

## Chapter 11 - Contract Management

11.001 (1994-06-23) Contracting officers must ensure that the terms of the contract are met and that the Crown's interests protected. The level of involvement in contract management activities will vary with the scope and complexity of the procurement.

*Effective client service will be enhanced when the contracting officer verifies with the client, on all milestone dates in a contract, that the contractor is meeting the terms of the contract.*

### Progress Claims and Invoicing

11.002 (1994-06-23) No payment, other than a progress payment, may be made under a contract unless a person authorized by the appropriate minister certifies that:

- (a) the work has been performed,
- (b) the goods supplied or the service rendered, as the case may be, and
- (c) the price charged is according to the contract or, if not specified by the contract, is reasonable.

Where a payment is to be made before the completion of the work, delivery of the goods or rendering of the service, the payment must be in accordance with the contract.

11.003 (1994-06-23) Progress claims are normally routed, through the contracting officer, to the client for verification and authorization of payment. Contracting officers processing payment claims must act promptly. The standard due date for payment is thirty (30) days after invoicing or receipt of goods, whichever is later. Acceptable performance standards must be set by the sectors/regions to allow adequate time for the certification of the claim by an authorized representative of the client. All other invoices are normally sent directly to the client by the contractor.

*Some confusion for contractors and clients may result because Public Works and Government Services Canada (PWGSC) is both the contracting authority and, with the Minister's role as Receiver General for Canada, the issuer of the cheque. If there is a payment problem the contracting officer must determine the source of the problem and take appropriate action.*

11.004 (2003-05-30) Progress payment claims must include the completed form [PWGSC-TPSGC 1111](#), Claim for Progress Payment, which requires a certification of contract expenditures. If the contractor's certification of the claim is false, this cannot be used against third party claimants.

11.005 (1994-06-23) Invoices that include billings for items not received are not considered due until all items are received. If a contractor wishes payment for a partial shipment, a revised invoice, if permitted by the contract, must be submitted.

11.006 (1994-06-23) Clients are required to notify suppliers of any error or missing information in an invoice or supporting documentation, within fifteen (15) days of receipt. Clients should return, within fifteen (15) days, any invoice not in accordance with the terms of the contract to the contractor for resubmission.

### Claims for Exchange Rate Adjustment

11.007 (2003-05-30) For contracts subject to the exchange rate fluctuation adjustment provision, the Conversion Factor (Initial) shown in Column 3 of the form Claim for Exchange Rate Adjustments, [PWGSC-TPSGC 9411](#), will establish the conversion rate against which claims for adjustment will be calculated, subject to the criteria set out in clauses [C3015C](#), [C3020C](#) or [C3030C](#). This Conversion Factor (Initial) will normally be the same as the Bank of Canada rate on the date of bid closing or any other date as otherwise specified in the contract. (See [7D.413](#).)

## Interest

11.008 (1994-06-23) Simple interest will be paid automatically on all amounts that have been outstanding for more than fifteen (15) days following the day the amount was due and payable, but only if the government is responsible for the delay. The amount of interest will be shown separately on the cheque stub or accompanying remittance advice.

Interest will be calculated from the day after the due date to the day prior to the date that the payment is issued. However, interest will not be paid until the contract payment is made.

Interest is calculated according to the following formula:

$$\text{Interest} = \text{Amount owed} \times ((\text{that date's bank rate} + 1.25\%) \times (\text{number of days interest payable}/365))$$

## Taxes and Duties

### Goods and Services Tax/Harmonized Sales Tax

11.010 (1998-02-16) Goods and Services Tax (GST) and the Harmonized Sales Tax (HST), as applicable, is payable on the invoiced amount before any discount for prompt payment or penalty for late payment.

11.011 (2004/05/14) GST/HST is payable when the progress, milestone, or advance payment becomes due or the client pays it.

*Canada Revenue Agency (CRA) considers advance payments to be progress payments*

11.012 (1998-02-16) GST/HST is normally paid on the total amount claimed before any holdback is deducted. No GST/HST is paid when the holdback is released.

The exception is a holdback under legislation or under a contract for the construction, renovation or repair of a marine vessel or real property. GST/HST is due when the amount held back becomes due or when the contractor receives it, whichever is earlier.

### Excise Taxes

11.013 (1994-06-23) The general terms and conditions provide for adjustments in firm price and ceiling price contracts in the event of changes in excise taxes after the contract date.

### After-Imposed and After-Relieved Taxes

11.014 (1994-06-23) A contract will be increased by the actual amount of any after-imposed taxes, provided the contractor forwards to the contracting officer a certified statement showing that the increase in cost is directly attributable to the after-imposed taxes and that no amount for such newly imposed taxes was included in the contract price.

11.015 (1994-06-23) A contract will be decreased by the actual amount of any after-relieved taxes.

### After-Imposed and After-Relieved Duties

11.016 (1994-06-23) Provision for price adjustments, upward or downward, may be made in firm price contracts, in the event that changes in duties, which affect the cost of the work to the contractor, are made after the contract date.

11.017 (1994-06-23) The contract price shall be increased by the actual amount of any after-imposed duties, provided the contractor forwards to the contracting officer a certified statement showing

that the increase in cost is directly attributed to the after-imposed duties, and that no amount for such newly imposed duties was included in the contract price.

- 11.018 (1994-06-23) The contract price shall be decreased by the actual amount of any after-relieved duties.

## Services of Non-Residents

### Entry Requirements

- 11.019 (1994-06-23) In the performance of a contract, a contractor may wish to use the services of a non-resident employee on a temporary basis. The determination of eligibility to enter Canada is the responsibility of Immigration Canada.
- 11.020 (1994-06-23) United States nationals may apply for employment authorization at the port of entry; all others must obtain authorization before the point of entry. To obtain the correct documentation and necessary authorizations, the applicant must contact the nearest Canadian Embassy or Consulate.

Canadian citizens residing outside Canada always have the right to work in Canada.

- 11.021 (1994-06-23) In cases of emergency service requirements, the client (or Public Works and Government Services Canada [PWGSC]) should provide the contractor with written notice, including details of the emergency. In some emergencies, this information may be provided by telephone to the appropriate immigration authorities.

### Withholding in Lieu of Taxes

- 11.022 (2005-06-10) Clients, on whose behalf a contract for services rendered in Canada has been awarded by PWGSC to a non-resident contractor, are responsible for: withholding 15 percent of any amounts payable, in lieu of taxes; remittance of this amount to Canada Revenue Agency (CRA); and reporting the amounts paid, and withheld, to CRA. (See [6D.430](#) and [7A.103](#).)

*PWGSC contracting officers should remind clients of their obligations in this regard. Reference should be made to CRA Income Tax Information Circular [IC75-6R2](#).*

- 11.023 (2005-06-10) When a contract provides for services to be performed in more than one country, including Canada, an allocation of the contract price is required. Only the portion of the payment attributable to services performed in Canada will be subject to a withholding of 15 percent. (See sections 32-34 of Income Tax Information Circular [IC75-6R2](#).)
- 11.024 (1994-06-23) Although most tax treaties between Canada and other countries provide for some relief from Canadian tax, Canada does not normally relinquish its right to withhold tax pursuant to the provisions of [section 153](#) of the *Income Tax Act* and subsection 105 (1) of the *Income Tax Regulations*.
- 11.025 (2004-05-14) Where the non-resident contractor can adequately demonstrate, based on treaty protection, that withholding normally required is in excess of the ultimate Canadian tax liability, the withholding may be reduced accordingly by CRA.
- 11.026 (2004-05-14) Requests for a waiver or a reduction of the amount required to be withheld will not be entertained unless deductions at source are remitted to CRA.

### Overtime

- 11.027 (1996-06-03) When a contractor incurs overtime work on Crown contracts, added costs may be incurred by the Crown in the form of overtime premiums. Recognition of the additional cost by the Crown depends upon the attendant circumstances and the cause of the overtime. Crown work

should not attract higher overtime charges than would apply to similar commercial work.

Scheduled overtime premium costs included in a contractor's overhead account and applied to Crown contracts are allowed if Crown contracts account for a pro rata share of the overtime.

Unscheduled overtime premium costs to specific contracts are allowable only if the overtime is due to PWGSC or client demands for accelerated delivery, increased delivery quantities, or other reasons initiated by the client for which benefit to the Crown can be demonstrated.

If the need for unscheduled overtime appears likely, the contracting officer should ensure that proper provisions concerning authorization, rates and dollar limits are included in the contract.

The contracting officer should consult with the cost analyst to ascertain whether the contractor's cost system includes overtime premium costs in the overhead account or as a direct charge to the particular contract.

11.028 (1994-06-23) When deciding to authorize unscheduled overtime, the contracting officer should:

- (a) consult with the client and jointly determine that authorization and the need of overtime will result in benefit to the Crown;
- (b) ensure that funds are available to reimburse the contractor;
- (c) determine the aggregate limits of time and costs of the overtime to be authorized;
- (d) determine what delegation of authority, if any, should be made to the client representative;
- (e) ensure that provision for proper claiming and approval of overtime claimed, and overtime payments to the contractor is included in the contract.

## Claims for Extra Payment

11.031 (2002-12-13) From time to time, contractors submit claims for upward price revision of firm price contracts, based on changes caused by Crown action. A firm price contract may not be amended to provide for upward price revision without prior approval of Treasury Board (TB), unless either the contract contains an escalation clause covering the adjustment requested or the contract terms and conditions allow for the adjustment requested.

When unusual circumstances exist, other than those a contractor might reasonably anticipate, a contractor or a sector/region may submit a claim to the Contract Audit Group (CAG).

*These Extra Payments shall cover only the additional reasonable costs incurred by the contractor and will be considered only where the circumstances were beyond the contractor's control and where the contractor was without fault or negligence and could not reasonably have foreseen the actual circumstances at the time the contract was awarded.*

11.032 (2003-05-30) The approval of TB is required for all Extra Payment claims, irrespective of the dollar amount. The advice of Legal Services should be obtained as to whether the extra payments may be considered as an amendment to the contract or an "ex gratia" payment.

*TB has granted full authority to deputy heads to make ex gratia payments, and to designate officials within the department to act on their behalf. Refer to TB [Policy on Claims and Ex gratia Payments](#).*

*As a general rule, claims for Extra Payments arising solely from the following causes will not be approved by TB:*

- increases in labour or material costs;
- changes in freight rates;

- *revisions in exchange rates;*
- *delays caused by the contractor;*
- *errors on the part of the contractor; or*
- *other difficulties which the contractor overlooked, but should have foreseen.*

## Assignment of Monies

- 11.033 (1994-06-23) Contracting officers may receive from contractors, banks, other financial institutions, or other sources, statements or documents showing that persons or companies other than the contractor claim to be entitled to receive monies under a contract with PWGSC or Canadian Commercial Corporation (CCC).
- 11.034 (2001-12-10) Payments to persons other than those named in the contract will only be made in cases of bankruptcy, the appointment of a receiver manager, or an assignment of debt pursuant to [Part VII](#) of the *Financial Administration Act*.
- 11.035 (2004-05-14) This does not include those cases where the contractor owes a debt to Canada for tax arrears where Canada Revenue Agency has obtained TB approval to collect taxes due or has requested a deduction for taxes due to Canada.
- 11.036 (1994-06-23) If the claim relates to a bankruptcy or insolvency situation, see [11.112](#).
- 11.037 (1994-06-23) The contracting officer, immediately upon receipt of any other claim, such as a power of attorney to receive monies under a contract, a notice of assignment of money under a contract, or an assignment of book debts with a request to pay the assignee, should send the document to the client's requisitioning authority or, for CCC, the Comptroller.

## Amending Contracts

- 11.038 (1994-06-23) Contract amendments are used to formally delete, modify, or introduce new conditions to the original contract. The need for an amendment may arise from continuing negotiations, changes in requirements, or to deal with an unforeseen circumstance. Amendments are subject to agreement by the contractor.

The amendment format will follow the form of the original contract. The amendment should identify, by using complete clauses, any changes, additions or deletions. Any aspect of the contract which will be affected by the amendment must be identified and dealt with in the amendment.

- 11.039 (1994-06-23) A single amendment may contain many individual changes.

The cost of producing amendments can become significant, so wherever practical, contracting officers should combine as many individual changes into a minimum number of amendments, e.g. multiple changes in a technical requirement due to design change or deviation.

Amendments must receive the same distribution as the original contract.

## Contract Amendment Request

- 11.040 (2000-12-01) If TB approval was previously required for a contract, or if an amendment to the original contract increases the dollar limit to TB approval, a Contract Request, form PWGSC-TPSGC 1151-1, must be completed.

Preparation of this form is outlined in [Annex 11.1](#). Information pertaining to Contract Requests is outlined in [7E.636](#) and [Annex 7.7](#). The amendment approval and signing levels are detailed in [Section 6A](#).

## Design Change/Deviation

- 11.045 (1994-06-23) If there is no design change or deviation provision in the contract, the procedure may be instituted only after an authorization document is received from the client and is incorporated in the contract. The client's Design Authority must be designated in the contract and adequate funds should be authorized and set aside for changes. If additional funds are required, a requisition amendment is needed.
- 11.046 (1994-06-23) Each design change or deviation request must have technical approval by the Design Authority and, normally, procurement authorization by the contracting officer.

### Delegation of Authority

- 11.048 (1994-06-23) After the client has authorized a design change or deviation, the contractor's estimated cost of design changes or deviations is subject to negotiation by the contracting officer.
- If possible, price changes should be negotiated before the work affected by the change has been completed.*
- 11.050 (1994-06-23) Design changes or deviations can result in upward, downward or nil adjustment to contract costs. After approval by the client, the contracting officer is responsible for prompt negotiation of price adjustments, and ensuring that these changes are reflected in the total contract price.
- 11.051 (2003-05-30) All design changes and deviations must be supported by the form Design Change/Deviation, [PWGSC-TPSGC 9038](#), and reflected in an amendment.
- It may be convenient to include a number of design changes or deviations in one amendment.*

### Implementing the Procedure

- 11.052 (1994-06-23) When it is necessary to depart, either temporarily or permanently, from the governing technical data in a contract, a request for design change or deviation may be originated by the contractor or by the Design Authority.
- 11.053 (1994-06-23) The contractor may initiate the Design Change/Deviation process by completing section 1 of the Design Change/Deviation form, including a ceiling price for the change, subject to negotiation and sending three copies to the Design Authority and one to the contracting officer. When required, copies of the supporting technical data must be submitted.
- A subcontractor must submit the Design Change/Deviation form through the contractor, who will ensure that all the information required is entered prior to submission.
- 11.054 (1994-06-23) The Design Authority, with the sole right to deny approval, will review the design change or deviation request and either approve it and forward it to the contracting officer or reject it and return it to the contractor so noted.
- 11.055 (1994-06-23) The Design Authority may initiate the process by sending five copies of the Design Change/Deviation form to the contractor. After providing the contractual information required, the contractor will retain one copy, and send three copies to the Design Authority and one to the contracting officer.
- 11.056 (1994-06-23) Where equipment or stores affected by the change are being procured under more than one contract, a separate Design Change/Deviation form is required for each contract, unless the use of one form for all contracts held by a single contractor has been specifically authorized by the Design Authority. In all cases, the form must show all contract references, including the file number and the serial number assigned by the contracting officer.
- 11.057 (1994-06-23) The contracting officer will:

- (a) negotiate a firm price, if possible, or another pricing basis that is consistent with the existing basis of payment in the contract;
- (b) provide contractual authority for the design change or deviation; and
- (c) sign the Design Change/Deviation form and send a copy to the contractor and the Design Authority. Upon receipt, the contractor will implement the change.

11.058 (1994-06-23) The contractor should direct enquiries regarding the Design Change/Deviation procedure to the Design Authority. The contracting officer or the Design Authority will provide blank forms to the contractor, who will provide forms to subcontractors.

### **Surplus Materiel**

11.060 (1994-06-23) Surplus materiel resulting from an authorized design change or deviation must be accounted for and reported to the contracting officer.

### **Loan of Department of National Defence Materiel**

11.061 (2003-05-30) When a contract does not provide for the loan of Department of National Defence (DND) materiel, the contractor may request such a loan.

Such requests should be directed to DND, Director Disposal, Sales, Artifacts and Loans at (819) 994-8692. (See [6B.188.](#))

### **Subcontracting**

11.062 (1999-12-13) Except for those subcontracts previously permitted in the contract or as allowed for in the general terms and conditions forming part of the contract, a contractor must apply to subcontract using form PWGSC-TPSGC 1137, Application for Permission to Subcontract. In completing the application for subcontracting the contractor is required to certify that the proposed subcontract is to be subject to the same general conditions and supplemental general conditions as contained in the contract. The contracting officer will only consent if satisfied with the subcontractor and the proposed subcontract.

11.063 (1994-06-23) If a contractor wishes the subcontract to include terms and conditions which deviate from those contained in the contract, the contractor should be informed that any deviations are entirely at its own risk.

11.064 (1994-06-23) The placement of a subcontract does not relieve the contractor of any contractual obligations or impose any liability upon the Crown in relation to the subcontractor.

11.065 (1994-06-23) The profit margin for a subcontract should not exceed the top rate of profit allowed in the contract or the type of subcontract, unless exceptional circumstances prevail.

11.066 (2005-06-10) If the value of the work subcontracted will exceed the amount authorized by more than 15 percent, the contractor must submit a revised form PWGSC-TPSGC 1137. Once approved, a copy of the revised form must be sent to Contract Audit Group (CAG).

11.067 (2004-05-14) For the protection of contractors and subcontractors, the contracting officer must instruct the contractor to inform each subcontractor, at the time of negotiating a subcontract, of the appropriate general conditions and supplemental general conditions, and the applicability of the Contract Cost Principles [1031-2.](#)

11.068 (2005-06-10) Copies of all subcontracts, multi-tier subcontracts, applications and revisions to subcontracts must be forwarded by the contractor to the contracting officer and CAG, in order to maintain up-to-date data on the contractors' financial status.

## Subsequent Tier Subcontracting

11.069 (1994-06-23) Direct PWGSC control over second and subsequent tier subcontractors is not practical. Contractors must be advised by the contracting officer, at the time of subcontracting, that when second-tier subcontractors award further subcontracts, all terms and conditions must be approved by the contractor.

## Defence Production Act

11.070 (1994-06-23) The *Defence Production Act* imposes upon defence subcontractors obligations similar to those imposed on contractors. The contractor must fully inform subcontractors that the terms and conditions in the contract are enforceable under the *Defence Production Act*.

## Assignment of Contracts

11.075 (1994-06-23) When a contractor assigns a contract, the responsibility for all or part of the performance is transferred to a third party. However, the assignment of a contract must not relieve the original contractor of any obligations under the contract or impose any liability on the Crown in relation to the assignee.

11.076 (1994-06-23) In order to protect the Crown's interest, the transfer of the liabilities and rights under the original contract to the assignee will be done so that the original contractor is ultimately liable for the performance of the contract.

*An acceptable manner of protecting the Crown's interest is to obtain the original contractor's guarantee of performance in the event the assignee fails to perform.*

11.077 (2002-05-24) The contracting officer, with the assistance of the Canadian and International Industrial Security Directorate, must ensure that the assignee meets all security requirements specified in the contract.

## Approval of Contract Assignments

11.078 (1994-06-23) Under the general conditions, the written permission of PWGSC is required prior to any contract assignment. All proposed assignments supported by a contracting officer must be referred to the cost analyst for review, and then, if appropriate, to Legal Services for concurrence and drafting of the necessary legal documents.

11.079 (1994-06-23) The contracting officer will forward the assignment agreement to the appropriate PWGSC signing authority with the reasons for the assignment, the number and value of contracts involved, and the financial condition of the assignee.

11.080 (2005-06-10) A copy of the approved assignment is to be forwarded to CAG, in order to maintain data on supplier financial status, or to the appropriate vice-president (Canadian Commercial Corporation).

## Audits

11.081 (2005-12-16) The authority for discretionary audits results from either the contractual terms, or statute (*Defence Production Act*, [section 19](#)). If a contracting officer determines that a discretionary audit is required, a request is to be made to the CAG. The cost of discretionary audits will be borne by CAG.

Contracting officers may refer any supplier certification of Canadian content to CAG for audit of compliance to the policy.

## Contractor Cost Records



- 11.082 (2005-06-10) If required audits have not been completed before a contract commences, the contracting officer must ask CAG to carry them out as soon as possible.
- 11.083 (2005-06-10) If inadequate contractor records are discovered during a contract, or the contractor's cost accounting system has changed, or is likely to change, an examination of the adequacy of a contractor's accounts is to be performed by qualified personnel approved by CAG.
- 11.084 (1994-06-23) If the audit confirms inadequate records, the contracting officer must advise the contractor of the deficiencies or inadequacies in the accounting records and obtain a commitment to an agreed plan of action to correct them.
- 11.085 (1994-06-23) When the contractor refuses to make a commitment to an agreed plan of action to correct a situation of inadequate records, or fails to meet commitments, the sector/region will decide, based on the circumstances, the appropriate course of action to follow. Among the various options are:
- (a) withholding of future contracts;
  - (b) negotiation of special terms and conditions after taking into account the known deficiencies, e.g. negotiation of a larger holdback on progress claims, negotiation of a firm pricing basis to replace a proposed cost reimbursable basis for which adequate substantiation of costs would not be available;
  - (c) full or partial termination of the contract for breach of contractual provisions relating to maintenance of proper accounts and records.
- 11.086 (2005-06-10) The contracting officer will advise CAG of the findings and of the option(s) exercised.

## Financial Security Issues

### Crown Responsibilities

- 11.087 (1994-06-23) During the contract management period, contracting officers must ensure that contract provisions relating to Crown responsibilities, a breach of which could nullify a surety bond, are strictly adhered to.

### Changes in Contract Terms

- 11.088 (1994-06-23) Before authorizing any material changes in contract terms, contracting officers must ensure that such changes do not invalidate security obligations by obtaining the consent of the surety company.

*"Material changes" means any change to the contract except a change which on the face of it and without further explanation or investigation is clearly for the benefit of the surety. Examples of changes which require the surety company's approval are: changes in the contract price; changes in the scope of the work; revision to the completion and/or delivery dates specified in the contract; and, changes in the payment schedule.*

- 11.089 (1994-06-23) Where the change is to be made by way of contract amendment, a copy of the draft amendment should be sent to the surety company for concurrence. Where the contract contains a provision for design or engineering changes within certain limits, it is not necessary to obtain the surety company's prior consent. In this case, the company only needs to be kept informed. If the limits are to be changed, the surety company's consent is required.
- 11.090 (1997-09-15) In cases where the contract price is being increased, it may be advisable to increase the amount of security to reflect the revised contract price. The face amount of a contract support letter of credit may be increased commensurate with the change in risk that has

occurred. The face amount may be changed by an amendment to the letter of credit. Alternatively, the letter of credit may contain an express provision for change by a specified or determinable amount or amounts on a specified date or dates or upon presentation of the document(s) specified for this purpose such as an interim certificate of completion. Contract amendments should be contingent upon issuance of a new letter of credit or an amendment to the current letter of credit.

- 11.091 (1997-09-15) If a security deposit exceeds the amount required due to changes in the contract price, the excess is to be returned to the contractor. (See [11.296](#).) The face amount of a contract support letter of credit may be reduced commensurate with the change in risk that has occurred. The face amount may be changed by an amendment to the letter of credit. Alternatively, the letter of credit may contain an express provision for change by a specified or determinable amount or amounts on a specified date or dates or upon presentation of the document(s) specified for this purpose such as an interim certificate of completion.

### Contractor Difficulties

- 11.092 (1994-06-23) As soon as the contracting officer becomes aware that a contractor may have difficulty in successfully completing a contract, the surety company must be informed immediately.

### Bonding Companies

- 11.093 (1994-06-23) Whenever a bonding company has failed to honour its undertakings, the matter must be referred to Legal Services for appropriate action, and to the Corporate Secretary who shall notify TB.

### Protecting Crown Goods

- 11.095 (1994-06-23) If a contractor is delinquent in discharging its accrued liabilities, liens may be attached, by subcontractors or suppliers, to goods that the Crown has taken title to through full or partial payment. Steps must be taken to protect the Crown's interests.

This is not required for service contracts, and is generally not cost effective for goods contracts under \$25,000.

- 11.096 (1994-06-23) Where a contractor has given security under [section 427](#) of the *Bank Act*, a waiver is to be obtained waiving the bank's priority over the Crown's title to the goods. The contracting officer must consult with Legal Services.

If the contractor should change banks and a new waiver is not obtained, or if the contractor fails to disclose that security was given, the Crown's title could be affected.

- 11.097 (2005-06-10) To protect the Crown's interest with potentially insolvent or bankrupt contractors, the contracting officer must obtain a waiver when a bank or other financial institution has a prior lien on the contractor's assets. If the waiver is unobtainable, consult with Legal Services, the cost analyst, and Contract Audit Group (CAG) to determine if the contractor's credit position warrants relieving the contractor of the contractual obligation relating to bank liens.
- 11.098 (1994-06-23) To preclude the attachment of liens, the contracting officer should check, to the extent possible, that the contractor has met payment obligations under the contract to its workmen, subcontractors and suppliers.
- 11.099 (1994-06-23) All intimations of unpaid invoices or wages, or unreasonable delays in the payment thereof, shall be reviewed promptly by the contracting officer, and a cost analysis carried out if appropriate, in cooperation with a cost analyst.
- 11.100 (1994-06-23) The frequency, scope and extent of checks will be determined and carried out by the contracting officer, based on cost/benefit, and the contractor's payment record, credit rating

and financial strength.

- 11.101 (2005-06-10) When the financial analysis indicates potentially serious financial problems, a report is to be sent to CAG, which will distribute copies to all procurement sectors/regions. The sectors/regions in turn must compile lists of all open contracts with the contractor involved, including the contract values and anticipated completion dates, and return these lists to CAG.

CAG will then determine whether a discretionary verification should be carried out, and the scope and extent of the verification.

*Sectors/regions should only enter into new contracts with the contractor with due caution and proper justification.*

- 11.102 (2005-06-10) A discretionary verification is carried out by qualified personnel approved by CAG. Discretionary verifications may be commissioned only by CAG, and will be performed on a timely and prompt basis so as to lessen potential risks to the Crown.
- 11.103 (1997-09-15) If the total risk exposure is \$2 million or over, a discretionary verification will normally be undertaken. A determination will be made as to the protection provided to the Crown by any security deposits (government guaranteed bonds, bills of exchange, irrevocable standby letters of credit), performance bonds, labour and material payments bonds, or registration action taken or intended.
- 11.104 (2005-06-10) If the total risk exposure is under \$2 million, CAG will, in consultation with the sector/region involved, determine the need to commission a discretionary verification, after taking into account any financial security provision or registration action.
- 11.105 (2005-06-10) When the verification points to a breach of the contractor's specific contractual obligation to effect prompt payment to its workmen, subcontractors, or suppliers, CAG will provide written advice to the sectors/regions and senior financial officers of the client(s) holding the contracts in default.

### Registering Notice of Interest in Goods

- 11.106 (1994-06-23) In provinces other than Quebec, the Crown can register notice of its interest in the goods with a view to protecting itself against the risk of liens. The registration requirements differ for each province. The contracting officer must consult with Legal Services. (See [7F.733](#).)

*In practical terms, because of the complexities involved, this action is appropriate only on high dollar value contracts.*

### Bankruptcy, Receivership, Insolvency

- 11.112 (2005-06-10) The contracting officer must consult Legal Services when:

- (a) a contractor proposes a settlement while in an impending or actual receivership, bankruptcy or insolvency condition;
- (b) the contract is secured by surety bond guarantees or other securities; or
- (c) a contractor has given security to a bank under [section 427](#) of the *Bank Act*.

Upon receipt of a bankruptcy, receivership or insolvency notice or when there is an indication of such, the contracting officer must:

- inform the Director;
- develop a plan, in consultation with the client, for completion of the work; and

- advise CAG and Legal Services.
- 11.113 (1994-06-23) When a contractor is in formal bankruptcy, the contracting officer must, in consultation with Legal Services, pursue the rights of the Crown, including:
- (a) realizing on any contractual securities;
  - (b) proving title to any Crown property in the contractor's possession;
  - (c) ensuring payment, if the Crown is unsecured, in priority of other unsecured creditors; or
  - (d) offsetting money payable to the contractor against any amount due the Crown.
- 11.114 (1994-06-23) After formal bankruptcy or receivership, monies due to the contractor are to be sent to the Trustee in Bankruptcy or the Receiver-Manager, as applicable.

## Disputes

- 11.115 (1994-06-23) Disputes must be handled expeditiously. The contracting officer is responsible for ensuring that all parties meet their contractual obligations. Proper record keeping during disputes is vital for clarification, audit or termination purposes.
- 11.116 (1994-06-23) If the client has a valid complaint, the contracting officer should formally advise the contractor in writing, with a reminder of the default provisions in the general conditions. If during a reasonable period of time, corrective action has not been undertaken, consultation with Legal Services is recommended to ensure the protection of the interests of the Crown.
- 11.117 (1994-06-23) If a contracting officer is unable to resolve a contract dispute, the matter should be brought to the attention of the contracting officer's immediate supervisor.
- 11.118 (2002-12-13) When any dispute associated with goods and services contracts cannot be resolved expeditiously through negotiation, the contractor should be advised, in writing, to submit a formal claim to Contracts Settlement Board (see [11.201](#)).

When any dispute associated with architectural and engineering, construction, building and maintenance and leasing contracts cannot be resolved expeditiously through negotiation, the contractor/consultant may request the Minister, in writing, to authorize a Contract Disputes Advisory Board hearing (see [11.202](#)).

## Goods/Services not in accordance with the Contract

- 11.120 (1994-06-23) It is the responsibility of the client to inform the contractor, within fifteen (15) days of receipt, or as specified in the contract, that the goods or services are not in accordance with the contract. Failure to do so may prejudice any subsequent claims by the Crown. The settlement made following such a disagreement may take into account any outstanding interest.

## Timely Performance

- 11.121 (1994-06-23) Under the general conditions, time is of the essence of the contract. If a contractor fails to deliver the goods or perform the services on time, the contracting officer must ascertain, in consultation with the client and Legal Services, the facts surrounding the delay. If the delay was caused by factors beyond the control and without the fault or negligence of the contractor, the contracting officer must extend the time of performance of the contract for a period equal to the length of the delay. Excusable delays are detailed in the general conditions. In all other circumstances, the contractor is responsible for the delivery default. If the contractor is in default in carrying out the delivery commitments, the contracting officer may, upon giving notice in writing to the contractor, terminate the contract fully or partially.

11.122 (1994-06-23) Where time of performance is to be extended due to delays beyond the control of the contractor, and if the contract is secured by surety bonds, the contracting officer must:

- (a) advise the surety company and obtain its concurrence before the completion dates specified in the contract are actually extended; and
- (b) if applicable, advise the surety company and obtain its concurrence before adjusting the contract price due to additional work requirements.

### Loss of Narcotics

11.123 (2005-06-10) In the case of any loss, theft or breakage involving narcotics or controlled drugs while in transit, the Scientific, Medical and Photographic Division of the Commercial Acquisition and Supply Management Sector, will initiate action in accordance with the *Controlled Drugs and Substances Act* and *Food and Drugs Act*.

### Terminations

11.130 (2003-12-12) To determine which type of termination might be involved, see [11.131](#) (Termination for Convenience of the Crown), [11.133](#) (Termination for Default) and [11.135](#) (Termination by Mutual Consent). Refer to [subsection 5-J](#) of the *Standard Acquisition Clauses and Conditions* (SACC) Manual for termination clauses.

### Termination for Convenience of the Crown

11.131 (2002-12-13) Occasionally the Crown may wish to terminate a contract for convenience. (See [11.146](#).) This may be due to curtailment of funds, discontinuation of a government program, or other circumstances which make the acquisition of the product or service unnecessary. To protect the integrity of the bid solicitation system, the Crown may also terminate a contract for convenience if it is determined that it has been mistakenly awarded to other than the lowest responsive bidder. The general conditions contain a section titled "Termination for Convenience" which becomes applicable as soon as the "Notice of Termination" is received by the contractor.

11.132 (1998-06-15) Termination for Convenience is to be applied where:

- (a) the client has requested termination;
- (b) a Termination for Default cannot be considered because the contractor is not in default; and,
- (c) a Termination by Mutual Consent would not be more advantageous to the Crown.

### Termination for Default

11.133 (1994-06-23) Termination for Default applies when the contractor breaches the contract, usually through non-performance or delayed delivery. "Default by Contractor" in the general conditions provides the basis for Termination for Default. (See [11.180](#).)

11.134 (1994-06-23) Termination for Default is to be applied where:

- (a) the contractor has breached the contract; and
- (b) in the Crown's opinion, the contractor would have no valid defence, should the Crown claim loss or damages. Any opinion regarding a contractor's valid defence shall be rendered only by Legal Services.

*A valid defence usually exists if failure to perform arises out of causes beyond the control and*

*without the fault or negligence of the contractor, for example:*

- *faulty or incomplete specifications were provided by the Crown;*
- *government-supplied materiel was faulty or substandard, or supplied after the time agreed to in the contract;*
- *samples were not provided on time; or*
- *no action was taken by the Crown after the first default by the contractor.*

### **Termination by Mutual Consent**

- 11.135 (1994-06-23) On rare occasions both parties may agree to termination without claims or penalties, usually where the client has requested full or partial termination of a contract, the contractor has incurred minor or no expenses and is willing to forego a claim, and the matter may be settled at no cost to the Crown. (See [11.195.](#))
- 11.136 (1994-06-23) Termination by Mutual Consent will not be actioned where it is in the interest of the Crown to issue a default termination or when additional costs are claimed by the contractor following the reduction or cancellation of all or a portion of the contract.

### **Contractor's Request for Termination**

- 11.137 (1994-06-23) When a contractor requests termination because of anticipated losses in performing the contract, consent will not be granted. Instead, the contractor should be instructed that the obligations in the contract must be fulfilled. The contractor may, on completion of the contract, request an "extra payment" for additional costs incurred or losses suffered, if some responsibility for the additional cost or for the loss can be ascribed to the Crown. (See [11.031.](#))

If the contractor refuses to carry out the contractual obligations, termination for default should be instituted.

### **Financial Security Issues**

- 11.138 (1997-09-15) If the contract is secured by a security deposit (government guaranteed bonds, bills of exchange, irrevocable standby letters of credit) it should not be terminated without the prior advice of Legal Services.
- 11.139 (1994-06-23) If the contract is secured by surety bonds, it is not to be terminated as this would also terminate the existing contractual relationship with the bonding company. When a contractor fails to perform a contract, or when a claim is received for non-payment of labour or material, and a payment bond is in place, contracting officers must immediately inform the surety company in writing, requesting that corrective action be taken. Contracting officers must not enter into negotiations with the contractor or claimant.

### **Involvement of Legal Services**

- 11.140 (1998-06-15) The following terminations shall not be issued without a written legal opinion: all Terminations for Default, Terminations by Mutual Consent, and confirming Notices of Terminations for Convenience.

In seeking the opinion of Legal Services, the contracting officer must submit the contract file with a chronological, typed index of the documents forming the basis for the termination request, together with a short note outlining the events leading to termination. Based on this information, Legal Services will render an opinion and advise as to the appropriate method of termination.

**Note:** A legal opinion is not required for initial Notices of Termination for Convenience. The

issuance of an initial Notice of Termination for Convenience may only be taken in response to the client's written instructions.

*While a legal opinion prior to the issuance of any termination is desirable, in the interest of limiting costs incurred by the Crown, the initial Notices of Termination for Convenience (see Standard Acquisition Clauses and Conditions [SACC] Manual clauses [J0200C](#) and [J0205C](#)) do not require a legal opinion and may be issued by the contracting officer in accordance with [11.145](#).*

## Involvement of the Contract Claims Resolution Board

11.141 (2005-06-10) The Termination Claims Officer (TCO), Policy, Risk, Integrity and Strategic Management Sector (PRISMS), must be involved immediately in the claim settlement process resulting from contracts that are partially or completely terminated for convenience. Accordingly, the contracting officer must contact the TCO as soon as the initial Notice of Termination (see SACC Manual clauses [J0200C](#) and [J0205C](#)) is issued, and is to provide the TCO with a copy of each initial and confirming Notice of Termination. The TCO's facsimile number is (819) 956-0355.

## Adjustment to Source Lists

11.142 (1994-06-23) Terminations for Convenience of the Crown should not result in any adjustment of the source lists, while Terminations by Mutual Consent may require correction of source lists. Terminations for Default usually are cause for the deletion or suspension of the contractor from the source list.

## Standing Offers

11.143 (1994-06-23) Standing Offers are not contracts in the legal sense, and either party may withdraw from a Standing Offer by simple notification to the other party. However, call-ups received by a supplier prior to the date of its formal withdrawal must be fulfilled in accordance with the terms of the Standing Offer.

## PWGSC Offices Outside Canada

11.144 (2002-12-13) Termination procedures for contracts awarded by Public Works and Government Services Canada (PWGSC) offices outside Canada may differ from those for contracts issued in Canada, and the termination procedures serve only as a general guide.

*For example, if problems arise in such cases, the Director, PWGSC Washington, will obtain guidance from the TCO and, if necessary, obtain legal advice for the outside offices from Legal Services.*

## Signing Authority

11.145 (2004-05-14) Initial and confirming Notices of Termination shall be approved and signed by a contracting officer with the signing authority (as indicated in [Annex 6.1.2](#)) for the total contract value at the time of the termination.

## Termination for Convenience

11.146 (2004-05-14) On 15 January 2002, PRISMS was designated to provide termination settlement services associated with goods and services contracts that have been terminated for the convenience of the Crown. PRISMS was also designated to handle claims arising from United States and Canadian Commercial Corporation (US/CCC) contracts that are terminated for the convenience of the US Government. For terminations involving US/CCC contracts, the Director General, PRISMS will ensure compliance with the certification and termination settlement functions that are required to conform with the US Department of Defense and Department of National Defence Letter of Agreement (refer to US Defense Federal Acquisition Regulation

Supplements 225.870-6 and 249.7000). The Director General, PRISMS, will also be responsive to requests by the US Government for arranging for audits of US Government contracts or subcontracts placed directly with Canadian-based suppliers that are terminated for convenience.

The contracting officer and the TCO are responsible for the following termination activities:

Termination Activities	Contracting Officer	Termination Claims Officer
Issue initial and confirming Notices of Termination	X	
Administration of the non-terminated portion of the contract	X	
Assessment of the contractor's request for any upward adjustment of the contract price for the non-terminated portion of the contract		X
Request claim from contractor and forward claim forms	X	
Assist contractor with preparation of claim		X
Ensure acceptability of claim		X
Determine if audit is required		X
Define audit requirements and arrange audit		X
Arrange for inventory verification and screening by client	X	
Negotiate final settlement with contractor		X
Preparation of Settlement and Release document		X
Disposal of surplus inventory	X	
Forward Settlement and Release document to contractor for acceptance		X
Obtain invoice from contractor		X
Process invoice through client department	X	
Distribute Settlement and Release document	X	

11.147 (1994-06-23) Occasionally, the client will require a status report before making a decision to cancel. In this event, the client will inform PWGSC of its intention to reduce or cancel a contract by: issuing a "Notice of Intent to Cancel"; telephone; or, a written message to that effect. The client will usually request all or part of the following contract status information before making a final decision to terminate:

- (a) quantity of stores produced against the contract;
- (b) quantity of stores in production;
- (c) value of raw materials and/or components acquired by the contractor to carry out the specific contract;
- (d) the position with respect to tooling and capital equipment, especially where the contractor had to tool-up to carry out the contract;
- (e) status of subcontracts;



- (f) the most economical point at which to effect termination; and,
- (g) the approximate amount of termination claims if known.

11.148 (1998-06-15) The contracting officer will immediately request the information from the contractor and closely follow up to ensure that it is received as soon as possible.

When the information is received, the contracting officer will forward it, together with any recommendations, to the client.

Normally, the client's first request will be to cancel all or a portion of a contract, in which case the contracting officer must immediately issue an initial Notice of Termination in accordance with [11.150](#) if the termination is due to curtailment of funds, discontinuance of a government program or circumstances that make the acquisition of the product or service unnecessary.

An initial Notice of Termination must be followed by the issuance of a confirming Notice of Termination.

### Notice of Termination

11.150 (2002-12-13) On receiving the client's initial written instructions to cancel all or part of a contract for the convenience of the Crown (see [11.131](#)), the contracting officer must immediately issue an initial Notice of Termination for Convenience to advise the contractor to "stop work" (see SACC Manual clause [J0200C](#) for a complete termination or clause [J0205C](#) for a partial termination). Following the issuance of the initial Notice of Termination for Convenience a confirming Notice of Termination must be issued (see SACC Manual clauses [J0001C](#) or [J0002C](#)). The confirming Notice of Termination cannot be issued until the formal requisition amendment is received, and a legal opinion has been sought. The contracting officer must also contact and provide the Termination Claims Officer (TCO) with a copy of the initial Notice of Termination.

*To expedite the termination action and minimize potential costs to the Crown, the contracting officer is authorized to issue an initial Notice of Termination for Convenience prior to receipt of the formalized amendment to the requisition, and without seeking legal advice (see [11.140](#)).*

### Suspension of the Work - Stop Work Order

11.151 (2002-05-24) When a client wishes to suspend the work of a contract rather than cancel it, SACC Manual clause [J0500C](#) is to be used. The suspension of the work of a contract allows the client to obtain a review of the contract status before deciding the type and extent of termination (including a termination for default). Should a client wish to reinstate a contract after a Suspension of the Work - Stop Work Order has been issued, the Stop Work Order must be rescinded. (See SACC Manual clause [J0501C](#)). In this event, it may be necessary to adjust the delivery terms and/or contract price. It is the responsibility of the contracting officer to determine the reasonableness of all claims for additional costs which the contractor may make. Amendments to cover payment of such costs shall be approved in accordance with the contract amendment approval and signing authorities ([Annex 6.1.5](#)).

### No Claim is Involved

11.152 (2002-12-13) When a contractor advises the contracting officer that a claim will not be submitted following the receipt of an initial Notice of Termination, the contracting officer is to prepare a confirming Notice of Termination, for approval by Legal Services, which includes SACC Manual clause [J0003C](#) and eliminates the funding for the terminated items. This Notice of Termination is then forwarded to the contractor for acceptance. Since no claim is made, the TCO is not involved in this process.

### Client's Decision

- 11.153 (1994-06-23) It is the client's responsibility to decide at what stage a full or partial termination should take place. Formal amendments to the requisition confirming the decision to terminate must be provided as quickly as possible.
- 11.154 (1998-06-15) The contracting officer must not issue a confirming Notice of Termination for Convenience until an amendment to the client's requisition has been received.

The contracting officer should ensure that sufficient funds remain in the amended requisition to cover the estimated claim costs and costs resulting from post-termination activity carried out by the contractor. This includes the cost of producing the claim, segregation, packing, secured storage or residual inventory of material, parts assemblies, tools, equipment, etc., prior to disposal procedure.

### Confirming Notice of Termination

- 11.155 (1998-06-15) As soon as the requisition amendment is received, the contracting officer will prepare and on advice from Legal Services send the contractor the confirming Notice of Termination or the confirming Notice of Partial Termination, using the standard clauses provided in [Subsection 5-J](#) of the SACC Manual.
- 11.156 (2002-12-13) After the confirming Notice of Termination or Partial Termination is issued, the contracting officer will immediately send one copy of the notice to the TCO.

*In order to avoid further costs to the Crown and hardship to the contractor, a confirming Notice of Termination must be issued as promptly as possible to finalize the implications of an initial Notice of Termination.*

### Adjustment of Funds

- 11.157 (2004-05-14) The funds in the contract should not be adjusted when the confirming Notice of Termination is issued. The contract funds are adjusted only after a settlement offer has been made to a contractor.

*The funding will be adjusted by the TCO at the time that the Settlement and Release document is prepared for the approval and signature of the Director General, PRISMS.*

### Adjustment to the Price of the Non-Terminated Portion of the Contract

- 11.158 (2002-12-13) Whenever a contractor requests an upward adjustment to the cost or unit price of the non-terminated portion of a contract, the resulting claim for adjustment is to be referred to the TCO for review prior to reaching any agreement with the contractor concerning such upward cost or price adjustment.

### Termination File

- 11.159 (2002-12-13) For non-complex, fully terminated contracts, the contracting officer is to transfer the complete procurement file to the TCO, if a claim is involved.

For complex procurements or partial terminations where the non-terminated portion of the file is still active, the contracting officer will prepare a termination case file including copies of the contract, amendments, specifications, pricing details, documents, correspondence and any other information relevant to the termination, and send it to the TCO.

### Informing the Contractor

- 11.160 (2002-12-13) If a claim is involved, the contracting officer is to forward two sets of PWGSC Prime Contractor termination claim forms and the *Procedures Manual on Termination of Contracts*, to

the contractor.

These may be obtained from the TCO: each set of claim forms includes the following:

SPMS -1	Settlement Proposal for Fixed Price Contracts
SPMS-1A	Inventory Schedule A for Inventory of Metals in Mill Product Form
SPMS-1B	Inventory Schedule B for Inventory of Raw Materials, Finished Product, Purchased Parts, Plant Equipment, Finished Components, etc.
SPMS-1C	Inventory Schedule C for Inventory of Work in Process
SPMS-1D	Inventory Schedule D for Inventory of Special Tooling and Test Equipment
SPMS -2	Schedule of Accounting Information
SPMS-3	Application for Partial Payment

11.161 (1996-06-03) The accompanying letter to the contractor should contain the following instructions:

"In the event subcontractors are involved with this termination, please advise of the number of subcontractors who will require termination claim forms. Please arrange to complete all sections of the claim in as much detail as possible and, after signature by your executive authority, return the original and one (1) copy to this office.

You are hereby requested to forward your completed claim within a two month period from the date of this letter. In order to assist you in meeting that date, we would be pleased to provide guidance and explanations necessary to ensure proper action is taken by your company and that the correct information is included in the forms.

Please note that all communications and documents with respect to your claim should be directed to: \_\_\_\_\_. (***Insert appropriate name and address of the responsible contracting officer***).

11.162 (2002-12-13) After the termination claim forms are forwarded, the contractor must be contacted by telephone to ensure that the forms have been received and that the necessary action is being taken on the contractor's part to submit a claim. If the contractor has any questions concerning the presentation of the claim, or the details of the termination settlement procedures, the contracting officer may advise the contractor to contact the TCO directly. When the contractor has completed the forms, the signed original and one copy are returned to the contracting officer. On receipt of the contractor's claim, one copy is to be forwarded promptly to the TCO, who shall then become responsible for the resolution of the claim.

### Audit of Claims

11.163 (2002-12-13) Upon receipt of a claim, the TCO will determine the need for an audit. If the TCO concludes that an audit is required, the TCO will prepare the terms of reference for the audit and arrange for its completion by Consulting and Audit Canada.

*When an audit is performed, the TCO reviews the cost factors reported by the auditor and reconciles the contractor's claim with the auditor's report and the Inventory Verification Report form (SPMS-50). The cost implications of any inventory adjustments must be discussed with the auditor as well as with the contractor.*

### Inventories

11.164 (2002-12-13) If the claim from a termination for convenience involves inventory that is rendered surplus by the termination, the contracting officer must send copies of the termination inventory

schedules to the client in order to obtain instructions as to disposition, which will be either:

- (a) arranging for the verification and shipment of all, or any part, of the inventories to a recipient designated by the client. The costs associated with packaging, routing, shipping, etc., are a proper post termination charge to be added to the contractor's claim;

*Inventory verification is to be arranged by the contracting officer with the Inspection Authority of the client and a copy of the Inventory Verification Report must be provided to the TCO so that the settlement offer may be adjusted to reflect any inventory discrepancies.*

- (b) arranging for the disposal of the residual inventory by the Crown Assets Distribution Centre (CADC). In this case, the contracting officer must prepare the form PWGSC-TPSGC 11001, Report of Surplus (Materiel and Equipment).

The Report of Surplus must be signed by the director general or director concerned, to certify that: the inventories are reasonable in relation to the requirements of the terminated portion of the relevant contract; that their use is not required for other existing PWGSC contracts, due to the nature of the goods; and consequently, that disposal is recommended. The contracting officer will forward the signed Report of Surplus to CADC.

In due course, the contracting officer receives a Final Inventory Certificate (FIC) from CADC, signed by the CADC inspector or assessor and the contractor.

*By signing the FIC, the contractor agrees to the final quantities for disposal and, at the same time, agrees to retain and be responsible for the residual inventories for ninety (90) days, at no cost, on behalf of CADC. At the time of receipt of the FIC, the contracting officer is relieved of the responsibility for the residual inventory. Any proceeds realized from the sale of the surplus inventory are credited, on behalf of the client, to the Consolidated Revenue Fund or to the revolving fund, as applicable.*

## Settlement Offer

- 11.166 (2004-05-14) Upon receipt of the audit report, the TCO will prepare a proposed settlement offer. This offer informs the contractor of the amount of settlement the TCO is prepared to recommend to the Director General, Policy, Risk, Integrity and Strategic Management Sector (DG/PRISMS), for approval.
- 11.167 (2004-05-14) If the contractor accepts the proposed settlement offer, the TCO will prepare a Settlement and Release, form PWGSC-TPSGC 9223-2, and submit it to Legal Services for review, the DG/PRISMS, for approval and signature, and then to the contractor for acceptance. When the contractor's written acknowledgement is received, the original is placed on the PRISMS file and a copy forwarded to the contracting officer, for the contract file.
- 11.168 (2002-12-13) If the contractor rejects the proposed settlement, the TCO will advise the contractor to submit the case directly, in writing, to the Director, Contract Claims Resolution Board (CCRB), so that the case may be handled in accordance with CCRB's procedures for handling disputes (see [11.201](#)).

## Contract Termination Claims

- 11.169 (2004-05-14) When an interim payment or final settlement on a contract terminated or partially terminated for the convenience of the Crown is approved and signed by the DG/PRISMS, the TCO will place the original of the completed document on the PRISMS file and make arrangements to implement the approved settlement payment.

## Termination for Default

11.180 (1994-06-23) The decision to terminate a contract for default should be made only after all other possible solutions have been explored. In all cases, the advice of Legal Services must be obtained at an early stage to ensure that any proposed action will not prejudice the Crown's legal position and that the termination is legally enforceable.

*Failure to take action may prejudice Crown interests.*

*If a contract is secured by surety bonds, termination of the contract may change the existing contractual relationship with the bonding company.*

11.181 (1994-06-23) The Crown has the right to terminate all or any part of the contract for default if:

- (a) the contractor fails to make progress so as to endanger performance of the contract.

The contracting officer may provide the contractor in writing with a reasonable period of time, normally ten (10) days, to rectify the situation. If this period must be longer, the contracting officer may require the contractor, within ten (10) days, to show evidence of corrective action.

If the contractor does not rectify the situation, the contracting officer may, subject to the limitations in the Default Clause, initiate action to terminate the contract for default.

- (b) the contractor fails to perform any other provision of the contract.

If the contractor does not rectify such a defect within ten (10) days of receipt of a notice from the contracting officer, the contracting officer may, within the limitations set forth in the Default clause, initiate action to terminate the contract in whole or in part for default.

- (c) the contractor fails to deliver the goods or perform the services within the time specified in the contract.

In the absence of excusable delays, the Crown has the right to terminate the contract immediately, regardless of how slight the delay may be. This includes the right to accept or reject goods shipped but not yet delivered. In addition, if the contractor does make timely delivery, but delivers defective goods or improperly performs services, and is unable to take corrective action within the unexpired delivery schedule period, the Crown also has the right to terminate for default.

Whenever a contracting officer contemplates termination of a contract for failure to deliver on time, the contractor must be so advised as soon as possible after the default occurs. Failure to take such action may prejudice the Crown's position.

When there is reasonable assurance that delivery will be made even though late, it may be desirable to discuss extension of the delivery time with the client. If the delivery date is extended, a reduction in the contract price may be appropriate.

*This situation would arise when delivery would be further delayed by terminating and placing the contract elsewhere.*

- (d) the contractor becomes bankrupt or insolvent.

Upon receipt of a notice of bankruptcy or insolvency, the settlement procedure outlined in [11.112](#) is to be followed.

## Action to Recover Loss or Damage

11.183 (1994-06-23) After termination, the contracting officer will determine the actual amount or best estimate of loss or damage suffered by the Crown, and the distribution of the damages to be

recovered from the contractor.

*Estimates of loss or damage should include any amount in excess of the contract price which the Crown may be obliged to pay in procuring the goods or services elsewhere.*

- 11.184 (1997-09-15) The contracting officer must refer claims to Legal Services when a contract is secured by a security deposit (government guaranteed bonds, bills of exchange, irrevocable standby letters of credit) or when the Crown has a claim against a contractor that is related to a work package for which the contractor has a claim against the Crown.

In all other cases the contracting officer will attempt to negotiate a settlement. When a satisfactory settlement cannot be reached, the claim will be referred to Legal Services for action.

- 11.185 (2002-12-13) When a contractor agrees with the proposed settlement, the recommendation to recover monies will be submitted to Contract Audit Group (CAG), or, in the case of a CCC contract, the Director, Finance and Resources Administration (FRA). CAG or the Director, FRA, will issue an invoice to the contractor for the monetary recovery.

If payment is not received within sixty (60) days of date of issue of the invoice, CAG or the Director, FRA, will advise the contracting officer to take appropriate follow-up action with the contractor. When normal follow-up procedures have not been successful, the matter must be referred to Legal Services.

- 11.186 (1994-06-23) Claims must not be removed from departmental records until satisfied by payment or a properly authorized deletion action.

### **Contract Payment under Surety Bond**

- 11.187 (1994-06-23) When a surety bond is being enforced, payments will be issued as follows:

- (a) Performance bond - upon completion of the contract to the satisfaction of the Crown, the bonding company may be paid all amounts to which the contractor would be entitled under the terms of the contract.
- (b) Payment bond - the bonding company shall not be reimbursed for the payment of creditors from any funds held by the Crown until the work is complete and the surety company has fully discharged its obligations under the bond.

### **Termination by Mutual Consent**

- 11.195 (2002-12-13) On receiving the client's request for termination by Mutual Consent, the contracting officer shall request the contractor to confirm that no claim is involved and shall refer the matter to Legal Services in accordance with [11.140](#).

*Since no claim is made, the TCO is not involved in this process.*

### **Contract Claims Resolution Board**

- 11.200 (2002-12-13) All enquiries, from contractors or contracting officers, concerning the Contract Claims Resolution Board (CCRB) and submissions to the CCRB, should be directed to CCRB.

*The CCRB was formed in January 1994 by the integration of the Contract Dispute Advisory Board of the former Public Works Canada and the Contracts Settlement Board (CSB) of the former Supply and Services Canada. A summary of these two processes follows:*

### **Contract Settlement Board Process**

- 11.201 (2002-12-13) The Contract Settlement Board (CSB) process is designed to provide for the prompt

resolution of disputes arising from goods and services contracts. It provides for an independent review of a contractor's claim as well as the Crown's response to the claim. Following that review process, the Board issues a decision which is not binding on the contractor. Accordingly, if the contractor rejects the decision of the Board, its rights at law are not compromised. Further details on the CSB Process are set forth in [11.204](#).

### **Contract Dispute Advisory Board Process**

11.202 (2002-12-13) The Contract Dispute Advisory Board (CDAB) process is designed to provide for the prompt resolution of disputes arising from architectural and engineering, construction, building maintenance and leasing contracts. The process provides a simplified, non-binding arbitration dispute resolution process for contractors which involves the selection of a private sector arbitrator by both parties. Following a Board Hearing, the arbitrator submits a recommendation for the Minister's final decision. Given that the Minister's decision is not binding on the Claimant, its rights at law are not compromised. Further details on the CDAB Process are set forth in [11.218](#).

### **Advice, Assistance and Training**

11.203 (2002-12-13) Upon request, CCRB's staff will provide advice and assistance concerning any of the matters falling within the purview of CCRB to all persons seeking it, and is available to provide brief information and training sessions on the claims process. The expertise associated with lessons learned derived from previous cases may provide useful information to assist in the resolution of disputes.

### **Contract Settlement Board Procedures**

11.204 (2002-12-13) When any dispute arising from goods and services cannot be resolved through negotiation, the contractor should be advised in writing to submit a formal statement and documentation of claim to the Director, CCRB. The proposed letter to the contractor should be referred to CCRB for approval.

*Without this step, unresolved disputes can only be resolved through formal legal action. The CCRB process exists to resolve matters without that potentially lengthy and expensive process.*

11.205 (2002-12-13) The contractor may submit a claim at any time during or after the contract. Normally a claim should not be submitted to CCRB until the contract has been completed, since in most cases an audit of the total contract will be required. The extent and nature of the Board's review process is at the discretion of CCRB.

11.206 (2002-12-13) CCRB will inform the contractor of the receipt of the claim and that the sector/region has been requested to prepare the Crown's submission. The sector/region is also notified to arrange preparation of a submission to CCRB.

11.207 (2002-12-13) The submission, to be signed at the director level, must include a recommended settlement as well as confirmation that funds are available for settlement under the encumbrance.

11.208 (2002-12-13) The Chairperson, CSB, will advise the contractor in writing of the date of receipt of the submission from the sector/region, and will, if necessary, arrange a meeting of the participants.

11.209 (2002-12-13) Depending on the complexity of the dispute, the contractor will be given the opportunity to appear in person, or to have selected company officials appear, and can be represented by legal counsel. The same opportunity will also be afforded to PWGSC and the client in relation to data or presentation against, or in support of, the contractor's claim.

### **Meetings**

11.210 (2002-12-13) The Chairperson, CSB, is responsible for ensuring that all participants, at any Board

meeting, are fully aware of the role and responsibilities of the CSB, and the manner in which the proceedings will be conducted. The Chairperson will also determine the time necessary to permit a full and detailed discussion of the claim.

*All copies of submissions to CSB, assemblies of data, memoranda and working papers of CSB, are for the sole use of the Members of CSB, the Director General, Audit and Ethics Branch (AEB), the Deputy Minister and the Minister of PWGSC.*

- 11.211 (2002-12-13) Normally, full Board meetings are only convened to review complex claims in excess of \$100,000. Such meetings would be attended by the Chairperson, CSB, one or more private sector consultants, an independent representative from the project authority, as well as the Board's legal advisor. For claims at \$100,000 or less, the review of the contractor's claim will normally be conducted less formally and without incurring the expense of engaging any private sector consultants.
- 11.212 (2002-12-13) When deliberations are complete, the final conclusions and recommendations for settlement will be recorded in the Minutes of Proceedings.

## Settlement Offer

- 11.213 (2002-12-13) When the Chairperson, CSB, concludes that a settlement offer is to be made, CSB will officially advise the contractor of the recommended amount of settlement and will seek to obtain the contractor's written acceptance. A copy of CSB's letter of offer to the contractor will be sent to the client and the sector/region for information.
- 11.214 (2002-12-13) If the settlement amount exceeds departmental approval authorities, the contractor will be advised that the settlement is subject to the approval of Treasury Board (TB). The contracting officer will prepare the necessary TB submission, and send it to the CCRB for submission to TB.
- 11.215 (2002-12-13) When the recommended payment has received all necessary approvals, CSB prepare, in collaboration with Legal Services, a settlement and release agreement which must contain an acceptance and release clause approved by Legal Services.
- 11.216 (2002-12-13) Copies of the settlement and release agreement must be distributed to all interested parties.

## Non-acceptance of Settlement

- 11.217 (2002-12-13) If a CSB ruling is not acceptable to the contractor, the contractor may institute legal proceedings against the Crown.

## Contract Dispute Advisory Board (CDAB) Procedures

- 11.218 (2002-12-13) When any dispute arising from architectural and engineering, construction, building maintenance and leasing contracts cannot be resolved through negotiation, the contractor/consultant may request the Minister, in writing, to set up a CDAB. The Minister's Office will forward such a request to Contract Claims Resolution Board (CCRB).
- 11.219 (2005-06-10) If no final departmental position has been reached, the Region is to advise, within three working days, what specific actions are underway to attempt to reach a settlement by negotiation. This Region must also document the nature of the claim and supply a copy of it to the Director, CCRB, and the Assistant Deputy Minister, Real Property Branch (ADM/RPB).
- 11.220 (2005-06-10) If the negotiation process appears to be unduly protracted, the Director, CCRB, will write to the ADM/RPB requesting direction. The memo will attach a copy of the claim, summarize the regional position and recommend a course of action. A legal opinion or other advise may be included, as necessary.



11.221 (2005-06-10) If the negotiation process has reached an impasse, the Director, CCRB, will obtain the agreement of the ADM/RPB and will prepare a letter for the Minister's signature offering the CDAB process. Copies of the letter will explain that the CDAB process is non-binding and is without prejudice to the rights of either party. The Minister's letter will enclose an agreement containing the terms and conditions for its initiation. The agreement must be accepted and signed by the contractor/consultant before a hearing will be scheduled.

11.222 (2005-06-10) Once the CDAB process has been agreed to, the Director, CCRB, will:

- (a) Obtain the names of at least three arbitrators to act as Chairpersons from a recognized provincial Institute of Arbitrators, and forward these names to the Region and the Contractor/Consultant who will rank the proposed Chairpersons in order of their choice and will advise CCRB accordingly. CCRB will engage the highest ranking individual by combining the choices from both parties.
- (b) Establish the time frame for the CDAB process through dialogue with the Region, Contractor/Consultant and the Chairperson. With regard to the time frame for the hearing itself, three days are normally allotted with the claim being presented on the first day, and responded to on the second day. On the third day, the panel concludes its review of the facts as presented by the parties.
- (c) Obtain the Regional Director's response to the claim and forward copies of the claim together with the Region's response to the panel members.
- (d) Arrange to have the CDAB session monitored to ensure that the intent of the process is met and ensure that no new items of claim are introduced during the hearings.
- (e) Ensure that the Chairperson's report is promptly distributed to both parties
- (f) Prepare a briefing note and draft a letter of decision for the Minister's signature for sign off by the ADM/RPB and the Director General, Audit and Ethics Branch.
- (g) Brief the Contractor/Consultant. If requested, concerning the basis of the Minister's decision.
- (h) If the Minister's decision involves a settlement amount, the CCRB will arrange for a settlement and release document to be prepared and will ensure that the settlement payment is made in a timely manner.

### **Non-acceptance of Settlement**

11.223 (2002-12-13) If a CCRB ruling is not acceptable to the contractor, the contractor may institute legal proceedings against the Crown.

## **Supplier Sanctions**

### **Removal from Source List**

11.225 (2002-12-13) Names of suppliers are to be removed from source lists in the following instances:

- (a) when the supplier requests removal;
- (b) in the event of bankruptcy or business failure;
- (c) in the event of permanent shutdown;
- (d) when fire or other disasters render the enterprise inoperable for an extended period;

- (e) when the supplier refuses to provide information necessary to confirm its listing(s);
- (f) when there is non-compliance with PWGSC policies or programs.

Strikes or lockouts normally do not constitute reason for removal.

- 11.226 (2004-05-14) Contracting officers may normally remove a supplier's name from the source lists. The supplier must be informed of this in writing.

Removal for non-compliance must have the director's approval and the letter notifying the supplier must be signed by the director general. Copies of the letter must be sent to the Deputy Minister, Assistant Deputy Minister, Acquisitions Branch, and Acquisition Policy and Process Directorate (APPD).

If a supplier is removed for non-compliance, its inclusion on other similar lists should be reviewed by the sectors/regions responsible for the other lists. APPD will advise the sectors/regions of affected lists.

- 11.227 (2002-12-13) Evidence provided by a supplier that the circumstances leading to the deletion have been rectified must be considered to determine whether the removal action should be rescinded.

## **Return of Special Test Equipment and Special Production Tooling**

- 11.240 (2003-05-30) Contractors are required to provide Department of National Defence Director, Disposal, Sales, Artifacts and Loans (DND/DDSAL) with at least sixty (60) days written notice prior to the date when the production assets will no longer be required. The notice should identify the contract or loan agreement serial number under which the production assets were held, location of the equipment, a brief but adequate description of the surplus production assets and the total estimated value, if applicable. (See [6B.188](#).)

A decision to retain production assets for future use should be supported by a cost/benefit analysis which provides an estimate of the storage and transportation costs involved, the duration of the storage, the refurbishing/modification costs that may be required to re-activate the assets, including installation/set-up charges, if applicable, and the remaining operational use or life of the equipment.

DND/DDSAL will advise the contractor on the most appropriate method of retention and storage of the assets. DND/DDSAL will arrange for the transfer of production assets to another contractor, or a storage facility or will prepare the appropriate documentation, declaring the items surplus, and forward it to Crown Assets Distribution Centre.

## **Return of Department of National Defence (DND) Loaned Materiel**

- 11.241 (2003-05-30) Returns are to be made:

- (a) when the materiel is no longer required;
- (b) when repairs are beyond the contractor's capability;
- (c) when recalled by DND/DDSAL;
- (d) on completion of the contract.

- 11.242 (2003-05-30) The contractor is required to return the materiel, as directed by DND/DDSAL, and shall request from DND/DDSAL, in writing, instructions for the disposition of the items to be returned. The request should include a description of the items, identification or NATO stock number, their condition, and the Loan Agreement number.

- 11.243 (2003-05-30) DND/DDSAL will issue disposition instructions and inform all concerned. The contractor shall arrange for the return of the items as directed and confirm action by returning a signed copy of the "Notice to Ship" to DND/DDSAL.
- 11.244 (2003-05-30) Inspection on issue and return of DND loaned materiel will be carried out by the local Canadian Forces Quality Assurance Representative at their discretion.
- 11.245 (2003-05-30) The Contractor shall report lost, damaged or destroyed DND loaned materiel, in writing, to DND/DDSAL which is responsible for coming to a resolution with the contractor.

## Final Payments

- 11.265 (2005-06-10) The total time charged under a fixed rate contract shall be verified for acceptability and accuracy of recording before the final claim is processed for payment. The findings of such verifications will be noted on the contract file.

Verification of time for acceptability should be carried out by the contracting officer or other qualified personnel designated by the sector/region concerned.

Verification of time for accuracy of recording should be carried out by qualified personnel from the financial division or section in the directorate concerned or other suitably qualified personnel with the prior approval of the Director, Cost and Forensic Accounting Directorate, who is also responsible for setting the standards of verification for the accuracy of recording.

## Contract Close-Out

### Cost Submissions Standards for Cost Reimbursable Contracts

- 11.280 (1994-06-23) The contractor will be paid, in accordance with the contract, the cost reasonably and properly incurred in the performance of the work. Upon completion of the work on all cost reimbursable contracts meeting the cost threshold, a certification by the contracting officer that the final amount paid represents a reasonable price shall be placed on the contract file. This certification shall be based on the findings of either a formal or an informal audit.

The audit provision in contracts valued over \$50,000 with Canadian suppliers allows for the determination of the actual costs incurred, to determine the final contract cost of cost reimbursable contracts and the reasonableness of the price.

- 11.281 (1994-06-23) All cost reimbursable contracts require a cost submission upon the completion of the contract. All multi-year cost reimbursable contracts, except for Repair and Overhaul (R&O) services, will include a provision for an annual cost submission as a mandatory deliverable item.

*For R&O service contracts, this is up to the discretion of the contracting officer and the audit agency.*

### Formal Audits

- 11.282 (2005-06-10) The selection of cost reimbursable contracts for formal audit will be made by Contract Audit Group (CAG), within Acquisition Program Integrity Secretariat, in accordance with the following:

- (a) all contracts associated with Major Crown Projects (MCPs); and
- (b) those contracts placed with contractors considered to be priority as determined by CAG.

In addition, contracting officers may request a formal audit on an ad hoc basis.

- 11.283 (2005-06-10) Sectors/regions will supply to CAG, for those contracts selected for formal audit, a copy of the contract document together with copies of all cost submissions received.
- 11.284 (2005-06-10) A copy of the audit report will be forwarded to the contracting officer, along with an audit notification form prepared by CAG detailing overpayments and/or comments requiring approval.
- 11.285 (2005-06-10) The contracting officer will establish a final price with the contractor based on the audit findings. Every effort will be made to do this within ninety (90) days of the audit report being received. CAG will be notified by the contracting officer of the terms of the settlement and resolution of all audit issues raised in the contract audit.
- 11.286 (1994-06-23) When the final price has been agreed with the contractor, the contracting officer will prepare the final price certification.

### **Informal Audits**

- 11.287 (1994-06-23) Informal audits will be carried out by the contracting officer, with the assistance of a cost analyst, as soon as possible after the work is complete and the final cost submission received.

When, as a result of the informal audit, a final price is agreed to by the contractor, the contracting officer will prepare the final price certification.

### **Sample Audits**

- 11.288 (2005-06-10) CAG has a random sample audit program to select contracts for formal audit. These audits will be carried out by Consulting and Audit Canada. The findings of these audits, which are a form of quality assurance, will be sent to the appropriate sector/region.

### **Release of Contract Financial Security**

- 11.295 (1994-06-23) Surety bonds, according to their terms, automatically expire when the contractor has fulfilled all obligations under the contract. When the contract has been completed, surety bonds shall be destroyed.
- 11.296 (2005-06-10) Where a contract, in respect of which a security deposit (government guaranteed bonds, bills of exchange, irrevocable standby letters of credit) was given, has been completed or terminated through no fault of the contractor, the security deposit shall be returned to the contractor. The contracting officer is to instruct the Finance, Accounting, Banking and Compensation Branch to requisition a cheque for the amount of a bill of exchange plus accumulated interest, or to request that branch to arrange the release of bonds, letters of credit and other negotiable instruments deposited.

### **Financial Claims by the Crown**

- 11.300 (1994-06-23) There are two general categories of claims by the Crown, as a result of contracting activities:
- (a) legal disputes, e.g. termination for default, bankruptcy, (only when the amount owing is actually known and final); and
  - (b) overpayments/overclaims, e.g. as may occur when reported as a result of audit.

*Either instance can only be determined when a contract has been completed.*

- 11.301 (2002-12-13) Where monies may be owing to the Crown as a result of contracting activity, sectors/regions are to determine the liability and amount owing, with assistance as necessary

from Legal Services.

There are special procedures to be followed whenever there are suggestions of unreasonably high profits from any contract placed pursuant to the *Defence Production Act* or from any contract other than competitive firm price. The procedures, which are in [Annex 11.2](#), also deal with situations where a contractor wishes to return excess profits; for refunds from subcontractors; or where a settlement from the contractor is to be financed partly from the proceeds of its income tax refund.

The contracting officer is to liaise with the supplier to get concurrence of the final amount that is owing. Once that amount has been established, the contracting officer, following TB policy, must formally advise the client to establish an accounts receivable. The client must advise PWGSC that this has been done, and take collection action.

11.302 (2005-06-10) Many organizations have roles to play relating to these claims by the Crown.

- (a) The contracting officer is responsible for reviewing the acceptability of contractor claimed amounts, responding to audit observations as required, liaising with the client as to concurrence on the final amount, and advising Contract Audit Group (CAG) of all settlements reached.
- (b) Consulting and Audit Canada (CAC) provides audit reports on specific contracts,.
- (c) Legal Services is responsible for:
  - identifying the changes in the legal relationship between the Crown and the contractor resulting from claims by the Crown, and the consequences in terms of risk and liability being assumed by the Crown as a result of claims against the contractor;
  - informing the contractor, when requested by the contracting authority, of the Crown claim, by way of a formal legal demand;
  - initiating legal action against the contractor.
- (d) Industry Canada, for Technology Partnerships Canada, is responsible for:
  - following up on the disposition of all audit qualifications and/or observations raised by CAC, except for audit issues involving interpretation of the Contract Cost Principles which are a PWGSC responsibility; and
  - resolving issues and disputes in the case of joint Canadian Commercial Corporation and Industry Canada agreements.

## Receipt and Deposit of Monies

11.350 (2005-06-10) When contracting officers receive monies directly from contractors with respect to a particular claim by the Crown, these monies must be sent, in compliance with Treasury Board [Chapter 3-3](#), to the **departmental accounting unit** as soon as possible. The monies must be accompanied by a memorandum, with copies to the **client** and CAG. The memorandum must include:

- (a) a brief description explaining why monies are being remitted;
- (b) the name of the **client**;
- (c) the PWGSC file/contract serial number;
- (d) the name and telephone number of the contracting officer.

In the National Capital Area, the monies are sent to:

Finance, Accounting, Banking and Compensation Branch  
Public Works and Government Services Canada  
Portage III, 12B1  
Gatineau, Quebec K1A 0S5

Outside the National Capital Area, the recipient is the appropriate PWGSC regional director's office.

## Vendor Performance Policy

### Introduction

11.450 (1997-03-31) The goal of the Vendor Performance Policy (VPP) is to improve client service, by preventing problems with vendors from arising. While it is never possible to ensure that there is no poor performance, we can improve suppliers' performance by instituting the appropriate measures in the event of non-performance.

### Principles

11.460 (1997-03-31) Public Works and Government Services Canada (PWGSC) has the authority and the duty to take reasonable measures to ensure that it can rely on its contractors to perform their obligations. The Department, within the framework of its policy that procurement be open, accessible and fair, has the same right as other purchasers in the market to assess a vendor's performance, and may take action to prevent future problems, based on the vendor's past performance. The discretion to take such action must be exercised in a fair and reasonable manner within the policy. Any measure taken must rationally relate to the nature and severity of the problem for which it is applied.

### Definitions

11.470 (1997-03-31) **Poor performance:** means anything less than full performance of a contract by a vendor.

*While even minor instances of poor performance may be noted, action would normally only be taken against a vendor as the result of a major instance of poor performance on a contract, or a cumulative record of poor performance.*

**vendor:** includes subcontractors, owners, directors, officers, employees, agents, parent corporation or subsidiary of a vendor, which may be responsible for a vendor's poor performance.

*While persons other than a contractor may be treated as "vendors" under the Policy, action against them can only be taken where they have been notified of the poor performance and of any proposed measures and given the same opportunity to respond that a contractor would have.*

**Vendor Performance Corrective Measure (VPCM):** means a condition or limitation placed on a vendor's ability to contract with (PWGSC on the basis of PWGSC's assessment of their reliability. A VPCM can be applied to a vendor overall or only in respect of certain products or services. There are three types:

- (a) **Debarment** is the refusal by PWGSC to do business with a vendor for a specified period, which may be expressed in terms of a number of relevant procurements, and is generally not to exceed three (3) years;
- (b) **Suspension** is the refusal by PWGSC to do business with a vendor pending the outcome of an investigation into serious or multiple instances of poor performance, or until the

vendor meets conditions set for reinstatement, such as remedying a problem;

- (c) **Conditions** can be imposed on vendors seeking to do business with PWGSC, for a specified period, which may be expressed in terms of a number of relevant procurements, and is generally not to exceed three (3) years, or until the vendor meets conditions set for re-instatement, such as remedying a problem.

As part of a VPCM, the vendor may also be subject to probation when the Measure ends. In such a case, if further instances of poor performance occur, the VPCM may be extended, or another applied.

## Process

### Monitoring

11.480 (1997-03-31) Contracting officers must enforce the terms of contracts wherever possible and appropriate. The same incident may support both enforcement of the remedies available under the contract and a VPCM. The contracting officer will document events that may be instances of poor vendor performance in the contract file.

Where the terms of the contract are enforced by notice to the contractor of its poor performance, but no further action is taken, this must be noted in the contract and vendor files, together with the facts which justify it. That the contracting officer intends to commence an action to impose a VPCM on the vendor is not a reason to decline to enforce the contract.

The approval of the relevant Director is required for noting an instance of poor performance on the vendor file for the vendor on the Vendor Information Management (VIM) system. A notation of poor performance on VIM will include the contract number, the subject of the contract, the nature of the poor performance, any remedial action taken by the vendor, its effects and the status or disposition of the problem.

The vendor must be informed of each instance of poor performance by the relevant Director and will have ten days to respond before the notation will appear on VIM.

A vendor, which may be someone other than the contractor, who is responsible for the contractor's failure to fulfil the contract, must be notified each time a poor performance notation is made on VIM, and be informed that PWGSC will take past performance into account in its future dealings with vendors.

A vendor may respond to notification of the Director's intention to have an instance of poor performance noted on VIM. The Director will consider the input of the vendor in deciding whether to enter the information.

Outstanding performance of a vendor should also be noted, as it may be useful in making an overall assessment of a contractor's performance in the event corrective measures are required.

A performance notation will generally remain on VIM for seven (7) years. After that time, a vendor may request that it be removed. Performance, good or bad, more than seven (7) years in the past will not ordinarily be relevant to a decision whether to impose a corrective measure.

Since the VPP limits itself to consideration of poor performance, being failure to fulfil a contract, contracting officers should make sure that their contracts cover all aspects of performance which they would want to consider in evaluating the vendor's performance on the contract.

### Investigation for Vendor Performance Corrective Measures (VPCM)

11.490 (1997-03-31) Formal corrective measures should be considered where there is evidence that continued contracting with a vendor may pose a greater risk to the Crown than is acceptable. This may be as the result of a major instance of poor performance on a contract, or a cumulative

record of poor performance. Sectors and regions may also set general or commodity-based standards, as the basis for consideration of VPCM (see [11.560](#)).

In investigating whether corrective measures should be applied, the Sector or Region will:

- (a) ensure a full review of contract file(s), and the record of the vendor in general;
- (b) notify all other sectors or regions and consult those which have a particular interest in the matter;
- (c) consult clients which have a particular interest in the matter, either as major purchasers of the vendor's product or as the initiator of the complaint; and,
- (d) consult Legal Services, as to what evidence should be sought, and what process should be used, to ensure fairness in light of all the circumstances.

All components of an investigation and subsequent decision must be fully documented, with the disposition being noted on the vendor file in VIM.

### Decision on Application of Vendor Performance Corrective Measures

11.500 (1997-03-31) A decision to apply VPCM should be made where, on the basis of the vendor's performance history, a prudent person acting on their own behalf would not continue to deal with the vendor, or would not continue to deal with the vendor without special conditions being attached.

A VPCM may take one of the following forms:

- (a) **Debarment** is the refusal by PWGSC to do business with a vendor for a specified period, which may be expressed in terms of a number of relevant procurements. Debarment would be used for problems of a criminal nature, or where there is poor performance which demonstrates a lack of good faith effort on the part of the contractor to perform its various obligations. Since the vendor has demonstrated a lack of good faith effort, it would not be realistic to allow reinstatement on the satisfaction of some requirement. Debarment would not generally be for a period exceeding three (3) years.
- (b) **Suspension** is the refusal by PWGSC to do business with a vendor pending the outcome of an investigation into serious or multiple instances of poor performance, or until the vendor meets conditions set for reinstatement, such as remedying a problem. Suspension would be imposed where doing business with a vendor before an investigation is complete or before the vendor has made changes would pose too great a risk that the vendor would not carry out its obligations under future contracts.
- (c) **Conditions** can be imposed on vendors seeking to do business with PWGSC. Conditions would be used in the case of problems which could be prevented by a less onerous means than a refusal to do business. Conditions would not generally be applied for a period exceeding three (3) years.

When investigating to determine if a VPCM should be imposed, consideration must be given to the extent to which the VPCM will apply to the various elements of a vendor's organization and to related organizations. As the objective of this Policy is to prevent problems with vendors from arising, the breadth of the VPCM will depend on the nature and source of the poor performance for which the VPCM is being considered.

*Examples: (1) Where the source of the poor performance is dishonesty within the highest management of a vendor, then imposing the VPCM on the vendor as a whole would likely be appropriate. (2) Where the poor performance relates to problems with product quality in one of the vendor's several product lines, where there is no element of wilful failure to produce a suitable product, this would likely be more appropriately dealt with by a VPCM*



*limited to the product line with which problems have been experienced. (3) Where the poor performance was the result of safety problems that were the result of policy set for the subsidiary vendor by its parent corporation, it may be appropriate, provided proper notice has been given, to apply a VPCM to the parent corporation and all its subsidiaries with which similar safety issues might arise. These examples are provided solely for illustration. Actual cases will depend on their particular situations.*

When, on the basis of the investigation, a Director General believes that one of these measures should be applied, the Sector or Region will notify the vendor of the VPCM proposed together with the reasons for it, and give the vendor a reasonable opportunity (including a reasonable period of time) to respond.

What constitutes a "reasonable opportunity" will vary with the circumstances, and could range from an exchange of correspondence, to formal consultations. A vendor will be given access to documents relevant to its performance on the same basis as these would be available in a contract dispute. In determining whether to provide a particular document to the vendor, it should be borne in mind that if absence of that document means the vendor is not in a position to address the allegations made against it, this may allow successful court challenge of a subsequent decision to impose a VPCM.

The notice to the Vendor will include, in addition to the type of measure:

- (a) a list of the instances of poor performance which form the basis for the proposed VPCM sufficient to identify them;
- (b) the reasons why the vendor's performance record merits the proposed VPCM;
- (c) whether the VPCM will be across-the-board (that is, affecting all aspects of the vendor's operations) or limited by product, division, geographic division, type of contract (such as urgent delivery requirement) or some other factor;
- (d) when and how the VPCM will end;
- (e) whether the vendor will be subject to a formal period of probation following the end of the VPCM, and who will determine if the probation has been breached;
- (f) in the case of a VPCM that can end when the vendor satisfies conditions, who will decide if the conditions have been satisfied.

If, after considering the vendor's response, the Director General still believes the proposed VPCM, or some less severe measure, should be applied, that measure will be applied. If it is intended, after reviewing the vendor's response, to apply a more severe measure than originally proposed, the vendor must be notified, and given a reasonable opportunity to respond to that change.

The decision to apply a VPCM will include, in addition to the type of measure:

- (a) the procurements for which the vendor is ineligible to bid or contract, that is, whether the VPCM will be across-the-board (affecting all aspects of the vendor's operations), or limited by product, division, geographic division, type of contract (such as urgent delivery requirement) or some other factor;
- (b) when and how the VPCM will end;
- (c) whether the vendor will be subject to a formal period of probation following the end of the VPCM, and who will determine if the probation has been breached;
- (d) in the case of a VPCM that can end when the vendor satisfies conditions, who will decide if the conditions have been satisfied.

## Review

11.510 (2004-05-14) Except where there is an approved Sector Program (see [11.560](#)), the Assistant Deputy Minister, Acquisitions Branch (ADM/AB) will review all decisions to apply a VPCM, and any additional representations made by the vendor, and may decide to vary the decision. If the ADM/AB intends to apply a more severe VPCM, the vendor must be notified, and given a reasonable opportunity to respond to that change.

## Enforcement

11.520 (2004-05-14) When a VPCM is applied, the ADM/AB (or appropriate Director General, where there is a Sector Program) will inform the vendor of the decision. All sectors and regions, and clients which have a particular interest in the matter, will also be informed.

The fact that a vendor is subject to a measure under the VPP will be published on the Government Electronic Tendering Service and in the *Government Business Opportunities*, together with the particulars of the measure, but not the reasons. This notice will continue to be published while the measure is in effect.

A debarment or suspension renders a vendor ineligible to bid on or receive contracts related to certain types of procurements. Where a vendor is subject to conditions and the vendor does not meet those conditions for a particular procurement, the vendor is ineligible.

A debarred or suspended vendor will be removed from relevant source lists, automated vendor rotation systems, and standing offers. Bids received from vendors debarred or suspended from doing any business with PWGSC will not be considered for evaluation. Bids from vendors who are debarred or suspended in part will not be considered for evaluation, if the bids pertain to procurements from which the vendor has been debarred or suspended. Where a vendor is subject to special conditions, any bid from that vendor which does not conform to the conditions will not be considered for evaluation.

A VPCM does not affect existing contracts, though it does affect amendments. If a current VPCM imposed on a vendor would have been relevant to the award of the contract had the VPCM been in effect at the time, or is relevant to the subject matter of the amendment, then the amendment requires the approval of the relevant Director General as an exception to the VPCM.

Information on a VPCM will only be entered into VIM by Policy, Risk, Integrity and Strategic Management Sector (PRISMS), which will be responsible for maintenance of the information (including removal of notice where a VPCM has ended). This information will be accessible to anyone who has access to Automated Buyer Environment (ABE).

When a Measure ends, the Sector or Region that initiated it is responsible for promptly notifying the vendor.

## Role of the Contracting Officer

11.530 (2004-05-14) The contracting officer must ascertain whether a bidder, or a vendor being considered for a sole source contract, is subject to any VPCM, and for determining if that measure affects the procurement the contracting officer is working on.

When accessing the VIM file on a vendor, the contracting officer will have a clear notice of any VPCM. ABE will not interfere with the issuing of a contract to a vendor subject to a VPCM. As the VPCM details area is limited to about 250 characters, additional information may be contained on VPCM type comments, which should also be consulted.

## Suspensions in Cases of Urgency

11.540 (2004-05-14) Where a problem with a vendor is particularly serious (e.g., involving negligence or

wilful misconduct, or carrying health or safety implications), the ADM/AB may apply an immediate suspension on the advice of a Director General, prior to a complete investigation. The suspension will remain in effect until measures have been taken to remove any unacceptable risk to the Crown or public. The vendor will immediately be notified, and given the same opportunity to respond as in a normal VPCM action.

## Exceptions

11.550 (1997-03-31) In cases of emergency, or great urgency in a procurement, an exception may be made to a VPCM, by a Director General. In such cases, special care must be taken to protect the Crown. Where an exception is made, the reason must be recorded on the contract file and the vendor file. The fact that a vendor subject to a VPCM is low bidder is not enough reason to make an exception.

## Sector Programs

11.560 (2004-05-14) A Sector or Region may establish a program for evaluating vendor performance and determining appropriate VPCM to apply within that Sector or Region. Where such a program has the approval of the ADM/AB, it is not necessary that the ADM/AB review each case. The decision can be made by the persons delegated that authority under the program.

The performance standards and the VPCM to be applied must be established on a commodity basis, and other areas of the department which may be affected by the proposed Program must be consulted. This is to prevent differing standards for the same commodities, in different sectors or regions. Once established, a program is administered by the Sector or Region, in accordance with the provisions of this Policy.

## Use of Vendor Performance Clause

### Authority to Reject a Bid

11.570 (1997-03-31) Authority to reject a bid under the Vendor Performance clause [A9100T](#) rests with the officer responsible for evaluating bids; except that in the case of bids being considered for rejection pursuant to 1(d)(2); 1(d)(3); or 1(d)(4) the authority to reject a bid rests with the appropriate Director General.

### Notice to the Bidder

11.580 (1997-03-31) Notice of intent to reject a bid pursuant to this clause will be given by telephone, and followed by confirming facsimile or letter, except that a bidder excluded under 1(b) will not be notified. The call must be made to an employee of the bidder, with clear and directly related management responsibilities. Notice is considered to have been received by the rejected supplier at the time of the telephone call. The person making the call must note on the file the date and time of the call, and the person spoken to.

### Contents of Notice

11.590 (1997-03-31) The notice must set out the facts and the reasons for the decision to reject the bid. For example: Where a supplier with a record of persistent lateness, but as yet not subject to a VPCM is excluded from a procurement where timeliness is critical, the notice would cite the contracts on which the supplier was late (facts) and state that this record shows an unacceptable risk in light of the critical nature of the time requirement in the present procurement (reason).

Where a bid is being rejected under 1(c), it is sufficient to cite the VPCM.

## Review

11.600 (2004-05-14) A bidder, except a bidder excluded under 1(b), may have the decision to reject reviewed by the Assistant Deputy Minister, Acquisitions Branch (ADM/AB). It is entirely in the ADM/AB's discretion, whether the bid evaluation and contract award process will be held up, to give time to review the decision.

A review by the ADM/AB will result in an investigation, and a decision. Such a decision can have effect beyond the particular procurement from which the supplier has been rejected. When the decision has been made, the bidder will be informed of the results, in writing.