

Chapter 19
**Inspection, Acceptance
and Warranty**



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CHAPTER 19

INSPECTION, ACCEPTANCE, AND WARRANTY

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CHAPTER 19

INSPECTION, ACCEPTANCE, AND WARRANTY

I. INTRODUCTION.

- A. A fundamental goal of the acquisition process is to obtain quality goods and services. In furtherance of this goal, the government inspects tendered supplies or services to insure that they conform with contract requirements.
- B. While the right to inspect and test is very broad, it is not without limits. Frequently, government inspectors perform unreasonable inspections, rendering the government liable to the contractor for additional costs. Proper inspections are critical, because once the government accepts a product or service, it cannot revoke its acceptance except in narrowly defined circumstances.
- C. Attorneys can contribute to the success of the government procurement process by working with government inspectors and contracting officers to insure that each of these individuals understands the government's rights and obligations regarding inspection, acceptance, and warranty under government contracts.

II. FUNDAMENTAL CONCEPTS OF INSPECTION AND TESTING.

- A. General.
 - 1. The inspection clauses, which are remedy granting clauses, vest the government with significant rights and remedies. FAR 52.246-2 thru 52.246-12.
 - 2. In any dispute, the parties must identify the correct theory of recovery and applicable contractual provisions. The theory of recovery normally flows from a contractual provision. See Morton-Thiokol, Inc., ASBCA No. 32629, 90-3 BCA ¶ 23,207 (government denial of cost reimbursement rejected-board noted government's failure to cite Inspection clause).
- B. Origin of the Government's Right to Inspect.
 - 1. The government has the right to inspect to ensure that it receives conforming goods and services. FAR Part 46. The particular inspection clauses contained in a contract, if any, determine the government's right to inspect a contractor's performance.

2. Contract inspections fall into three general categories, depending on the extent of quality assurance needed by the government for the acquisition involved. These include:
 - a. Government reliance on inspection by the contractor (FAR 46.202-2);
 - b. Standard inspection requirements (FAR 46.202-3); and
 - c. Higher-level contract quality requirements (FAR 46.202-4).
3. The FAR contains several different inspection clauses. In determining which clause to use, consider:
 - a. The contract type (e.g., fixed-price, cost-reimbursement, time-and-materials, and labor-hour); and
 - b. The nature of the item procured (e.g., supply, service, construction, transportation, or research and development).
4. Depending upon the specific clauses in the contract, the government has the right to inspect and test supplies, services, materials furnished, work required by the contract, facilities, and equipment at all places and times, and, in any event, before acceptance. See, e.g., FAR 52.246-2 (supplies-fixed-price), 52.246-4 (services-fixed-price), 52.246-5 (services-cost-reimbursement), 52.246-6 (time-and-materials and labor-hour), 52.246-8 (R&D-cost-reimbursement), 52.246-9 (R&D), and 52.246-12 (construction).

C. Operation of the Inspection Clauses.

1. Definitions.
 - a. “Government contract quality assurance” is “the various functions, including inspection, performed by the Government to determine whether a contractor has fulfilled the contract obligations pertaining to quality and quantity.” FAR 46.101.
 - b. “Testing” is “that element of inspection that determines the properties or elements, including functional operation of supplies or their components, by the application of established scientific principles and procedures.” FAR 46.101.
2. The government may require a contractor to maintain an inspection system that is adequate to ensure delivery of supplies and services that conform to the requirements of the contract. David B. Lilly Co., ASBCA No. 34678,

92-2 BCA ¶ 24,973 (government ordered contractor to submit new inspection plan to eliminate systemic shortcomings in the inspection process).

3. Inspection and testing must *reasonably relate* to the determination of whether performance is in compliance with contractual requirements.
 - a. Contractually-specified inspections or tests are presumed reasonable unless they conflict with other contract requirements. General Time Corp., ASBCA No. 22306, 80-1 BCA ¶ 14,393.
 - b. If the contract specifies a test, the government may not require a higher level of performance than measured by the method specified. United Technologies Corp., Sikorsky Aircraft Div. v. United States, 27 Fed. Cl. 393 (1992).
 - c. The government may use tests other than those specified in the contract provided the tests do not impose a more stringent standard of performance. Donald C. Hubbs, Inc., DOT BCA No. 2012, 90-1 BCA ¶ 22,379 (use of rolling straightedge permitted after initial inspection determined that road was substantially nonconforming); Puroflow Corp., ASBCA No. 36058, 93-3 BCA ¶ 26,191 (upholding government's rejection of First Article Test Report for contractor's failure to perform an unspecified test).
 - d. Absent contractually specified tests, the government may use any tests that do not impose different or more stringent standards than those required by the contract. Space Craft, Inc., ASBCA No. 47997, 98-1 BCA ¶ 29,341 (government reasonably measured welds on clamp assemblies); Davey Compressor Co., ASBCA No. 38671, 94-1 BCA ¶ 26,433; Al Johnson Constr. Co., ENG BCA No. 4170, 87-2 BCA ¶ 19,952.
 - e. If the contract specifies no particular tests, consider the following factors in selecting a test or inspection technique:
 - (1) Consider the intended use of the product or service. A-Nam Cong Ty, ASBCA No. 14200, 70-1 BCA ¶ 8,106 (unreasonable to test coastal water barges on the high seas while fully loaded).
 - (2) Measure compliance with contractual requirements, and inform the contractor of the standards it must meet. Service Eng'g Co., ASBCA No. 40275, 94-1 BCA ¶ 26,382 (board refused to impose a military standard on contract for ship repair, where contract simply required

workmanship in accordance with “best commercial marine practice”); Tester Corp., ASBCA No. 21312, 78-2 BCA ¶ 13,373, mot. for recon. denied, 79-1 BCA ¶ 13,725.

- (3) Use standard industry tests, if available. DiCecco, Inc., ASBCA No. 11944, 69-2 BCA ¶ 7,821 (use of USDA mushroom standards upheld). But see Chelan Packing Co., ASBCA No. 14419, 72-1 BCA ¶ 9,290 (government inspector failed to apply industry standard properly).
- (4) The government must inspect and test correctly. Baifield Indus., Div. of A-T-O, Inc., ASBCA No. 13418, 77-1 BCA ¶ 12,308 (cartridge cases/rounds fired at excessive pressure).
- (5) Generally, the government is not required to perform inspections. Cannon Structures, Inc., AGBCA No. 90-207-1, 93-3 BCA ¶ 26,059.
 - (a) The government’s failure to discover defects during inspection does not relieve the contractor of the requirement to tender conforming supplies. FAR 52.246-2(j); George Ledford Constr., Inc., ENGBCA No. 6218, 97-2 BCA ¶ 29,172.
 - (b) However, the government may not unreasonably deny a contractor’s request to perform preliminary or additional testing. Alonso & Carus Iron Works, Inc., ASBCA No. 38312, 90-3 BCA ¶ 23,148 (no liability for defective fuel tank because government refused to allow a preliminary water test not prohibited by the contract); Praoil, S.R.L., ASBCA No. 41499, 94-2 BCA ¶ 26,840 (government unreasonably refused contractor’s request, per industry practice, to perform retest of fuel; termination for default overturned).
- (6) Requiring a contractor to perform tests not specified in the contract may entitle the contractor to an equitable adjustment of the contract price. CBI NA-CON, Inc., ASBCA No. 42268, 93-3 BCA ¶ 26,187.

4. Costs

- a. The burden of paying for testing depends on the clause used in the contract

- (1) For supplies, generally the contractor pays for all reasonable facilities and assistance for the safe and convenient performance of Government inspectors. FAR 52.246-2(d).
 - (a) The Government pays for all expenses for inspections or tests at other than the contractor or subcontractor's premises. FAR 52.246-2(d).
 - (b) If supplies are not ready for tests or inspections, the contractor may be charged for the additional costs of re-inspection or tests. FAR 52.246-2(e)(1).
 - (c) The contractor may also be charged for additional costs of inspection following a prior rejection. FAR 52.246-2(e)(2).
- (2) For services, the contractor and subcontractors are required to furnish, at no additional costs, reasonable facilities and assistance for the safe and convenient performance of tests or inspections on the premises of the contractor or subcontractor. FAR 52.246-4(d).
- (3) For construction, the contractor shall furnish, at no increase in contract price, all facilities, labor, and material reasonably needed for performing safe and convenient inspection and tests as may be required.
 - (a) If the work is not ready for tests or inspections or following a prior rejection, the contractor may be charged for the additional costs of re-inspection or tests. FAR 52.246-12(e).
 - (b) The Government is required to perform tests and inspections in a manner that will not unnecessarily delay the work. FAR 52.246-12(e).
 - (c) The Government may engage in destructive testing, i.e. examining already completed work by removing it or tearing it out. The contractor must promptly furnish all necessary facilities, labor, or material.
 - (i) If the work is defective, the contractor must defray the expenses of the examination and satisfactory reconstruction.

- (ii) If the work meets contract requirements, the contractor will receive an equitable adjustment for the additional services involved in the test and reconstruction, to include an extension of time if completion of the work was delayed by the test.
- b. If a test is found to be unreasonable, courts and boards may find that the government assumed the risk of loss resulting from an unreasonable test. See *Alonso & Carus Iron Works, Inc.*, ASBCA No. 38312, 90-3 BCA ¶ 23,148.

III. GOVERNMENT REMEDIES UNDER THE INSPECTION CLAUSE.

A. Introduction.

- 1. The inspection clauses give the government significant remedies. FAR 46.407; FAR 52.246; DFARS 246.407
- 2. The government's remedies under the inspection clauses operate in two phases. Initially, the government may demand correction of deficiencies. If this proves to be unsuccessful, the government may obtain corrective action from other sources.
- 3. Under the inspection clauses, the government's remedies depend upon when the contractor delivers nonconforming goods or services.

B. Defective Performance **BEFORE** the Required Delivery Date.

- 1. If the contractor delivers defective goods or services before the required delivery date, the government may:
 - a. Reject the tendered product or performance. *Andrews, Large & Whidden, Inc. and Farmville Mfg. Corp.*, ASBCA No. 30060, 88-2 BCA ¶ 20,542 (government demand for replacement of nonconforming windows sustained); But see *Centric/Jones Constr.*, IBCA No. 3139, 94-1 BCA ¶ 26,404 (government failed to prove that rejected work was noncompliant with specifications; contractor entitled to equitable adjustment for performing additional tests to secure government acceptance);
 - b. Require the contractor to correct the nonconforming goods or service, giving the contractor a reasonable opportunity to do so. *Premiere Bldg. Servs., Inc.*, B-255858, Apr. 12, 1994, 94-1 CPD ¶ 252 (government may charge reinspection costs to contractor);
or,

- c. Accept the nonconforming goods or services at a reduced price. Federal Boiler Co., ASBCA No. 40314, 94-1 BCA ¶ 26,381 (change in cost of performance to the contractor, not the damages to the government, is the basis for adjustment); Blount Bros. Corp., ASBCA No. 29862, 88-2 BCA ¶ 20,644 (government entitled to a credit totaling the amount saved by contractor for using nonconforming concrete). See also Valley Asphalt Corp., ASBCA No. 17595, 74-2 BCA ¶ 10,680 (although runway built to wrong elevation, only nominal price reduction allowed because no loss in value to the government).
 - 2. The government may not terminate the contract for default based on the tender of nonconforming goods or services before the required delivery date.
- C. Defective Performance **ON** the Required Delivery Date.
 - 1. If the contractor delivers nonconforming goods or services on the required delivery date, the government may:
 - a. Reject or require correction of the nonconforming goods or services;
 - b. Reduce the contract price and accept the nonconforming product; or
 - c. Terminate for default if performance is not in substantial compliance with the contract requirements. See FAR 52.249-6 to 52.249-10. When the government terminates a contract for default, it acquires rights and remedies under the Termination Clause, including the right to reprocure supplies or services similar to those terminated and charge the contractor the additional costs. See FAR 52.249-8(b).
 - 2. If the contractor has complied substantially with the requirements of the contract, the government must give the contractor notice and the opportunity to correct minor defects before terminating the contract for default. Radiation Tech., Inc. v. United States, 366 F.2d 1003 (Ct. Cl. 1966).
- D. Defective Performance **AFTER** the Required Delivery Date.
 - 1. Reject and require correction of the late nonconforming goods or services;
 - 2. Accept the late nonconforming goods or services at a reduced price; or

3. Terminate the contract for default. However, if the contractor has complied substantially with the requirements of the contract, albeit after the required delivery date, the government should give the contractor notice of the defects and an opportunity to correct them. See Franklin E. Penny Co. v. United States, 524 F.2d 668 (Ct. Cl. 1975) (late nonconforming goods may substantially comply with contract requirements). Note: Penny arguably expanded the concept of substantial compliance to include late delivery of nonconforming goods. While the courts and boards have not widely followed Penny, they have also not overruled it.

E. Remedies if the Contractor Fails to Correct Defective Performance.

If the contractor fails to correct defective performance after receiving notice and a reasonable opportunity to correct the work, the government may:

1. Contract with a commercial source to correct or replace the defective goods or services (obtaining funding is often difficult and may make this remedy impracticable), George Bernadot Co., ASBCA No. 42943, 94-3 BCA ¶ 27,242; Zimcon Professionals, ASBCA Nos. 49346, 51123, 00-1 BCA ¶ 30,839 (Government may contract with a commercial source to correct or replace the defective goods or services and may charge cost of correction to original contractor);
2. Correct or replace the defective goods or services itself;
3. Accept the nonconforming goods or services at a reduced price, or;
4. Terminate the contract for default. FAR 52.246-4(f); Firma Tiefbau Meier, ASBCA No. 46951, 95-1 BCA ¶ 27,593.

F. Special Rules for Service Contracts.

1. The inspection clause for fixed-price service contracts, FAR 52.246-4, is different than FAR 52.246-2, which pertains to fixed-price supply contracts.
2. The government's remedies depend on whether it is possible for the contractor to perform the services correctly.
 - a. Normally, the government should permit the contractor to re-perform the services and correct the deficiencies, if possible, for no additional fee. Pearl Properties, HUD BCA No. 95-C-118-C4, 96-1 BCA ¶ 28,219 (government's failure to give contractor notice

and an opportunity to correct deficient performance waived right to reduce payment).

- b. Otherwise, the government may:
 - (1) Require the contractor to take adequate steps to ensure future compliance with the contract requirements; and
 - (2) Reduce the contract price to reflect the reduced value of services received. Teltara, Inc., ASBCA No. 42256, 94-1 BCA ¶ 26,485 (government properly used random sampling inspections to calculate contract price reductions); Orlando Williams, ASBCA No. 26099, 84-1 BCA ¶ 16,983 (although default termination of janitorial contract was sustained, the government acted unreasonably by withholding maximum payments when some work had been performed satisfactorily). Even if it reduces the contract price, the government may also recover consequential damages. Hamilton Securities Advisory Servs., Inc. v. United States, 46 Fed. Cl. 164 (2000).
- c. Authorities disagree about whether the same failure in contract performance can support both a reduction in contract price and a termination for default. Compare W.M. Grace, Inc., ASBCA No. 23076, 80-1 BCA ¶ 14,256 (monthly deductions due to poor performance waived right to T4D during those months) and Wainwright Transfer Co., ASBCA No. 23311, 80-1 BCA ¶ 14,313 (deduction for HHG shipments precluded termination) with Cervetto Bldg. Maint. Co. v. United States, 2 Cl. Ct. 299 (1983) (reduction in contract price and termination are cumulative remedies).

IV. STRICT COMPLIANCE VS. SUBSTANTIAL COMPLIANCE.

A. Strict Compliance.

- 1. As a general rule, the government is entitled to strict compliance with its specifications. Blake Constr. Co. v. United States, 28 Fed. Cl. 672 (1993); De Narde Construction Co., ASBCA No. 50288, 00-2 BCA ¶ 30,929 (government entitled to type of rebar it ordered, even if contrary to trade practice). See also Cascade Pac. Int'l v. United States, 773 F.2d 287 (Fed. Cir. 1985); Ace Precision Indus., ASBCA No. 40307, 93-2 BCA ¶ 25,629 (government rejection of line block final assemblies that failed to meet contract specifications was proper). But see Zeller Zentralheizungsbau GmbH, ASBCA No. 43109, 94-2 BCA ¶ 26,657 (government improperly

rejected contractor's use of "equal" equipment where contract failed to list salient characteristics of brand name equipment).

2. Contractors must comply with specifications even if they vary from standard commercial practice. R.B. Wright Constr. Co. v. United States, 919 F.2d 1569 (Fed. Cir. 1990) (contract required three coats over painted surface although commercial practice was to apply only two); Graham Constr., Inc., ASBCA No. 37641, 91-2 BCA ¶ 23,721 (specification requiring redundant performance sustained).
3. Slight defects are still defects. Mech-Con Corp., GSBCA No. 8415, 88-3 BCA ¶ 20,889 (installation of 2" pipe insulation did not satisfy 1½" requirement).

B. Substantial Compliance.

1. "Substantial compliance" is a judicially created concept to avoid the harsh result of termination for default based upon a minor breach, and to avoid economic waste. The concept originated in construction contracts and has been extended to other types of contracts. See Radiation Tech., Inc. v. United States, 366 F.2d 1003 (Ct. Cl. 1966).
2. Substantial compliance gives the contractor the right to attempt to cure defective performance, even if that requires an extension of time beyond the original delivery date. The elements of substantial compliance are:
 - a. Timely delivery;
 - b. Contractor's good faith belief that it has complied with the contract's requirements, See Louisiana Lamps & Shades, ASBCA No. 45294, 95-1 BCA ¶ 27,577 (no substantial compliance because contractor had attempted unsuccessfully to persuade government to permit substitution of American-made sockets for specified German-made sockets);
 - c. Minor defects;
 - d. The defects can be corrected within a reasonable time; and
 - e. Time is not of the essence, i.e., the government does not require strict compliance with the delivery schedule.
3. Generally, the doctrine of substantial compliance does not require the government to accept defective performance by the contractor. Cosmos Eng'rs, Inc., ASBCA No. 19780, 77-2 BCA ¶ 12,713.

4. Except in those rare situations involving economic waste (discussed below), the doctrine of substantial compliance affects only when, not whether, the government may terminate for default. While substantial compliance requires the government to give the contractor a reasonable amount of time to correct the defects, including, if necessary, an extension beyond the original required delivery date, it does not preclude the government from terminating the contract for default if the contractor fails to correct the defects with a reasonable period of time. Firma Tiefbau Meier, ASBCA No. 46951, 95-1 BCA ¶ 27,593 (termination for default justified by contractor's repeated refusal to correct defective roof panels).

C. Economic Waste.

1. The doctrine of economic waste requires the government to accept noncompliant **construction** if the work, as completed, is suitable for its intended purpose and the cost of correction would far exceed the gain that would be realized. Granite Constr. Co. v. United States, 962 F.2d 998 (Fed. Cir. 1992), cert. denied, 113 S. Ct. 965 (1993); A.D. Roe Co., Inc., ASBCA No. 48782, 99-2 BCA ¶ 30,398 (economic waste is exception to general rule that government can insist on strict compliance with contract).
2. To be "suitable for its intended purpose," the work must substantially comply with the contract. Amtech Reliable Elevator Co. v. General Servs. Admin., GSBCA No. 13184, 95-2 BCA ¶ 27,821 (no economic waste where contractor used conduits for fire alarm wiring which were not as sturdy as required by specifications and lacked sufficient structural integrity); Triple M Contractors, ASBCA No. 42945, 94-3 BCA ¶ 27,003 (no economic waste where placement of reinforcing materials in drainage gutters reduced useful life from 25 to 20 years); Shirley Constr. Corp., ASBCA No. 41908, 93-3 BCA ¶ 26,245 (concrete slab not in substantial compliance even though it could support the design load; without substantial compliance, doctrine of economic waste inapplicable); Valenzuela Engineering, Inc., ASBCA No. 53608, 53936, 04-1 BCA ¶ 32,517 (absent expert testimony, government can demand strict performance for structure designed to contain explosions).

V. PROBLEM AREAS IN TESTING AND INSPECTION.

A. Claims Resulting from Unreasonable Inspections.

1. Government inspections may give rise to equitable adjustment claims if they delay the contractor's performance or cause additional work. The government:

- a. Must perform reasonable inspections. FAR 52.246-2. Donald C. Hubbs, Inc., DOT BCA No. 2012, 90-1 BCA ¶ 22,379 (more sophisticated test than specified, rolling straightedge, was reasonable).
 - b. Must avoid overzealous inspections. The government may not inspect to a level beyond that authorized by the contract. Overzealous inspection may impact adversely upon the government's ability to reject the contractor's performance, to assess liquidated damages, or to otherwise assert its rights under the contract. See The Libertatia Associates, Inc., 46 Fed. Cl. 702 (2000) (COR told contractor's employees that he was Jesus Christ and that CO was God); Gary Aircraft Corp., ASBCA No. 21731, 91-3 BCA ¶ 24,122 ("overnight change" in inspection standards was unreasonable); Donohoe Constr. Co., ASBCA No. 47310, 98-2 BCA ¶ 30,076, motion for reconsideration granted in part on other grounds, ASBCA No. 47310, 99-1 BCA ¶ 30,387 (government quality control manager unreasonably rejected proposed schedules, ignored contractor submissions for weeks, and told contractor he would "get even" with him); Lan-Cay, Inc., ASBCA 56140, 2012-1 BCA ¶ 34,935 (contractor affidavits consisting of personal attacks, argument, hearsay and conjecture lack credibility and are insufficient to show overzealous inspection).
 - c. Must resolve ambiguities involving inspection requirements in a timely manner. P & M Indus., ASBCA No. 38759, 93-1 BCA ¶ 25,471.
 - d. Must exercise reasonable care when performing tests and inspections prior to acceptance of products or services, and may not rely solely on destructive testing of products after acceptance to discover a deficiency it could have discovered before acceptance. Ahern Painting Contractors, Inc., GSBCA No. 7912, 90-1 BCA ¶ 22,291.
2. Improper inspections:
- a. May excuse a contractor's delay, thereby delaying or preventing termination for default. Puma Chem. Co., GSBCA No. 5254, 81-1 BCA ¶ 14,844 (contractor justified in refusing to proceed when government test procedures subjected contractor to unreasonable risk of rejection).

- b. May justify claims for increased costs of performance under the delay of work or changes clauses in the contract. See, e.g., Hull-Hazard, Inc., ASBCA No. 34645, 90-3 BCA ¶ 23,173 (contract specified joint inspection, however, government conducted multiple inspections and bombarded contractor with “punch lists”); H.G. Reynolds Co., ASBCA No. 42351, 93-2 BCA ¶ 25,797; Harris Sys. Int’l, Inc., ASBCA No. 33280, 88-2 BCA ¶ 20,641 (10% “spot mopping” specified, government demanded 100% for “uniform appearance”). But see Trans Western Polymers, Inc. v. Gen. Servs. Admin., GSBCA No. 12440, 95-1 BCA ¶ 27,381 (government properly performed lot by lot inspection after contractor failed to maintain quality control system); Space Dynamics Corp., ASBCA No. 19118, 78-1 BCA ¶ 12,885 (defects in aircraft carrier catapult assemblies justified increased government inspection).
 - c. May give rise to a claim of government breach of contract. Adams v. United States, 358 F.2d 986 (Ct. Cl. 1966) (government breached contract when inspector disregarded inspection plan, doubled inspection points, complicated construction, delayed work, increased standards, and demanded a higher quality tent pin than specified); Electro-Chem Etch Metal Markings, Inc., GSBCA No. 11785, 93-3 BCA ¶ 26,148. But see Southland Constr. Co., VABCA No. 2217, 89-1 BCA ¶ 21,548 (government engineer’s “harsh and vulgar” language, when appellant contributed to the tense atmosphere, did not justify refusal to continue work) Olympia Reinigung GmbH, ASBCA Nos. 50913, 51225, 51258, 02-2 BCA ¶ 32,050 (allegation of aggressive government inspections did not render termination for default arbitrary or capricious).
3. It is a constructive change to test a standard commercial item to a higher level of performance than is required in commercial practice. Max Blau & Sons, Inc., GSBCA No. 9827, 91-1 BCA ¶ 23,626 (insistence on extensive deburring and additional paint on a commercial cabinet was a constructive change).
 4. Government breach of its duty to cooperate with the contractor may shift the cost of damages caused by testing to the government. See Alonso & Carus Iron Works, Inc., ASBCA No. 38312, 90-3 BCA ¶ 23,148 (government refusal to permit reasonable, preliminary test proposed by contractor shifted the risk of loss to the government).

B. Waiver, Prior Course of Dealing, and Other Acts Affecting Testing and Inspection.

1. By his actions, an authorized government official may waive contractual requirements if the contractor reasonably believes that a required specification has been suspended or waived. Gresham & Co. v. United States, 470 F.2d 542, 554 (Ct. Cl. 1972), Perkin-Elmer's Corp. v. United States, 47 Fed. Cl. 672 (2000).
2. The government may also be estopped from enforcing a contract requirement. The elements of equitable estoppel are:
 - a. Authorized government official;
 - b. Knowledge by government official of true facts;
 - c. Ignorance by contractor of true facts; and
 - d. Detrimental reliance by the contractor. Longmire Coal Corp., ASBCA No. 31569, 86-3 BCA ¶ 19,110.
3. Normally, previous government acceptance of similar nonconforming performance is insufficient to demonstrate waiver of specifications.
 - a. Government acceptance of nonconforming performance by other contractors normally does not waive contractual requirements. Moore Elec. Co., ASBCA No. 33828, 87-3 BCA ¶ 20,039 (government's allowing deviation to another contractor on prior contract for light pole installation did not constitute waiver, even where both contractors used the same subcontractor).
 - b. Government acceptance of nonconforming performance by the same contractor normally does not waive contractual requirements. Basic Marine, Inc., ENG BCA No. 5299, 87-1 BCA ¶ 19,426.
4. However, numerous government acceptances of similar nonconforming performance by the same contractor may waive the requirements of that particular specification. Gresham & Co. v. United States, 470 F.2d 542 (Ct. Cl. 1972) (acceptance of dishwashers without detergent dispensers eventually waived requirement to equip with dispensers); Astro Dynamics, Inc., ASBCA No. 28381, 88-3 BCA ¶ 20,832 (acceptance of seven shipments of rocket tubes with improper dimensions precluded termination for default for same reason on the eighth shipment). But see Kvass Constr. Co., ASBCA No. 45965, 94-1 BCA ¶ 26,513 (Navy's acceptance on four prior construction contracts of "expansion compensation devices" for a heat distribution system did not waive contract requirement for "expansion loops").

5. Generally, an inspector's failure to require correction of defects is insufficient to waive the right to demand correction. Hoboken Shipyards, Inc., DOT BCA No. 1920, 90-2 BCA ¶ 22,752 (government not bound by an inspector's unauthorized agreement to accept improper type of paint if a second coat was applied).

VI. ACCEPTANCE.

A. Acceptance.

Acceptance is the "act of an authorized representative of the Government by which the Government, for itself or as agent of another, assumes ownership of existing identified supplies tendered or approves specific services rendered as partial or complete performance of the contract." FAR 46.101.

B. General Principles of Acceptance.

1. Acceptance is conclusive except for latent defects, fraud, gross mistakes amounting to fraud, or as otherwise provided for in the contract, e.g., warranties. FAR 52.246-2(k); Hogan Constr., Inc., ASBCA No. 39014, 95-1 BCA ¶ 27,398 (government improperly terminated contract for default after acceptance).
2. Acceptance entitles the contractor to payment and is the event that marks the passage of title from the contractor to the government.
3. The government generally uses a DD Form 250 to expressly accept tendered goods or services.
4. The government may impliedly accept goods or services by:
 - a. Making final payment. Norwood Precision Prods., ASBCA No. 24083, 80-1 BCA ¶ 14,405. See also Farruggio Constr. Co., DOT CAB No. 75-2-75-2E, 77-2 BCA ¶ 12,760 (progress payments on wharf sheeting contract did not shift ownership and risk of loss to the government). Note, however, that payment, even if no more monies are due under a contract, does not necessarily constitute final acceptance. Spectrum Leasing Corp., GSBCA No. 7347, 90-3 BCA ¶ 22,984 (no acceptance because contract provided that final testing and acceptance would occur after the last payment). See also Ortech, Inc., ASBCA No. 52228, 00-1 BCA ¶ 30,764 (contractor's acceptance of final payment from the government may preclude a later claim by the contractor).

- b. Unreasonably delaying acceptance. See, e.g., Cudahy Packing Co. v. United States, 75 F. Supp. 239 (Ct. Cl. 1948) (government took two months to reject eggs); Mann Chem. Labs, Inc. v. United States, 182 F. Supp. 40 (D. Mass. 1960).
 - c. Using or changing a product. Ateron Corp., ASBCA No. 46,867, 96-1 BCA ¶ 28,165 (government use of products inconsistent with contractor's ownership); The Interlake Cos. v. General Servs. Admin., GSBCA No. 11876, 93-2 BCA ¶ 25,813 (government improperly rejected material handling system after government changes rendered computer's preprogrammed logic useless).
5. Unconditional acceptance of partial deliveries may waive the right to demand that the final product perform satisfactorily. See Infotec Dev., Inc., ASBCA No. 31809, 91-2 BCA ¶ 23,909 (multi-year contract for Minuteman Missile software).
6. As a general rule, contractors bear the risk of loss or damage to the contract work prior to acceptance. See FAR 52.246-16, Responsibility for Supplies (supply); FAR 52.236-7, Permits and Responsibilities (construction). See also Meisel Rohrbau GmbH, ASBCA No. 40012, 92-1 BCA ¶ 24,716 (damage caused by children); DeRalco Corp., ASBCA No. 41306, 91-1 BCA ¶ 23,576 (structure destroyed by 180 MPH hurricane winds although construction was 97% complete and only required to withstand 100 MPH winds); G&C Enterprises, Inc. v. United States, 55 Fed. Cl. 424 (2003) (no formal acceptance where structure destroyed by windstorm after project 99% complete and Army had begun partial occupation) .
- a. If the contract specifies f.o.b. destination, the contractor bears the risk of loss during shipment even if the government accepted the supplies prior to shipment. FAR 52.246-16; KAL M.E.I. Mfg. & Trade Ltd., ASBCA No. 44367, 94-1 BCA ¶ 26,582 (contractor liable for full purchase price of cover assemblies lost in transit, even though cover assemblies had only scrap value).
 - b. In construction contracts, the government may use and possess the building prior to completion. FAR 52.236-11, Use and Possession Prior to Completion. The contractor is relieved of responsibility for loss of or damage to work resulting from the government's possession or use. See Fraser Eng'g Co., VABCA No. 3265, 91-3 BCA ¶ 24,223 (government responsible for damaged cooling tower when damage occurred while tower was in its sole possession and control).

C. Exceptions to the Finality of Acceptance.

1. Latent defects may enable the government to avoid the finality of acceptance. To be latent, a defect must have been:
 - a. Unknown to the government. See Gavco Corp., ASBCA No. 29763, 88-3 BCA ¶ 21,095;
 - b. In existence at the time of acceptance. See Santa Barbara Research Ctr., ASBCA No. 27831, 88-3 BCA ¶ 21,098; mot. for recon. denied, 89-3 BCA ¶ 22,020 (failure to prove crystalline growths were in laser diodes at the time of acceptance and not reasonably discoverable); and
 - c. Not discoverable by a reasonable inspection. Munson Hammerhead Boats, ASBCA No. 51377, 00-2 BCA ¶ 31,143 (defects in boat surface, under paint and deck covering, not reasonably discoverable by government until four months later); Stewart & Stevenson Services, Inc., ASBCA No. 52140, 00-2 BCA ¶ 31,041 (government could revoke acceptance even though products passed all tests specified in contract); Wickham Contracting Co., ASBCA No. 32392, 88-2 BCA ¶ 20,559 (failed spliced telephone and power cables were latent defects and not discoverable); Dale Ingram, Inc., ASBCA No. 12152, 74-1 BCA ¶ 10,436 (mahogany plywood was not a latent defect because a visual examination would have disclosed); But see Perkin-Elmer Corp. v. United States., 47 Fed. Cl. 672 (2000) (six years was too long to wait before revoking acceptance based on latent defect).
2. Contractor fraud allows the government to avoid the finality of acceptance. See D&H Constr. Co., ASBCA No. 37482, 89-3 BCA ¶ 22,070 (contractors' use of counterfeited National Sanitation Foundation and Underwriters' Laboratories labels constituted fraud). To establish fraud, the government must prove that:
 - a. The contractor intended to deceive the government;
 - b. The contractor misrepresented a material fact; and
 - c. The government relied on the misrepresentation to its detriment. BMY – Combat Sys. Div. Of Harsco Corp., 38 Fed.Cl. 109 (1997) (contractor's knowing misrepresentation of adequate testing was fraud); United States v. Aerodex, Inc., 469 F.2d 1003 (5th Cir. 1972).

3. A gross mistake amounting to fraud may avoid the finality of acceptance. The elements of a gross mistake amounting to fraud are:
 - a. A major error causing the government to accept nonconforming performance;
 - b. The contractor's misrepresentation of a fact, Bender GmbH, ASBCA No. 52266, 04-1 BCA ¶ 32,474 (repeated false invoices in "wonton disregard of the facts" allowed government to revoke final acceptance); and
 - c. Detrimental government reliance on the misrepresentation. Z.A.N. Co., ASBCA No. 25488, 86-1 BCA ¶ 18,612 (gross mistake amounting to fraud established where the government relied on Z.A.N. to verify watch caliber and Z.A.N. accepted watches from subcontractor without proof that the caliber was correct);
4. Warranties. Warranties operate to revoke acceptance if the nonconformity is covered by the warranty.
5. Revocation of Acceptance.
 - a. Once the government revokes acceptance, its normal rights under the inspection, disputes, and default clauses of the contract are revived. FAR 52.246-2(l) (Inspection-Supply clause expressly revives rights); Spandome Corp. v. United States, 32 Fed. Cl. 626 (1995) (government revoked acceptance, requested contractor to repair structure, and demanded return of purchase price when contractor refused); Jo-Bar Mfg. Corp., ASBCA No. 17774, 73-2 BCA ¶ 10,311 (contractor's failure to heat treat aircraft bolts entitled government to recover purchase price paid). Cf. FAR 52.246-12 (Inspection-Construction clause is silent on reviving rights).
 - b. Failure to timely exercise revocation rights may waive the government's contractual right to revoke acceptance. Perkin-Elmer's Corp. v. United States, 47 Fed. Cl. 672 (2000) (Air Force attempted to revoke acceptance of "portable wear metal analyzer" six years after acceptance; Court of Federal Claims held the six-year delay in revoking acceptance was unreasonable, thus prohibiting government recovery on the claim).

VII. WARRANTY.

A. General Principles.

1. Warranties may extend the period for conclusive government acceptance. FAR 46.7; DFARS 246.7; AR 700-139, ARMY WARRANTY PROGRAM (7 Oct 05).
2. Warranties may be express or implied. Fru-Con Constr. Corp., 42 Fed. Cl. 94 (1998) (design specifications result in an implied warranty; no implied warranty with performance specifications because of the broader discretion afforded the contractor in their implementation).
3. Normally, warranties are defined by the time and scope of coverage.
4. The use of warranties is not mandatory. FAR 46.703. In determining whether a warranty is appropriate for a specific acquisition, consider:
 - a. Nature and use of the supplies or services;
 - b. Cost;
 - c. Administration and enforcement;
 - d. Trade practice; and
 - e. Reduced quality assurance requirements, if any.

B. Asserting Warranty Claims.

1. When asserting a warranty claim, the government must prove:
 - a. That there was a defect when the contractor completed performance. Vistacon Inc. v. General Servs. Admin., GSBCA No. 12580, 94-2 BCA ¶ 26,887;
 - b. That the warranted defect was the most probable cause of the failure. Hogan Constr., Inc., ASBCA No. 38801, 95-1 BCA ¶ 27,396; A.S. McGaughan Co., PSBCA No. 2750, 90-3 BCA ¶ 23,229; R.B. Hazard, Inc., ASBCA No. 41061, 91-2 BCA ¶ 23,709 (government denied recovery under warranty theory because it failed to prove that pump failure was not the result of government misuse and that defective material or workmanship was the most probable cause of the damage);
 - c. That the defect was within the scope of the warranty;

- d. That the defect arose during the warranty period;
 - e. That the contractor received notice of the defect and its breach of the warranty, Land O’Frost, ASBCA Nos. 55012, 55241, 2003 B.C.A. (CCH) ¶ 32,395 (Army’s warranty claim failed to provide specific notice of a defect covered by the warranty); and
 - f. The cost to repair the defect, if not corrected by the contractor. See Hoboken Shipyards, Inc., DOT BCA No. 1920, 90-2 BCA ¶ 22,752; Globe Corp., ASBCA No. 45131, 93-3 BCA ¶ 25,968 (reducing government’s claim against the contractor because the government inconsistently allocated the cost of repairing defects).
- 2. The government may invalidate a warranty through improper maintenance, operation, or alteration.
 - 3. A difficult problem in administering warranties on government contracts is identifying and reporting defects covered by the warranty.
 - 4. Warranty clauses survive acceptance. Shelby’s Gourmet Foods, ASBCA No. 49883, 01-1 BCA ¶ 31,200 (government entitled to reject defective “quick-cooking rolled oats” under warranty even after initial acceptance).

C. Remedies for Breach of Warranty.

- 1. The FAR provides the basic outline for governmental remedies. See FAR 52.246-17 and 52.246-18. If the contractor breaches a warranty clause, the government may—
 - a. Order the contractor to repair or replace the defective product; or
 - b. Retain the defective product at a reduced price;
- 2. If the contractor fails to repair or replace the supplies within the time established, or fails to accept return of the nonconforming supplies or fails to make progress in correcting or replacing them, the government may
 - a. Correct the defect in-house or by contract and charge the cost to the contractor; or
 - b. Require an equitable adjustment in the contract price. However, the adjustment cannot reduce the price below the scrap value of the product.

D. Mitigation of Damages.

1. The government must attempt to mitigate its damages.
2. The government may recover consequential damages. Norfolk Shipbldg. and Drydock Corp., ASBCA No. 21560, 80-2 BCA ¶ 14,613 (government entitled to cost of repairs caused by ruptured fuel tank).

VIII. CONCLUSION