design documents or even the RFP to ensure that the government gave you proper information.

FAR Clause 52.246-21, Warranty of Construction

As prescribed in 46.710(e)(1), the contracting officer may insert a clause substantially as follows in solicitations and contracts when a fixed-price construction contract (see 46.705(c)) is contemplated, and the use of a warranty clause has been approved under agency procedures:

WARRANTY OF CONSTRUCTION (MAR 1994)
(a) In addition to any other warranties in this contract, the Contractor warrants, except as provided in paragraph (i) of this clause, that work performed under this contract conforms to the contract requirements and is free of any defect in equipment, material, or design furnished, or workmanship performed by the Contractor or any subcontractor or supplier at any tier.

(b) This warranty shall continue for a period of 1 year from the date of final acceptance of the work. If the Government takes possession of any part of the work before final acceptance, this warranty shall continue for a period of 1 year from the date the Government takes possession.

(c) The Contractor shall remedy at the Contractor’s expense any failure to conform, or any defect. In addition, the Contractor shall remedy at the Contractor’s expense any damage to Government-owned or controlled real or personal property, when that damage is the result of—

(1) The Contractor’s failure to conform to contract requirements; or

(2) Any defect of equipment, material, workmanship, or design furnished.

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

(e) The Contracting Officer shall notify the Contractor, in writing, within a reasonable time after the discovery of any failure, defect, or damage.

(f) If the Contractor fails to remedy any failure, defect, or damage within a reasonable time after receipt of notice, the Government shall have the right to replace, repair, or otherwise remedy the failure, defect, or damage at the Contractor’s expense.

(g) With respect to all warranties, express or implied, from subcontractors, manufacturers, or suppliers for work performed and materials furnished under this contract, the Contractor shall—

(1) Obtain all warranties that would be given in normal commercial practice;

(2) Require all warranties to be executed, in writing, for the benefit of the Government, if directed by the Contracting Officer; and

(3) Enforce all warranties for the benefit of the Government, if directed by the Contracting Officer.

(h) In the event the Contractor’s warranty under paragraph (b) of this clause has expired, the Government may bring suit at its expense to enforce a subcontractor’s, manufacturer’s, or supplier’s warranty.

(i) Unless a defect is caused by the negligence of the Contractor or subcontractor or supplier at any tier, the Contractor shall not be liable for the repair of any defects of material or design furnished by the Government nor for the repair of any damage that results from any defect in Government-furnished material or design.

(j) This warranty shall not limit the Government’s rights under the Inspection and Acceptance clause of this contract with respect to latent defects, gross mistakes, or fraud.

(End of clause)
**Default**

**FAR Clause 52.249-10, Default,** authorizes the government to terminate the total contract or part of the contract for default if the contractor is not performing to the schedule or is not doing the work properly. It usually takes numerous notifications to the contractor before the government can terminate a total contract. “Numerous” means that the government has to give you notification telling you that you are behind schedule more than 10 percent; then it must give you another notification telling you that you need to show how you are going to complete the work on time; and then it must give you the final notice in what's called a “show cause,” which means “Tell us why we, the government, should not terminate your contract.” Those three steps have to happen before the government may actually terminate the contract, so the government gives you enough notification that you know you are in trouble before you are defaulted.

As bad as all of that seems, the government is required by this clause to have legitimate reasons for defaulting you. Normally, the only reason for default is lack of performance, such as timeliness or quality of the work. This clause also has numerous other reasons why the government cannot default you; it cannot default you if the reason for the lack of performance is one of those listed in the clause. None of these delays are compensable—meaning the government won’t pay for them but will extend the project schedule. The government may extend the schedule out for the time that you were delayed, but you need to request the time and you must clearly show that the delay impacted the project critical path. There are lots of acts covered by this clause. Acts of God are one such item. Maybe a tornado hits, or you have a severe hailstorm or hurricane. You might also have events such as fires, floods, epidemics, and quarantines—restrictions due to disease going around, making it necessary to quarantine a base. Another legitimate delay included in the clause, which is very common and can really affect a contractor, is a strike. The way this clause is worded, it's a strike by anyone in the chain for the project, including the manufacturer, or perhaps the freight company. It could also be a vendor or your subcontractor’s union that strikes. Again, these are not compensable, but you can get credit for the time and can have the contract extended accordingly.

Even though its title is Default, this clause tells you that you can get time for unusually severe weather. Most of the government contracts now include how many days of poor weather you might expect in a month, but unusually severe weather that actually stops your job is not considered a part of that timeframe. It's incumbent upon the contractor and the superintendent to keep track of these lost days.

The contractor has 10 days in which to notify the contracting officer in writing that work might be delayed for one of these legitimate reasons and the delay might affect the project. I actually had to use the unusually severe weather part of this clause on one of the last projects I worked on. We had been keeping up with all the changes by making a FRAGNET schedule of every change and documenting every change we had, even though we had no time added to our contract at that point. We had a day that was so cold that no one could even get to work, and
there was so much ice on the road that none of our critical equipment could be delivered on the one day that it was needed and scheduled. Even though we could get the equipment delivered the next day, this one day of unusually severe weather turned into a 42-day time extension because of keeping up with the FRAGNET schedule and invoking the Default clause. So this clause actually helped us to gain 42 days. We didn't get paid for those extra 42 days, but the schedule was extended by 42 days.

**FAR Clause 52.249-10, Default (Fixed-Price Construction)**

As prescribed in 49.504(c)(1), insert the following clause:

**DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984)**

(a) If the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in this contract including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work (or the separable part of the work) that has been delayed. In this event, the Government may take over the work and complete it by contract or otherwise, and may take possession of and use any materials, appliances, and plant on the work site necessary for completing the work. The Contractor and its sureties shall be liable for any damage to the Government resulting from the Contractor's refusal or failure to complete the work within the specified time, whether or not the Contractor's right to proceed with the work is terminated. This liability includes any increased costs incurred by the Government in completing the work.

(b) The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause, if—

(1) The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include—

(i) Acts of God or of the public enemy,
(ii) Acts of the Government in either its sovereign or contractual capacity,
(iii) Acts of another Contractor in the performance of a contract with the Government,
(iv) Fires,
(v) Floods,
(vi) Epidemics,
(vii) Quarantine restrictions,
(viii) Strikes,
(ix) Freight embargoes,
(x) Unusually severe weather, or
(xi) Delays of subcontractors or suppliers at any tier arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers; and

(2) The Contractor, within 10 days from the beginning of any delay (unless extended by the Contracting Officer), notifies the Contracting Officer in writing of the causes of delay. The Contracting Officer shall ascertain the facts and the extent of delay. If, in the judgment of the Contracting Officer, the findings of fact warrant such action, the time for completing the work shall be extended. The findings of the Contracting Officer shall be final and conclusive on the parties, but subject to appeal under the Disputes clause.

(c) If, after termination of the Contractor's right to proceed, it is determined that the Contractor was not
in default, or that the delay was excusable, the rights and obligations of the parties will be the same as if
the termination had been issued for the convenience of the Government.

(d) The rights and remedies of the Government in this clause are in addition to any other rights and
remedies provided by law or under this contract.

(End of clause)
Requests for Equitable Adjustment

A request for equitable adjustment (REA) may be submitted by the contractor in accordance with DFARS Clause 252.243-7002, Requests for Equitable Adjustment, at any time (and for any reason) the contractor thinks that he has been given an order and that the order constitutes a change. Even though he can request this equitable adjustment at any time, the superintendent has to remember that the documentation will make or break the request. The contracting officer doesn't have to approve a REA, but he does have to look at a number of things. He has to look at who gave the order, whether it was from the proper authority, and whether a notification was given within the required timeframe. He then has to make sure that the documentation clearly shows that you have legitimate costs involved. The superintendent must ensure that he captures the costs, documents what the requirement was, and makes sure that timely notification is made. The superintendent again has to remember that the documentation will make or break this.

Typically, the contractor will make such a request after the contracting officer has denied a change order for whatever reason. That's when the contractor goes back in and requests an equitable adjustment because if the contracting officer is going to approve a change order, he will generally request a proposal from the contractor as part of the change order request. The superintendent will then be called on to produce all of his documents, which means that to support the case again, you must have your daily reports up to snuff, you must have captured all the costs, and you must clearly show the effect on the project schedule.

I recently worked on a project where we had a situation involving a huge mass of concrete in the way of installing a water line. I went to the contracting officer and stated in writing that we had a mass of concrete that we needed to have out of the way before we could put the water line in, and I asked what he wanted to do. He came back and told me that it was our problem and that we'd have to just move forward on the project. So I went back to the contracting officer and requested an equitable adjustment. I outlined all the details of the situation: I showed when we had found the concrete, provided photographs of it, and captured the costs of it from our daily reports and cost reports. We had a method of isolating costs for each situation, so we went back and presented the contracting officer with the cost and with the part of the contract that clearly showed what we were responsible for. He then came back and gave us a change order for the amount of money that I had requested.

The Requests for Equitable Adjustment clause is used when the contracting officer rejects your request for a change order. Quite often you might find that you’ll use this clause in conjunction with another clause. For instance, you might use it with the Changes clause or the Changed Site Conditions clause.
REQUESTS FOR EQUITABLE ADJUSTMENT (MAR 1998)

(a) The amount of any request for equitable adjustment to contract terms shall accurately reflect the contract adjustment for which the Contractor believes the Government is liable. The request shall include only costs for performing the change, and shall not include any costs that already have been reimbursed or that have been separately claimed. All indirect costs included in the request shall be properly allocable to the change in accordance with applicable acquisition regulations.

(b) In accordance with 10 U.S.C. 2410(a), any request for equitable adjustment to contract terms that exceeds the simplified acquisition threshold shall bear, at the time of submission, the following certificate executed by an individual authorized to certify the request on behalf of the Contractor:

I certify that the request is made in good faith, and that the supporting data are accurate and complete to the best of my knowledge and belief.

(Official’s Name)

(Title)

(c) The certification in paragraph (b) of this clause requires full disclosure of all relevant facts, including—

(1) Cost or pricing data if required in accordance with subsection 15.403-4 of the Federal Acquisition Regulation (FAR); and

(2) Information other than cost or pricing data, in accordance with subsection 15.403-3 of the FAR, including actual cost data and data to support any estimated costs, even if cost or pricing data are not required.

(d) The certification requirement in paragraph (b) of this clause does not apply to—

(1) Requests for routine contract payments; for example, requests for payment for accepted supplies and services, routine vouchers under a cost-reimbursement type contract, or progress payment invoices; or

(2) Final adjustments under an incentive provision of the contract.

(End of clause)
**Documentation Required for a Claim**

The superintendent is usually responsible for gathering the information needed to submit a request for equitable adjustment (REA) or a claim. He may do this with the project manager, but most of the documents that the project manager will need must come from the superintendent. That is why I have included this discussion in *Federal Construction Contracting Made Easy: A Field Guide to the FAR*.

The two basic elements of any claim are **entitlement** and **quantum**. The entitlement portion establishes the factual and contractual basis supporting the contractor’s right to recover from the government. The quantum portion requires that the contractor state a *sum certain* under the Contract Disputes Act and the Disputes clause. Simply put, this means that you have to prove that you are owed for something and then prove the costs.

The entitlement portion requires that the contractor show how the government injured the contractor by its actions, such as a misinterpretation of a specification. The contractor must describe and prove that it had to perform extra work and had delay due to this action. The quantum portion of a monetary claim requires you to describe the amount of money and time to which you are entitled and must relate the “cause to effect” action relating the federal government’s actions to the cost incurred. The relation of cause and effect can be very difficult because it normally requires issues of scheduling, cost accounting, and support for estimates.

The contractor should as a matter of routine set policies and procedures that will provide adequate documentation should a claim situation arise. This same documentation will normally be required if a REA is contemplated. Contracting officers will tell you that the three key words to remember for a successful REA or claim are *documentation, documentation, documentation*—daily reports, correspondence (mail, e-mail, faxes, telephone logs, worker sign-in logs, RFIs, etc.), documentation of verbal or written directives, quality control reports, subcontractor daily reports, daily inspection reports, design clarifications, submittal registers, etc. Schedules might need to be submitted, especially if time is a factor in the claim. The schedule should be a FRAGNET schedule that clearly supports the contractor’s claim to time impact. Make sure that you follow the rules for preparing a FRAGNET schedule according to the rules of law. Proof that notifications were provided in the proper timeframe will also prove critical.

The superintendent should work with his project manager to set up a method to isolate all costs associated with a potential REA or claim. This will make it much easier to prove your case.
# Notice Checklist

<table>
<thead>
<tr>
<th>Clause Reference</th>
<th>Subject Matter of Notice</th>
<th>Time Requirements for Notice</th>
<th>Writing Required</th>
<th>Stated Consequences of Lack of a Notice</th>
</tr>
</thead>
<tbody>
<tr>
<td>Changes FAR 52.243-4</td>
<td>Proposal for adjustment</td>
<td>30 days from receipt of a written change order from the government or written notification of a constructive change by the contractor</td>
<td>Yes</td>
<td>Claim may not be allowed. Notice requirement may be waived until final payment.</td>
</tr>
<tr>
<td>Constructive Changes FAR 52.243-4</td>
<td>Date, circumstances and source of the order and that the contractor regards the government's order as a contract change</td>
<td>No starting point stated, but notice within 20 days of incurring any additional costs due to the constructive change fully protects the contractor's rights</td>
<td>Yes</td>
<td>Costs incurred more than 20 days prior to giving notice cannot be recovered, except in the case of defective specifications.</td>
</tr>
<tr>
<td>Differing Site Conditions FAR 52.236-2</td>
<td>Existence of unknown or materially different conditions affecting the contractor's cost</td>
<td>From the time such conditions are identified, notice must be furnished &quot;promptly&quot; and before such conditions are disturbed</td>
<td>Yes</td>
<td>Claim not allowed. Lack of notice may be waived until final payment.</td>
</tr>
<tr>
<td>Suspension of Work FAR 52.212-12</td>
<td>(1) Of &quot;the act or failure to act involved&quot;</td>
<td>(1) Within 20 days from the act or failure to act by the contracting officer(not including a suspension order) (2) &quot;As soon as practicable&quot; after termination of the suspension, delay, or interruption</td>
<td>(1) Yes (2) Yes</td>
<td>(1) Costs incurred more than 20 days prior to the notification cannot be recovered. (2) Claim not allowed, but claim may be considered until final payment.</td>
</tr>
<tr>
<td>Default FAR 52.249-10</td>
<td>Causes of delay beyond contractor's Control</td>
<td>10 days from the beginning of any delay</td>
<td>Yes</td>
<td>Contractor's right to proceed may be terminated and the government may sue for damages.</td>
</tr>
<tr>
<td>Disputes</td>
<td>Appeal of any final decision by the contracting officer</td>
<td>(1) <strong>Boards of Contract Appeals</strong>—90 days from receipt of contracting officer’s final decision</td>
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<tr>
<td>FAR 52.233-1</td>
<td>(2) <strong>U.S. Court of Federal Claims</strong>—1 year from receipt of contracting officer’s final decision</td>
<td>(1) Yes Notice of Appeal</td>
<td></td>
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</tr>
<tr>
<td></td>
<td></td>
<td>(2) Yes Filing of Complaint</td>
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<td>Contracting officer’s decision becomes final and conclusive.</td>
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