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Performance and Payment

Measurement and payment for performance of the contract is one of the most important aspects of contract administration. The *Financial Administration Act* states that contract payments must be accurate and in accordance with the contract.

This section outlines the general considerations of measuring performance and making payments at the various stages of PW&S contracts.

Partial Performance

Most contracts for the purchase of goods involve a single contract payment at full performance of the contract, usually delivery of the goods. However, for most service and construction contracts, the work is spread over several months or longer. In these cases, partial contract payments are usually made to the contractor. The terms of the contract should state the dates progress payments are due and/or milestone payments are due.

It is important to process payments on a timely basis and within the terms of the contract, since failure to pay when payment is due is a fundamental breach of contract. The timing of GNWT contract payments follows the *Financial Administration Manual*, Directive 1804, and is dependant on the date of receipt of substantiated invoices from the contractor. Invoices or requests for payment must be date stamped upon receipt.

Progress payments must reflect the amount of work actually performed.

Evaluating Payment Requests

Invoices or requests for contract payment received from the contractor must be evaluated for conformance with the contract terms, and to ensure that the amount requested represents only the value of work performed during that payment period. This may include any part of the work that has been completed and any material that has been delivered to the work site, but not yet incorporated into the work.

Materials / Goods on Site

Equipment, materials or goods that are delivered to the work site or possession of the GNWT, or are delivered to the work site but not yet incorporated into the work, are eligible for payment.

In rare cases, it may be justified to pay the contractor for materials or work that the GNWT has not yet received or are not yet at the work site. This may occur where there is a substantial amount of off-site prefabrication of materials, or goods are held in transit for an extended period of time for some reason.

In these cases, the **work can only be accepted and paid for if it is held in a bonded warehouse in the name of the GNWT.** In no case should the goods or materials be paid for if they are still in the contractor's possession or are not in bonded facilities.

Note: If further transportation of the goods will take place after they have been accepted and paid for, the contractor should be required to carry the appropriate transportation insurance on the goods.

Insurance requirements for these situations should be discussed with Risk Management and Insurance, Department of Finance, to ensure that the GNWT is fully covered against possible loss.

Initial Progress Payments

Before certifying the initial contract progress claim, the contract officer must verify that the contractor has submitted all the required documents as applicable:

Do not process contract payments until these documents are received.

- signed contract documents
- contract security
- insurance policies
- local/northern employment reports

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Performance Holdbacks

PW&S construction contracts provide for the retention or *holdback* of a percentage of the contract payment. This holdback is a security fund, intended to protect the interest of the GNWT and those who performed work or supplied materials to the contractor.

Disputed Requests

If any part of a progress claim is questionable or unsatisfactory, the contract officer should:

- Discuss the questionable areas with the contractor, requesting time sheets, subcontractor invoices, waybills or manufacturers' packing slips, etc. as required to substantiate the progress claim.
- If the claim cannot be substantiated, adjust the amount of the payment to reflect the correct value of the work performed.
- Forward a copy of the adjusted claim to the contractor, along with a letter explaining the rationale for the adjustment.

Substantial Completion

Substantial Completion applies primarily to the administration of construction contracts; it does not normally apply to general service, goods or consulting contracts.

Refer to the *PW&S Project Management Manual, Section 4.6, Substantial and Final Completion,* for detailed direction on substantial completion in the administration of construction contracts.

A contract is considered to be *substantially* complete when the contract is performed to the point where the facility or works can be safely used for the purpose intended. The remaining work should be relatively minor and should not restrict the use or jeopardize the health or safety of users.

Statutory Declarations

One of the requirements for granting substantial completion of a contract is that the contractor must provide a statutory declaration. A *statutory declaration* is a written declaration, by the contractor, that all current obligations with respect to the contract work have been paid. This includes all subcontracts, labour, materials, services, and all assessments and levies under applicable acts or legislation.

Release of Security and Holdback Funds

The effects of issuing a *Certificate of Substantial Completion* significantly reduce the GNWT's protection against contractor default, because:

- The contract security, if provided, must be returned to the contractor. A portion of the security may be retained, if it is considered as necessary leverage in having the contractor complete the remainder of the contract.

- The holdback money, other than that retained for identified deficiencies and uncompleted work, must be returned to the contractor.

Because of these effects, a *Certificate of Substantial Completion* should not be issued prematurely. It is very important that the contract officer's evaluation of the contractor's performance be accurate and thorough prior to the issue of the certificate.

Start of Warranty Period

The issuance of a *Certificate of Substantial Completion* is also important because it can trigger the start of the contract warranty period. Under the terms of most PW&S contracts, the contractor must rectify and make good any defect or fault that appears in the work within 12 months from the date of initial use or occupancy. In most cases, the date of occupancy coincides with date of substantial completion.

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Final Completion/Performance

The term *final completion* is used primarily in service and construction contracts, while goods contracts will refer to *total performance* or *total acceptance*. These terms essentially have the same meaning: a contract is considered to be *complete* when, in the opinion of the Contract Authority, the contractor has fulfilled all of its obligations under the terms of the contract. The work must be totally complete, with no items remaining to be completed. The only obligation of the contractor after contract completion would be warranty/guarantee work.

Statutory Declarations

For construction contracts and some service contracts, the contractor is required to provide a *Statutory Declaration*, prior to granting a *Certificate of Final Completion* or *Total Performance*.

Refer to the previous discussion on "statutory declarations" in this section.