

# UNIT 57: NONCOMMERCIAL ACQUISITION REMEDIES

*October 2003*

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<b>Overall Duty</b>	Apply remedies to protect the rights of the Government under noncommercial item contracts.
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<b>Overall Conditions</b>	Given a contract for noncommercial items, the contract file (including price negotiation memoranda and the contractor's proposal), evidence of performance problems, and documentation of informal attempts to resolve the problems.
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<b>Overall Standard</b>	Select the remedy that will best minimize the impact of the contractor's performance problems on the requirements, delivery schedule, and cost. Obtain reasonable consideration for any relief granted the contractor from the contract's original terms and conditions. Document all decisions and contacts with the contractor sufficient to support the Government's position in the disputes or court proceedings. Correctly follow all prescribed procedures for the remedy.
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## **Part A: Select a Formal Contract Remedy**

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<b>Sub-Duty</b>	Select a formal contract remedy for a performance problem.
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<b>Sub-Duty Standard</b>	Select the formal contract remedy that is appropriate for the contracting situation.
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## Part B: Prepare a Cure or Show Cause Notice

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**Sub-Duty** Prepare a cure or show cause notice.

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**Sub-Duty Standard** Issue a cure notice when there is sufficient time for the contractor to cure identified performance problems and a formal remedy is required. Issue a show cause notice when the delivery or performance period has expired to give the contractor an opportunity to show cause why the contract should not be terminated. Based on an evaluation of the contractor's response, take appropriate action to modify the contract, terminate the contract, or allow the contractor to continue performance without contract modification.

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## Part C: Assess Liquidated Damages

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**Sub-Duty** Assess liquidated damages to compensate the Government for probable damages.

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**Sub-Duty Standard** Assess liquidated damages at the rate(s) prescribed in the contract. Take all reasonable steps to mitigate liquidated damages.

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## Part D: Reject Nonconforming Supplies or Services

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**Sub-Duty** Reject nonconforming supplies or services.

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**Sub-Duty Standard** Reject nonconforming supplies or services unless the contractor provides adequate consideration or acceptance is otherwise in the Government's best interest.

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## **Part E: Enforce Warranty Clause**

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**Sub-Duty**            Obtain redress under a warranty clause.

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**Sub-Duty  
Standard**            Exercise the Government's rights under a warranty clause contained in the contract or purchase order.

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## **Part F: Select a Formal Contract Remedy under Fraud, Gross Mistake, or Latent Defect**

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**Sub-Duty**            Select the appropriate remedy when acceptance was due to fraud, gross mistake, or a latent defect.

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**Sub-Duty  
Standard**            Select the appropriate contract remedy after acceptance, when acceptance would not have been made if it were not for fraud, gross mistake, or failure to identify a latent defect.

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## Policies

<i>FAR</i>	<i>Agency Suppl.</i>	<i>Subject</i>
11.5		Liquidated damages.
11.7		Variations in quantity.
22.302		Liquidated damages and overtime pay.
22.809		Enforcement of equal opportunity requirements.
22.1022		Withholding contract payments.
22.1023		Termination for default.
22.1307		Actions because of noncompliance.
22.1407		Actions because of noncompliance.
23.506		Suspension of payments, termination of contract, and debarment and suspension actions.
46.407		Nonconforming supplies or services.
46.702		General policy relating to warranties.
46.706		Warranty terms and conditions.
49.402-3(b)		Procedure for default requirements related to cure or show cause notices.
49.402-3(c)		
49.402-3(d)		
49.402-3(e)(4)		
52.211-11		Liquidated damages – supplies, services or research and development.
52.211-16		Variation in quantity.
52.211-17		Delivery of excess quantities.
52.219-16		Liquidated damages – subcontracting plan.
52.222-4		Contract Work Hours And Safety Standards Act – overtime compensation.
52.222-26		Equal opportunity.
52.222-35		Affirmative action for disabled veterans and veterans of the Vietnam era.
52.222-36		Affirmative action for workers with disabilities.
52.222-41		Service Contract Act of 1965 as amended.
52.223-6		Drug-free workplace.
52.232-12		Advance payments.
52.232-16		Progress payments.
52.246-2		Inspection of supplies – fixed-price.
52.246-3		Inspection of supplies – cost-reimbursement.

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<i>FAR</i>	<i>Agency Suppl.</i>	<i>Subject</i>
52.246-4		Inspection of services – fixed-price.
52.246-5		Inspection of services – cost-reimbursement.
52.246-6		Inspection – time-and-material and labor-hour.
52.246-7		Inspection of research and development – fixed-price.
52.246-8		Inspection of research and development – cost-reimbursement.
52.246-9		Inspection of research and development (short form).
52.246-15		Certificate of conformance.
52.246-17		Warranty of supplies of a noncomplex nature.
52.246-18		Warranty of supplies of a complex nature.
52.246-19		Warranty of systems and equipment under performance specifications or design criteria.
52.246-20		Warranty of services.
52.246-23		Limitation of liability.
52.246-24		Limitation of liability – high-value items.
52.246-25		Limitation of liability – services.
52.249-8		Default (fixed-price supply and service).
52.249-9		Default (fixed-price research and development).

## Other KSAs

1. Knowledge of the most likely procedural errors in using remedies and ways to avoid them.
2. Knowledge of the purpose of liquidated damages clauses (as motivation, not as penalty).
3. Knowledge of the possibility that the Government may lose some or all of remaining rights if it manifests acceptance of nonconforming acts.
4. Knowledge of the possibility that continuing acceptance of partial performance will constructively modify the contractor's responsibility for substantial performance.
5. Knowledge of tests for invoking remedies.
6. Knowledge of relevant case law.

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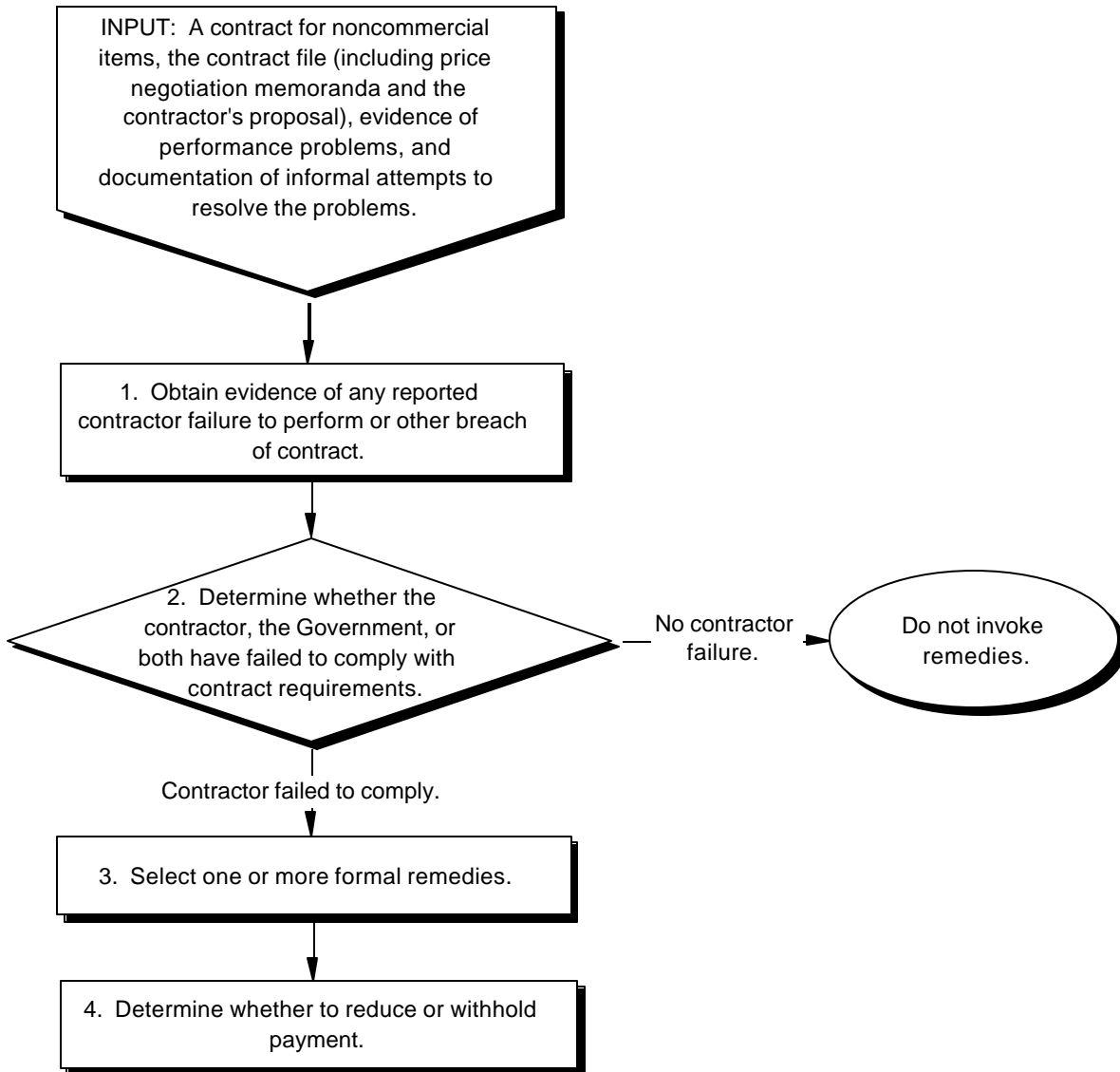
7. Ability to identify and apply rules, principles, and relevant information in making an accurate analysis of contractor performance problems.
  8. Ability to conscientiously evaluate the details involved in evaluating contractor performance.
  9. Ability to remain open to new information related to contractor performance.
  10. Ability to persuade others to accept recommendations about which remedies to use to influence contractor performance.
  11. Ability to make sound, well-informed, and objective decisions about contract remedies.
  12. Ability to maintain the honesty and integrity of the acquisition process.
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**Other Policies and References (Annotate As Necessary):**

# UNIT 57: NONCOMMERCIAL ACQUISITION REMEDIES

## Part A: Select a Formal Contract Remedy

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# UNIT 57: NONCOMMERCIAL ACQUISITION REMEDIES

## Part A: Select a Formal Contract Remedy

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Tasks	Related Standards
1. Obtain evidence of any reported contractor failure to perform or other breach of contract.	Collect all related facts, including the contractor's reactions to Government complaints. Reports on contractor failure to perform typically relate to: <ul style="list-style-type: none"><li>• Anticipated or actual late delivery;</li><li>• Failure to control costs; or</li><li>• Unsatisfactory performance.</li></ul>



# UNIT 57: NONCOMMERCIAL ACQUISITION REMEDIES

## Part A: Select a Formal Contract Remedy

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Tasks	Related Standards
<p>2. Determine whether the contractor, the Government, or both have failed to comply with contract requirements.</p>	<p>Consider both:</p> <ul style="list-style-type: none"> <li>• Contract language; and</li> <li>• Other evidence (e.g., contractor representations regarding the deliverable).</li> </ul> <p>If at issue, determine whether contractor representations regarding the quality, condition, description, or performance potential of the deliverable were:</p> <ul style="list-style-type: none"> <li>• Part of the basis of the bargain, given the:               <ul style="list-style-type: none"> <li>– Price negotiation memorandum (i.e., what transpired during contract negotiations);</li> <li>– The contractor’s proposal; and</li> <li>– The contract itself; or</li> </ul> </li> <li>• Mere “sales talk” or “puffing” about the offered supply or service.</li> </ul> <p>Verify that the Government has carried out its promises and responsibilities, for example:</p> <ul style="list-style-type: none"> <li>• Furnishing of suitable Government property at the specified time and place;</li> <li>• Implied duty to not hinder performance;</li> <li>• Implied duty to disclose information vital for offer preparation or contract performance;</li> <li>• Implied duty to provide factually correct information; and</li> <li>• Implied warranty of specifications.</li> </ul> <p>Analyze potential defenses to allegations that the:</p> <ul style="list-style-type: none"> <li>• Contractor failed to comply with contract requirements, such as:               <ul style="list-style-type: none"> <li>– Impracticability of performance;</li> <li>– Mutual mistakes; or</li> <li>– Unconscionable requirements.</li> </ul> </li> <li>• Government failed to comply with contract requirements, such as:               <ul style="list-style-type: none"> <li>– Disclaimers during negotiations; or</li> <li>– The Sovereign acts doctrine.</li> </ul> </li> </ul>

# UNIT 57: NONCOMMERCIAL ACQUISITION REMEDIES

## Part A: Select a Formal Contract Remedy

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Tasks	Related Standards
3. Select one or more formal remedies.	<p>Select the remedy or remedies that best match the problem and the extent (if any) to which the Government is at fault. Generally, consider the following remedies:</p> <ul style="list-style-type: none"><li>• Cure or show cause notice and the possibility of contract termination for cause;</li><li>• Assessment of liquidated damages;</li><li>• Rejection of supplies or services before or after acceptance and possible termination for cause;</li><li>• Remedies under a warranty clause (if incorporated as an addendum to FAR 52.212-4);</li><li>• Remedies that may be available when acceptance was due to fraud, gross mistake, or latent defect;</li><li>• Termination for convenience or cause (see the Termination Unit); or</li><li>• Any other remedies provided in the specific clause that was breached.</li></ul> <p>Alternatively, it may be in the Government's best interest to accept a supply or service nonconformance with additional contractor consideration. (FAR 46.407(f)).</p>

# UNIT 57: NONCOMMERCIAL ACQUISITION REMEDIES

## Part A: Select a Formal Contract Remedy

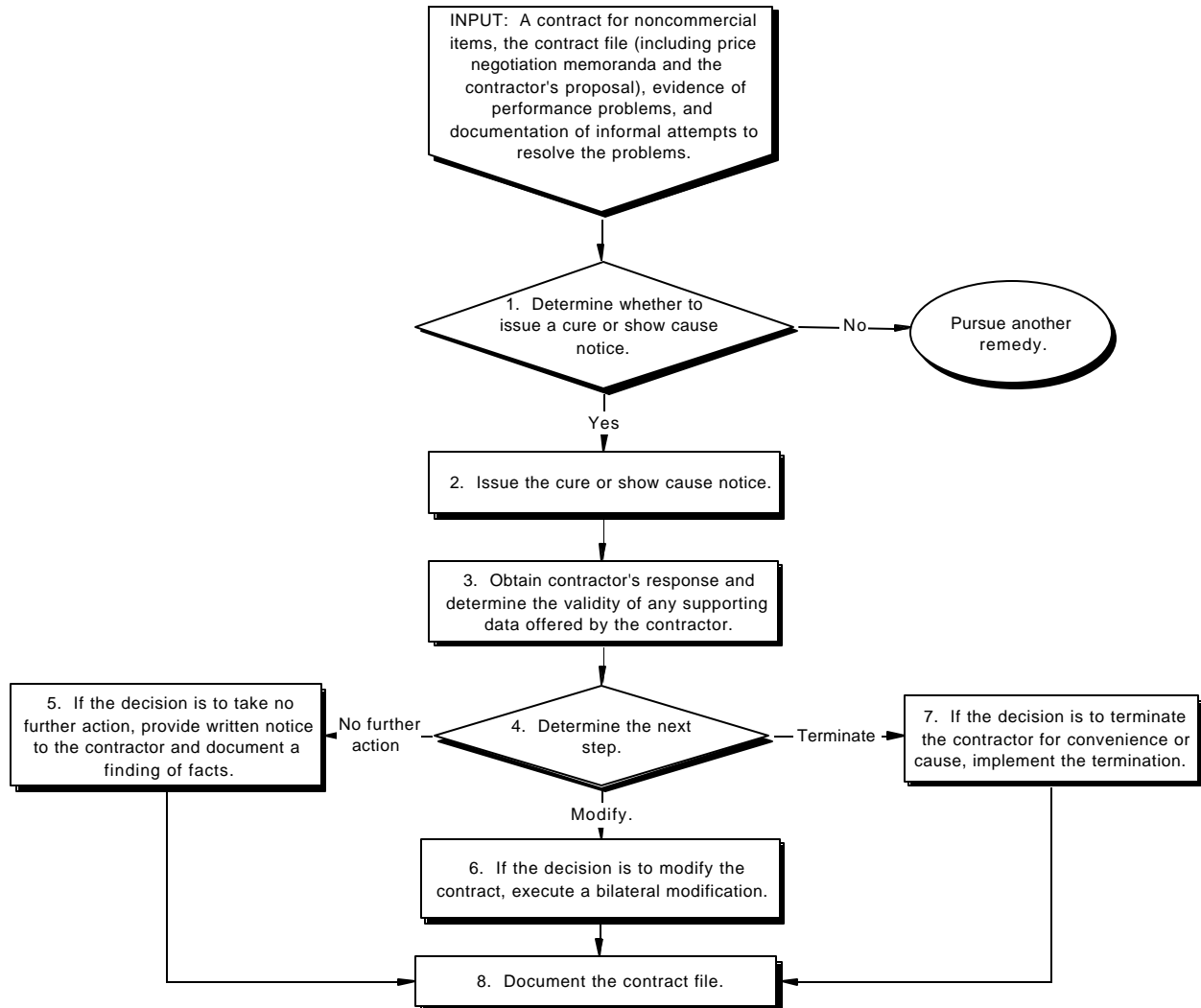
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Tasks	Related Standards
4. Determine whether to reduce or withhold payment.	<p>Withhold or reduce payment:</p> <ul style="list-style-type: none"><li>• As provided in the contract for problem and the remedy being invoked. For example, progress payments based on cost may be reduced or suspended, the rate of liquidation increased, or both:<ul style="list-style-type: none"><li>– If:<ul style="list-style-type: none"><li>? The Contractor failed to comply with any material requirement of this contract; or</li><li>? Performance of the contract is endangered; or</li></ul></li><li>– Other circumstances cited in the Progress Payments clause (FAR 52.232-16) occur.</li></ul></li><li>• For delivered and accepted supplies or services to reflect any downward adjustment in the price agreed to by the contractor.</li></ul>

# UNIT 57: NONCOMMERCIAL ACQUISITION REMEDIES

## Part B: Prepare A Cure Or Show Cause Notice

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# UNIT 57: NONCOMMERCIAL ACQUISITION REMEDIES

## Part B: Prepare A Cure Or Show Cause Notice

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Tasks	Related Standards
<p>1. Determine whether to issue a cure or show cause notice.</p>	<p>Use a cure notice in situations where the contractor:</p> <ul style="list-style-type: none"> <li>• Fails to:               <ul style="list-style-type: none"> <li>– Make progress as to endanger performance of the contract; or</li> <li>– Perform some of the other requirements of the contract (e.g., provide required insurance); and</li> </ul> </li> <li>• Has sufficient time remaining in the contract delivery or performance schedule to permit a realistic cure period (i.e., 10 days or more).</li> </ul> <p>Otherwise, use a show cause notice.</p>
<p>2. Issue the cure or show cause notice.</p>	<p>A cure notice must:</p> <ul style="list-style-type: none"> <li>• Follow the format presented in FAR 49.607(a);</li> <li>• Clearly identify the contractor’s failure or failures in performance of the contract; and</li> <li>• Provide the contractor 10 days to cure its failure or failures, but may provide any longer time that is reasonably necessary.</li> </ul> <p>A show cause notice:</p> <ul style="list-style-type: none"> <li>• Must follow the format presented in FAR 49.607(a); and</li> <li>• Should be sent immediately upon expiration of the contract delivery or performance period.</li> </ul> <p>If the contractor is a small business, immediately provide a copy of the cure or show cause notice to the:</p> <ul style="list-style-type: none"> <li>• Contracting office small business specialist; and</li> <li>• Small Business Administration Regional Office nearest the contractor.</li> </ul>

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## Part B: Prepare A Cure Or Show Cause Notice

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Tasks	Related Standards
3. Obtain contractor's response and determine the validity of any supporting data offered by the contractor.	<p>Examples of possible contractor responses to a cure notice include:</p> <ul style="list-style-type: none"><li>• An offer to cure performance;</li><li>• An offer to provide substantial performance in exchange for relief from some provisions of the contract;</li><li>• Presentation of a case for excusable delay;</li><li>• Agreement with the notice's facts with no solution offered; or</li><li>• No response.</li></ul> <p>Responses to a show cause notice may be similar, but should be limited to facts explaining why the contractor's failure to perform arose from causes beyond the contractor's control and without fault or negligence of the contractor.</p>

# UNIT 57: NONCOMMERCIAL ACQUISITION REMEDIES

## Part B: Prepare A Cure Or Show Cause Notice

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Tasks	Related Standards
<p>4. Determine the next step.</p>	<p>Typically, alternatives include the following:</p> <ul style="list-style-type: none"> <li>• Take no further action. Only choose this alternative when the contractor provides sufficient evidence that performance failures will be cured to complete the contract on time.</li> <li>• Modify the contract. Only choose this alternative when:               <ul style="list-style-type: none"> <li>– The contractor provides evidence of excusable delay that merits an extension of the delivery or performance period or other contract modification to permit completion within the original delivery or performance period; or</li> <li>– The modification is in the Government’s best interests and the contractor provides:                   <ul style="list-style-type: none"> <li>? Sufficient evidence that the contract will be completed as modified; and</li> <li>? Appropriate consideration for any relief from the contract’s requirements.</li> </ul> </li> </ul> </li> <li>• Begin proceedings to terminate for cause. Consider the following factors before determining to terminate a contract for cause:               <ul style="list-style-type: none"> <li>– The terms of the contract and applicable laws and regulations.</li> <li>– The specific failure of the contractor and the excuses for the failure.</li> <li>– The availability of the supplies or services from other sources.</li> <li>– The urgency of the need for the supplies or services and the period of time required to obtain them from other sources</li> <li>– The degree of essentiality of the contractor in the Government acquisition program and the effect of a termination for default.</li> <li>– The effect of a termination on the contractor’s ability liquidates any Government financing.</li> <li>– Any other pertinent facts and circumstances.</li> </ul> </li> </ul>

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## Part B: Prepare A Cure Or Show Cause Notice

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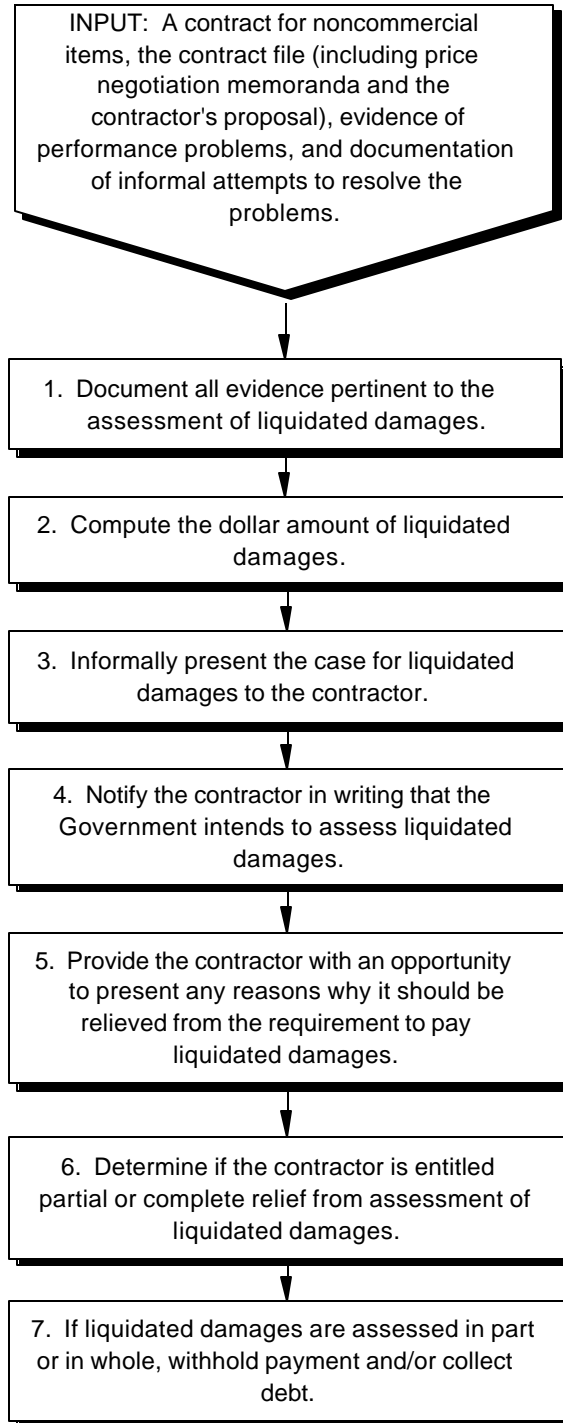
Tasks	Related Standards
5. If the decision is to take no further action, provide written notice to the contractor and document a finding of facts.	<p>In the notice, state that:</p> <ul style="list-style-type: none"> <li>• The Government accepts the contractor's commitments to cure performance.</li> <li>• Contractor failure to fulfill its commitments to cure performance failures will restore the Government's right to terminate for cause.</li> </ul>
6. If the decision is to modify the contract, execute a bilateral modification.	<p>In the modification, clearly describe the contract changes, including any:</p> <ul style="list-style-type: none"> <li>• Change in the delivery schedule;</li> <li>• Change in other terms and conditions; and</li> <li>• Consideration provided by the contractor in return for the modification.</li> </ul>
7. If the decision is to terminate the contractor for convenience or cause, implement the termination.	Implement the termination following the procedures described in the Termination Unit.
8. Document the contract file.	<p>Documentation should include:</p> <ul style="list-style-type: none"> <li>• The cure or show cause notice;</li> <li>• The contractor's response;</li> <li>• A summary of any other facts that affected the decision on appropriate course of action;</li> <li>• A price negotiation memorandum covering any negotiations with the contractor; and</li> <li>• Any contract modification or written notice to the contractor.</li> </ul>



# UNIT 57: NONCOMMERCIAL ACQUISITION REMEDIES

## Part C: Assess Liquidated Damages

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# UNIT 57: NONCOMMERCIAL ACQUISITION REMEDIES

## Part C: Assess Liquidated Damages

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Tasks	Related Standards
1. Document all evidence pertinent to the assessment of liquidated damages.	<p>Correctly identify performance problems covered by a clause that provides for liquidated damages, for example:</p> <ul style="list-style-type: none"> <li>• Liquidated Damages – Supplies, Services, or Research and Development (FAR 52.211-11);</li> <li>• Liquidated Damages – Subcontracting Plan (FAR 52.219-16); or</li> <li>• Contract Work Hours and Safety Standards Act – Overtime Compensation (FAR 52.222-4).</li> </ul>
2. Compute the dollar amount of liquidated damages.	Accurately calculate the damages per the formula prescribed by the applicable contract clause.
3. Informally present the case for liquidated damages to the contractor.	<p>Whenever practicable, discuss the assessment of liquidated damages informally with the contractor, before actual assessment:</p> <ul style="list-style-type: none"> <li>• Identify the liquidated damages clause in the contract;</li> <li>• Explain the reason that liquidated damages are being assessed;</li> <li>• Explain how the liquidated damages will be calculated; and</li> <li>• Advise the contractor on any action that may be taken to avoid the assessment or continuing assessment of liquidated damages. Available actions will depend on the requirements of the specific liquidated damages clause.</li> </ul>
4. Notify the contractor in writing that the Government intends to assess liquidated damages.	<p>In preparing the notification, consider all available information, including any information obtained during informal discussions. In writing:</p> <ul style="list-style-type: none"> <li>• Identify the liquidated damages clause in the contract;</li> <li>• Explain the reason that liquidated damages are being assessed;</li> <li>• Explain how the liquidated damages will be calculated; and</li> <li>• Advise the contractor on any action that may be taken to avoid the assessment or continuing assessment of liquidated damages.</li> </ul>

# UNIT 57: NONCOMMERCIAL ACQUISITION REMEDIES

## Part C: Assess Liquidated Damages

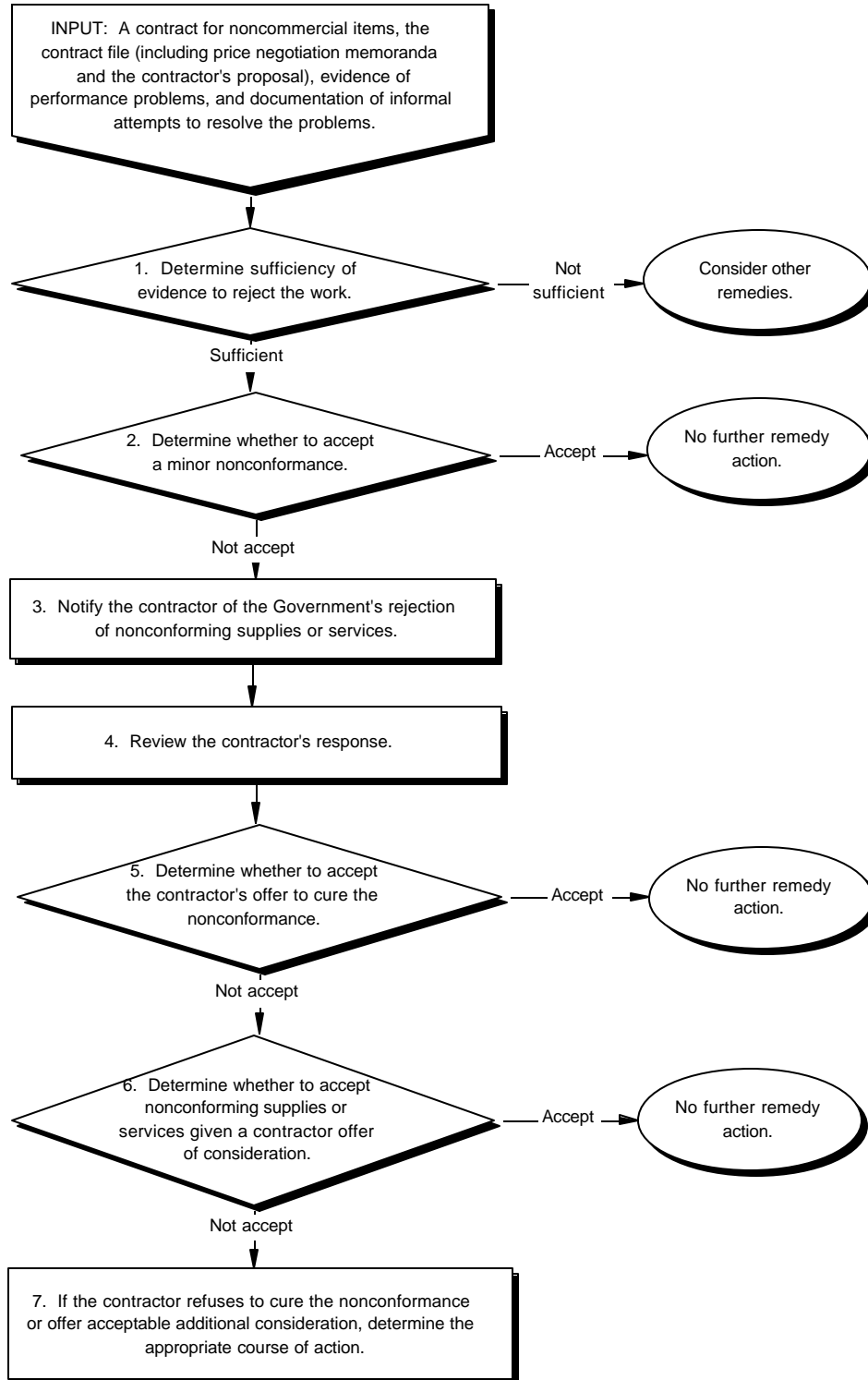
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Tasks	Related Standards
5. Provide the contractor with an opportunity to present any reasons why it should be relieved from the requirement to pay liquidated damages.	<p>For example, the contractor might:</p> <ul style="list-style-type: none"> <li>• Contend that any delay is excusable;</li> <li>• Contend performance was impossible, given the contract requirements; or</li> <li>• Provide evidence of substantial completion.</li> </ul>
6. Determine if the contractor is entitled partial or complete relief from assessment of liquidated damages.	<p>Consider the:</p> <ul style="list-style-type: none"> <li>• Requirements of the liquidated damages clause;</li> <li>• The facts presented by the contractor; and</li> <li>• Other available information.</li> </ul> <p>If the contractor is entitled to relief:</p> <ul style="list-style-type: none"> <li>• Determine whether to:               <ul style="list-style-type: none"> <li>– Forgo assessing liquidated damages; or</li> <li>– Assess a reduced amount.</li> </ul> </li> <li>• Document the basis for reducing the amount of liquidated damages and, given the basis, accurately calculate the amount of the reduction.</li> </ul>
7. If liquidated damages are assessed in part or in whole, withhold payment and/or collect debt.	<p>Normally, the amount of liquidated damages may be recovered through withholding contractor payment. If that is not appropriate, consider:</p> <ul style="list-style-type: none"> <li>• An offset against an existing contract;</li> <li>• Direct payment by the contractor; or</li> <li>• A claim against the contractor.</li> </ul>

# UNIT 57: NONCOMMERCIAL ACQUISITION REMEDIES

## Part D: Reject Nonconforming Supplies or Services

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# UNIT 57: NONCOMMERCIAL ACQUISITION REMEDIES

## Part D: Reject Nonconforming Supplies or Services

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Tasks	Related Standards
<p>1. Determine sufficiency of evidence to reject the work.</p>	<p>Ensure that the Government is not at fault and consider relevant case law and questions such as:</p> <ul style="list-style-type: none"> <li>• Has the Government accepted the deliverable either explicitly or implicitly by silence, late rejection, or retention and use of goods?</li> <li>• Did the Government inspect the deliverable prior to acceptance? If so:               <ul style="list-style-type: none"> <li>– Was the defect patent (i.e., discoverable through inspection) or latent?</li> <li>– Was fraud or gross mistake amounting to fraud the reason a discoverable patent defect survived inspection prior to acceptance?</li> </ul> </li> <li>• Was acceptance predicated on the reasonable assumption that the nonconformance would be cured (discovery at time of acceptance)?</li> <li>• Was acceptance reasonably induced by the seller’s assurances (no discovery at the time of acceptance)?</li> <li>• Is the Government stopped by reason of accepting nonconforming work under a prior contract for the same requirement?</li> </ul> <p>If the Government has accepted the deliverable, only consider revoking acceptance if the Government reports the defect to the contractor:</p> <ul style="list-style-type: none"> <li>• Within a reasonable time after the defect was discovered or should have been discovered; and</li> <li>• Before substantial change occurs in the condition of the item, unless the change is due to the defect in the item.</li> </ul> <p>Note: If the Government is at fault, options may include modifying the contract or terminating for convenience.</p>

# UNIT 57: NONCOMMERCIAL ACQUISITION REMEDIES

## Part D: Reject Nonconforming Supplies or Services

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Tasks	Related Standards
2. Determine whether to accept a minor nonconformance.	<p>A minor nonconformance may be accepted without additional contractor consideration as long as the nonconformance does not adversely affect the safety, health, reliability, durability, performance, interchangeability of parts or assemblies, weight, or appearance (where a consideration), or any other basic objective of the Government requirement.</p> <p>To assist in making this determination, the Government may establish a joint contractor-Government review group. Acceptance of supplies and services with any critical or major nonconformance is outside the scope of such a review group.</p> <p>Discourage the repeated tender of nonconforming supplies or services, including those with only minor nonconformance, by appropriate action, such as rejection and documenting the contractor's performance record.</p>

# UNIT 57: NONCOMMERCIAL ACQUISITION REMEDIES

## Part D: Reject Nonconforming Supplies or Services

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Tasks	Related Standards
<p>3. Notify the contractor of the Government's rejection of nonconforming supplies or services.</p>	<p>Promptness in giving the rejection notice is essential because, if timely notice of rejection is not furnished, acceptance may in certain cases be implied as a matter of law. The notice must:</p> <ul style="list-style-type: none"> <li>• Include the reasons for rejection.</li> <li>• Require the contractor to repair or replace the supplies or reperform the service at no increase in the contract price.</li> <li>• Be in writing if:               <ul style="list-style-type: none"> <li>– The supplies or services have been rejected at a place other than the contractor's plant;</li> <li>– The contractor persists in offering nonconforming supplies or services for acceptance; or</li> <li>– Delivery or performance was late without excusable cause.</li> </ul> </li> </ul> <p>Allow time (usually 10 days) for the contractor to respond.</p>
<p>4. Review the contractor's response.</p>	<p>Examples of possible contractor responses include:</p> <ul style="list-style-type: none"> <li>• Correction of the nonconformance without further comment;</li> <li>• An offer to correct the nonconformance;</li> <li>• Proposal that the Government accept the nonconforming supplies or services for a lower price or other consideration;</li> <li>• Refusal to correct work or offer consideration; or</li> <li>• No response.</li> </ul>

# UNIT 57: NONCOMMERCIAL ACQUISITION REMEDIES

## Part D: Reject Nonconforming Supplies or Services

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Tasks	Related Standards
<p>5. Determine whether to accept the contractor's offer to cure the nonconformance.</p>	<p>Normally:</p> <ul style="list-style-type: none"> <li>• Accept the offer at no change in contract price if the nonconformance can reasonably be cured within the contract's delivery or performance schedule.</li> <li>• If a cure is not possible within the delivery or performance schedule:               <ul style="list-style-type: none"> <li>– Determine whether to extend the delivery or performance schedule; and</li> <li>– If the decision is to extend the delivery or performance schedule, determine:                   <ul style="list-style-type: none"> <li>? The reasonableness of the proposed extension.</li> <li>? Whether to require consideration from the contractor and the amount of such consideration.                       <ul style="list-style-type: none"> <li>? If the contractor had reasonable grounds to believe that the deliverable was acceptable, do not require consideration for a reasonable extension of the delivery or performance schedule.</li> <li>? Otherwise, obtain consideration.</li> </ul> </li> </ul> </li> </ul> </li> </ul>
<p>6. Determine whether to accept nonconforming supplies or services given a contractor offer of consideration.</p>	<p>Only accept nonconforming supplies when in the Government's interest. Consider any:</p> <ul style="list-style-type: none"> <li>• Consideration offered by the contractor.</li> <li>• Information regarding the nature and extent of the nonconformance.</li> <li>• Written warranty that requires the contractor to make any necessary repairs or corrections after acceptance at no cost to the Government.</li> <li>• Recommendation for acceptance or rejection from other members of the Government acquisition team along with the rationale supporting that recommendation. Give special attention to any recommendation about the ability of the supply or service to meet health, safety, and performance requirements.</li> </ul>



# UNIT 57: NONCOMMERCIAL ACQUISITION REMEDIES

## Part D: Reject Nonconforming Supplies or Services

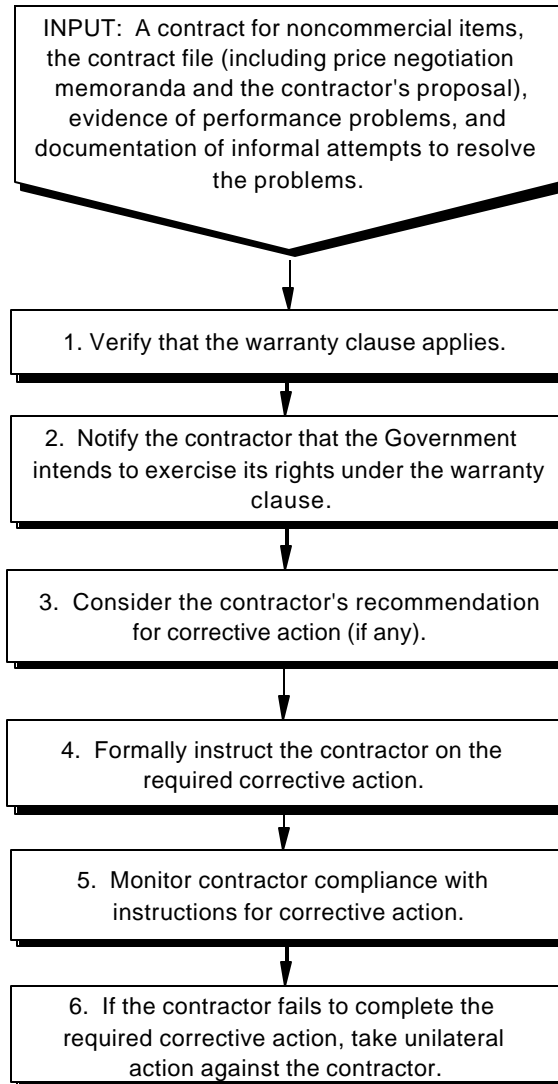
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Tasks	Related Standards
<p>7. If the contractor refuses to cure the nonconformance or offer acceptable additional consideration, determine the appropriate course of action.</p>	<p>The options include:</p> <ul style="list-style-type: none"><li>• Accepting the supply or service, if the contractor makes a persuasive case that:<ul style="list-style-type: none"><li>– There has been acceptance, or</li><li>– The work is acceptable under the contract’s terms and conditions;</li></ul></li><li>• Rejecting the supply or service and issuing a cure or show cause notice; or</li><li>• Arranging for correction of the defects at the contractor’s expense. Only correct work at the contractor’s expense if the contractor has first been given a chance to correct the work and failed to do so in a reasonable time.</li></ul>

# UNIT 57: NONCOMMERCIAL ACQUISITION REMEDIES

## Part E: Enforce Warranty Clause

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# UNIT 57: NONCOMMERCIAL ACQUISITION REMEDIES

## Part E: Enforce Warranty Clause

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Tasks	Related Standards
1. Verify that the warranty clause applies.	Base the verification on: <ul style="list-style-type: none"> <li>• The terms and conditions of the applicable warranty clause in the contract (e.g., duration of the warranty);</li> <li>• Whether Government obligations under the clause have been met; and</li> <li>• Whether the facts support the Government's case for invoking the warranty.</li> </ul>
2. Notify the contractor that the Government intends to exercise its rights under the warranty clause.	Prepare a written notice to the contractor of any breach of warranty. Assure that the notice: <ul style="list-style-type: none"> <li>• Meets any requirements established in the contract warranty clause; and</li> <li>• Is provided to the contractor within the time constraints established in the clause.</li> </ul>
3. Consider the contractor's recommendation for corrective action (if any).	If the warranty clause (e.g., Warranty of Supplies of a Complex Nature (FAR 52.246-18)) and Warranty of Systems and Equipment Under Performance Specifications or Design Criteria (FAR 52.246-19)) requires the contractor to submit a recommendation for corrective action, consider that recommendation in determining the appropriate corrective action.  Whenever practicable, reach agreement with the contractor on the appropriate corrective action.  Document results of any agreement with the contractor.
4. Formally instruct the contractor on the required corrective action.	When not part of the original notice of the breach of warranty, provide written notice of the required contractor action with a reasonable period to complete that action. Select the best alternative for making the Government whole available under the warranty clause, given the circumstances. Choose from among the alternatives presented in the contract clause.
5. Monitor contractor compliance with instructions for corrective action.	Ensure that the Government receives the full measure of relief provided by the warranty terms and conditions.

# **UNIT 57: NONCOMMERCIAL ACQUISITION REMEDIES**

## **Part E: Enforce Warranty Clause**

*October 2003*

# UNIT 57: NONCOMMERCIAL ACQUISITION REMEDIES

## Part E: Enforce Warranty Clause

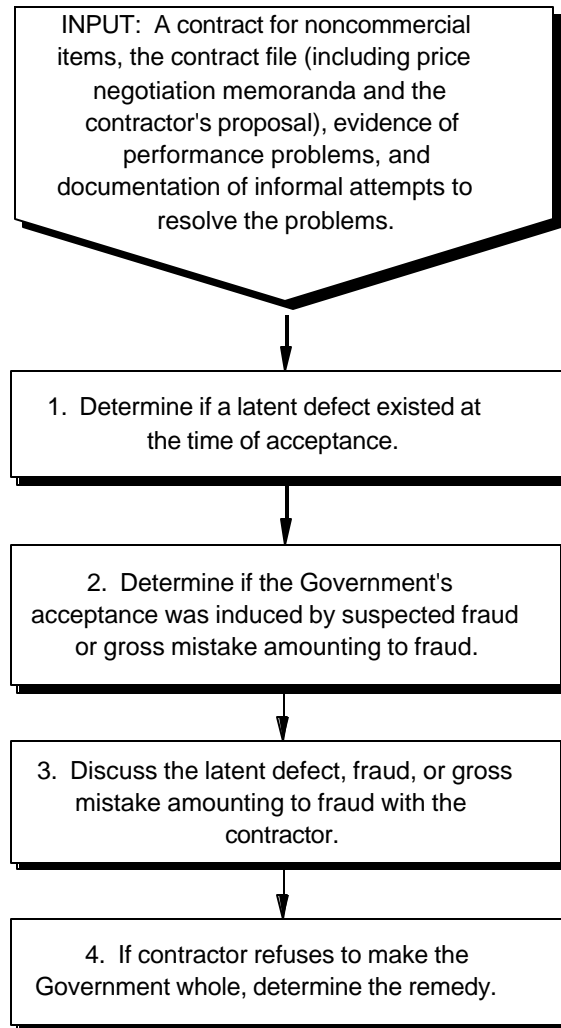
*October 2003*

<b>Tasks</b>	<b>Related Standards</b>
6. If the contractor fails to complete the required corrective action, take unilateral action against the contractor.	If the contractor fails to take the required corrective action, obtain the required supplies or services from other sources and charge the related cost to the contractor. This cost may be recovered by: <ul style="list-style-type: none"><li>• An offset against an existing contract; or</li><li>• A claim against the contractor.</li></ul>

# UNIT 57: NONCOMMERCIAL ACQUISITION REMEDIES

## Part F: Select a Formal Contract Remedy Under Fraud, Gross Mistake, or Latent Defect

*October 2003*



# UNIT 57: NONCOMMERCIAL ACQUISITION REMEDIES

## Part F: Select a Formal Contract Remedy Under Fraud, Gross Mistake, or Latent Defect

October 2003

Tasks	Related Standards
1. Determine if a latent defect existed at the time of acceptance.	<p>A latent defect is one that exists at the time of acceptance but cannot be discovered by a reasonable inspection. To determine if a latent defect existed at the time of acceptance, consider facts, such as:</p> <ul style="list-style-type: none"><li>• The contractor's liability for the defect;</li><li>• Whether the Government knew or had reason to know of the defect's existence at time of acceptance; and</li><li>• Whether the Government fulfilled its obligations for inspection, considering, for example, whether:<ul style="list-style-type: none"><li>– The inspection addressed commonly evaluated characteristics of the supply or service;</li><li>– Tests rigorous enough to reveal the defect would have been cost-effective; and</li><li>– The contractor proposed such testing in its offer or during contract negotiation.</li></ul></li></ul>

# UNIT 57: NONCOMMERCIAL ACQUISITION REMEDIES

## Part F: Select a Formal Contract Remedy Under Fraud, Gross Mistake, or Latent Defect

*October 2003*

Tasks	Related Standards
<p>2. Determine if the Government's acceptance was induced by suspected fraud or gross mistake amounting to fraud.</p>	<p>Fraud is deceit or trickery to gain unfair or dishonest advantage. Base the Government's case on gross mistake amounting to fraud when intent to defraud cannot be established but there is clear evidence that the contractor did not truthfully reveal all available information.</p> <p>To demonstrate the existence of a gross mistake amounting to fraud, prepare a finding stating that all of the following facts are present in the acquisition situation:</p> <ul style="list-style-type: none"> <li>• Acceptance was induced by the Government's reliance on the contractor's misrepresentation of fact (actual or implied) or concealment of a material fact.</li> <li>• The misrepresentation was made:               <ul style="list-style-type: none"> <li>– With knowledge of its falsity or in reckless or wanton disregard of the facts; and</li> <li>– With intent to mislead the Government into relying on the misrepresentation.</li> </ul> </li> <li>• As a consequence of the misrepresentation the Government suffered injury.</li> <li>• The misrepresentation has been or will be reported as evidence of potential fraud.</li> </ul>
<p>3. Discuss the latent defect, fraud, or gross mistake amounting to fraud with the contractor.</p>	<p>During the discussions:</p> <ul style="list-style-type: none"> <li>• Obtain the contractor's position and supporting data;</li> <li>• Request that the contractor:               <ul style="list-style-type: none"> <li>– Repair or replace the supply;</li> <li>– Reperform the service; and/or</li> <li>– Agree to adjust prices downward to compensate the Government for the reduced value of the supply or service;</li> </ul> </li> <li>• Negotiate a new delivery schedule and/or consideration; and</li> <li>• Document the results of negotiations.</li> </ul>



# UNIT 57: NONCOMMERCIAL ACQUISITION REMEDIES

## Part F: Select a Formal Contract Remedy Under Fraud, Gross Mistake, or Latent Defect

*October 2003*

Tasks	Related Standards
4. If contractor refuses to make the Government whole, determine the remedy.	Typically, the Government may either: <ul style="list-style-type: none"><li>• By contract or otherwise replace or correct the supplies or perform the services and charge the cost to the contractor;</li><li>• Negotiate an equitable adjustment in contract price or other terms and conditions; or</li><li>• Terminate the contract for default.</li></ul>

# UNIT 57: NONCOMMERCIAL ACQUISITION REMEDIES

## Appendix A: Selecting A Contract Remedy

*October 2003*

PROBLEM	OPTIONS	COMMENTS
The deliverable has been or will be delivered late and the delay is not excusable.	Reschedule the delivery date in exchange for consideration.	Appropriate when: <ul style="list-style-type: none"> <li>• There is no liquidated damages clause in the original contract;</li> <li>• There is a reasonable probability of delivery by the new date; and</li> <li>• The requiring activity can live with the new date.</li> </ul>
	Reduce or suspend progress, advance, or performance-based payments (e.g., FAR 52.232-16(c)(2) or FAR 52.232-12(k)(1)).	Appropriate when: <ul style="list-style-type: none"> <li>• The Government is financing the work; and</li> <li>• Performance of the contract is endangered by the contractor's failure to make progress.</li> </ul>
	Accept late delivery and impose liquidated damages.	Appropriate when: <ul style="list-style-type: none"> <li>• The contract provides for liquidated damages; and</li> <li>• There is a reasonable probability of delivery by a date that the requiring activity can tolerate.</li> </ul>
	Send a cure notice (10 days or more prior to the contract's delivery date) or a show cause notice (immediately upon expiration of the delivery period).	Appropriate when there is little probability of delivery by a date that the requiring activity can tolerate and/or the contractor has not offered adequate consideration.

# UNIT 57: NONCOMMERCIAL ACQUISITION REMEDIES

## Appendix A: Selecting A Contract Remedy

*October 2003*

PROBLEM	OPTIONS	COMMENTS
The deliverable has not been implicitly or explicitly accepted and does not conform to contract requirements.	Accept the deliverable without consideration.	Appropriate when the nonconformance is minor and obtaining consideration is not in the Government's interests (per FAR 46.407(f)).
	Accept the deliverable in exchange for consideration.	Appropriate when the requiring activity can tolerate nonconformance (per FAR 46.407(c)).
	Accept the deliverable and invoke a warranty to have the deliverable brought up to specification after acceptance.	Appropriate when there is an applicable warranty and immediate acceptance will benefit the requiring activity.
	Reject the deliverable and obtain correction or replacement at no cost to the Government.  Tell the payment office to withhold payment until an acceptable deliverable has been furnished.	Appropriate when there is a reasonable expectation that a satisfactory replacement will be provided by the delivery date in the contract, or, for consideration, within a reasonable time thereafter.
	Reject the deliverable and send a cure or show cause notice.	Appropriate when there is little expectation of receiving an acceptable product within a reasonable time.

# UNIT 57: NONCOMMERCIAL ACQUISITION REMEDIES

## Appendix A: Selecting A Contract Remedy

*October 2003*

PROBLEM	OPTIONS	COMMENTS
The deliverable has been accepted but does not conform to contract requirements.	Invoke an express warranty.	Appropriate when an express warranty applies.
	Invoke an implied warranty.	Appropriate when an implied warranty applies (i.e., because the contract does not establish finality of acceptance).
	Demand that the: <ul style="list-style-type: none"> <li>• Deliverable be replaced or corrected; and/or</li> <li>• Price adjusted downward.</li> </ul>	Appropriate when there was a latent defect or acceptance was based on fraud or gross mistake.
Other breaches when the contracting officer has exhausted all efforts at informal resolution of the problem.	Invoke whatever remedy (if any) is established in the applicable clause.	Examples: <ul style="list-style-type: none"> <li>• Liquidated damages under; the Liquidated Damages – Subcontracting Plan (FAR 52.219-16) for failing to comply with the subcontracting plan.</li> <li>• Cancellation, suspension, or termination of the contract under Equal Opportunity (FAR 52.222-26) (incorporated by reference if checked in FAR 52.212-5).</li> <li>• Withholding of payments and termination under Service Contract Act of 1965, As Amended (FAR 52.222-41).</li> <li>• Suspension of contract payments, termination for default, and suspension or debarment under Drug-Free Workplace (FAR 52.223-6).</li> </ul>
	Reduce or suspend progress, advance, or performance-based payments (e.g., FAR 52.232-16(c)(2) or FAR 52.232-12(k)).	Appropriate when the supplies deliverable or services will not be delivered or performed in accordance with the contract.
	Send a cure notice (10 days or more prior to the contract's delivery date).	Appropriate when the breach is of sufficient magnitude to warrant termination for default.