

## CHAPTER 8 - PROTESTS, DISPUTES, CLAIMS AND DEBARMENTS

### A. GENERAL

1. Introduction. SCOs will use the following procedures when seeking legal assistance in cases involving mistakes in bids, protests, disputes and appeals, claims and debarments.

2. Legal Assistance to Sales Offices. SCOs requiring the immediate services of an attorney may telephone either DRMS Counsel, (DSN) 661-5987 or Area Code 269-961-5987, or assigned DRMS field counsel.

### B. MISTAKES IN BIDS

1. General. SCOs: Examine all bids for mistakes. In cases of an apparent mistake and in cases where there is reason to believe that a mistake may have been made, request from the bidder a verification of the bid, calling attention to the suspected mistake. If the bidder confirms a mistake has been made, process the matter as follows:

#### 2. Apparent Clerical Mistakes

a. The term "apparent clerical mistake" is not readily defined except on a case-by-case basis. The test in a mistake in bid case is not whether "there is no doubt" in the SCO's mind, but whether a mistake in bid was made and whether a legally binding award may be made either on a bid as submitted or on the basis of a corrected bid. The SCO may correct any clerical mistake apparent on the bid prior to award if he has first obtained from the bidder written verification of the bid actually intended. However, to assure that an SCO does not make an invalid award when an apparent clerical mistake has been made, the SCO should consult assigned counsel for guidance.

b. If an SCO holds an award in abeyance pending resolution of a mistake and it appears that resolution of the mistake may not be accomplished until after the expiration of the bid acceptance period, the SCO must notify any bidders whose bids might be considered for an award and request that those bidders extend their bid acceptance period if appropriate.

c. When corrections to bids are required, the SCO will follow the procedures provided in this chapter. For example, an apparent clerical mistake is an obvious error in placing the decimal point, i.e., a bidder bids \$10 each on 10 units, but shows an extended price of \$1,000. In such a case, if there is any doubt, after receiving information from the bidder as to the intended bid, whether he actually intended to bid \$10 each or \$100 each, the SCO will not correct the bid as an obvious clerical error, but will process the mistake according to paragraph B3. An error in extension of prices may not be corrected without requesting verification from the bidder unless the difference is comparatively minor, for example when a bidder bids \$20.53 per ton for 10 tons, but extends the price as \$105.00. Reflect any correction made according to this paragraph in the award document, if an award is made on the corrected bid.

#### 3. Other Mistakes

a. The Defense Logistics Support Center is authorized to make the following administrative determinations in connection with mistakes in bids, other than apparent clerical mistakes, alleged after opening of bids and prior to award:

(1) Where the bidder requests permission to withdraw a bid, and clear and convincing evidence establishes the existence of a mistake, a determination will be made to permit the bidder to withdraw his bid.

(2) If the evidence is clear and convincing both as to the existence of the mistake and as to the bid actually intended, and if the bid, both as corrected and as uncorrected, is the highest received, a determination will be made to correct the bid but not to permit its withdrawal.

(3) Where the bidder requests permission to correct a mistake in his bid, and clear and convincing evidence establishes both the existence of a mistake and the bid actually intended, permit the bidder to correct the mistake. If correction should result in displacing one or more higher bids, the determination will not be made

unless the existence of the mistake and bid actually intended are ascertainable substantially from the invitation and the bid itself. If the evidence is clear and convincing only as to the mistake, but not as to the intended bid, a determination will be made permitting the bidder to withdraw his bid.

(4) Where the evidence is not clear and convincing that the bid as submitted was not the bid intended, the bid should be considered for award in the form submitted.

b. Authority for making the determinations described in paragraphs B3a (1) through (4) has been delegated to the DLA counsel and the DRMS counsel, and DRMS attorneys assigned to the NSO/DRMS-O.

c. SCOs: Process suspected or alleged mistakes as follows:

(1) In the case of any suspected mistake, immediately contact the bidder in question, calling attention to the suspected mistake and request verification of the bid. If the bid is verified, consider the bid as originally submitted. If the time for acceptance of bids is likely to expire before a decision can be made, request all bidders whose bids may become eligible for award to extend the acceptance time of their bids. However, do not request extensions of acceptance periods and/or grant to those bidders who originally offered less than the full 60-day acceptance period. When a bid with a short acceptance period is involved, the SCO should make telephonic contact with assigned counsel so as to permit prompt consideration and, if warranted, aid award within the prescribed period. If a bidder alleges a mistake, advise the bidder to make a written request indicating his desire to withdraw or modify the bid. The request must be supported by statements (sworn statements, if possible) concerning the alleged mistake and include all pertinent evidence such as the bidder's file copy of the bid, the original work sheets and other data used in preparing the bid, and any other evidence that conclusively establishes the existence of the error, the manner in which it occurred and the bid actually intended.

(2) Where the bidder fails or refuses to furnish evidence in support of a suspected or alleged mistake, consider the bid as submitted unless the indications of error are clear enough to justify that including the bid would be unfair to the bidder or to other bona fide bidders. Clear this action through assigned counsel prior to award, and will fully document all attempts to obtain the information required and the action taken with respect to the bid.

(3) Where the bidder furnishes evidence in support of an alleged mistake, refer the case to assigned counsel, together with a single set of supporting documents including the following data:

(a) The original bid.

(b) A copy of the IFB.

(c) A copy of an abstract or record of the bids received on all items involved in the error.

(d) The original written request by the bidder to withdraw or modify the bid, the bidder's written statement and supporting evidence (such as the work sheets or other data used in preparing the bid) of the existence of the mistake and the manner in which it occurred and supporting evidence of the bid actually received. The request should be signed by the same person who signed the bid form.

(e) A written statement, in duplicate, setting forth a description of the material involved; a summary of the evidence submitted; how and when the mistake was alleged; the acquisition cost of the item; prices received on any sale of similar materials; the expiration date of the bid and any other bids that may be eligible for award if relief is allowed; and any additional pertinent evidence.

(f) In a case involving an auction sale, and where required in a spot bid sale, the bidder's registration card.

(g) In a case involving an auction sale, a transcript of as much of the tape or other recording of the sale as relates to the item(s) involved in the allegation of mistake. If feasible, the tape itself should be submitted.

d. Include copies of all administrative determinations.

4. Mistakes Disclosed After Award

a. When a mistake is not discovered until after award, only DLA counsel, (for DRMS OCONUS or DRMS counsel, are authorized to rescind or reform sales contracts where the evidence is clear and convincing that:

(1) A mistake in the bid was made by the purchaser.

(2) The mistake was mutual or the SCO was, or should have been, on notice of the error prior to the award.

(3) It is determined that the contract price should be decreased or that the contract be rescinded or the item involved in the error be deleted.

(a) In reforming a contract any resultant deletion from the contract requirement does not cause the corrected price to be less than the price of the next high bid for the item concerned.

(b) The SCO received notice of the mistake prior to the performance of all obligations under the contract.

b. Process mistakes disclosed after award as follows:

(1) When a mistake in bid is alleged or disclosed after award, the SCO will advise the purchaser to support the alleged error by written statements and by all pertinent evidence, such as the purchaser's file copy of the bid, his original work sheets and other data used in preparing the bid, and any other material which will serve to establish the mistake, the manner in which it occurred, and the bid actually intended. The SCO will suspend delivery of property until the matter is resolved.

(2) When the purchaser furnishes evidence in support of an alleged mistake the SCO will forward the case to assigned counsel with:

(a) All evidence furnished by the purchaser in support of the alleged error.

(b) A signed statement:

(1) Describing the item(s) involved.

(2) Specifying how and when the mistake was alleged or disclosed.

(3) Summarizing the evidence submitted by the purchaser and any additional evidence considered pertinent.

(4) Quoting, in cases when only one bid was received, the most recent contract price for the Item(s) involved, or the absence of a recent contract for the item(s), an estimate of a fair price for the item(s).

(5) Setting forth his opinion whether a bona fide mistake was made and whether he was, or should have been, on notice of any error in the bid price prior to the award, together with the reasons for or data in support of that opinion.

(6) Disclosing the status of performance and payments under the contract, including contemplated payments, if applicable.

(c) A signed copy of the bid involved.

(d) A copy of the IFB.

(e) An abstract or written record of the bids received.

(f) A written request by the purchaser to reform or rescind the contract. This request should normally be signed by the person who signed the bid form.

(g) A copy of the contract and any change orders or supplemental agreements.

b. Counsels have been authorized to deny relief requested by the contractor, regardless of the amount requested, where it is determined that the evidence is not clear and convincing that (1) a mistake in bid was made by the contractor or (2) the mistake was mutual or the SCO was or should have been aware of the error prior to award of the contract.

c. The SCO, upon receipt of the administrative determination, will:

(1) Cite the administrative determination on copies of the contract modification, if a modification is authorized.

(2) Maintain a copy of the determination in the contract file.

### C. PROTESTS AGAINST AWARDS

1. General. SCOs: Consider all protests or objections to the award of a contract, whether submitted before or after award. Where a protest affects another bidder, purchaser, or any other party having a legitimate interest, normally give prompt notice of the protest to such parties in order that they may take appropriate action on their own behalf. The extent of the information furnished to the affected parties will be judged on a case-by-case basis with due weight given the important aspects of each case. These aspects may include, but are not limited to, legal considerations; interests of the Government, equitable consideration of the interests of the affected parties, and mitigation of losses or other injuries to any and all parties concerned. Emphasize to the recipients of the notice of protest that the notice in no way relieves them of any obligations, under a contract or otherwise, but is primarily intended to afford them a fair opportunity to be heard by and to present evidence for the consideration of the agency that will render a decision in the case. Protests generally will be resolved at the level to which the protest is submitted. However, if in the opinion of the activity to which the protest is submitted, it is considered desirable or in the best interest of the Government, that activity will submit the protest to higher authority for resolution.

2. Protests. Protests submitted to higher authority will be documented completely, including:

a. A signed statement from the person making the protest stating the complete facts on which the protest is based together with supporting evidence.

b. A signed statement, when relevant, from other persons or bidders affected by or involved in the protest, stating the facts with respect to their position in the matter, together with supporting evidence.

c. A copy of the bid submitted by the protesting bidder and a copy of the bid of the bidder to whom the award has been made or who is being considered for the award, if relevant to the protest.

d. A copy of the IFB.

e. List of all bids received.

f. Any other documents relevant to the protest.

g. A statement signed by the SCO setting forth his findings, actions and recommendations in the matter, together with any additional information and evidence deemed to be necessary in determining the validity of the protest. If the award of a contract was made pending resolution of the protest, the SCO's statement will include this information and the considerations upon which this action was based.

3. Protest Cases. Protest cases submitted by SCOs to higher authority will contain the recommendation of each intervening level of authority through which the protest is transmitted.

4. Protests Before Award

a. Oral Protests. If award has not been made, the SCO may require that written confirmation of an oral protest be submitted by a specified time and inform the protester the award will be withheld until the specified time. If the written protest is not received by the time specified, the oral protest may be disregarded and award may be made in the normal manner unless the SCO, upon investigation, finds that remedial action is required, in which event such action will be taken.

b. Written Protests. Where a written protest is received, the SCO will withhold award pending resolution of the protest by the appropriate level of authority. In appropriate cases, notice of the protest will be given to all bidders affected. Those bidders should be requested, before expiration of the time for acceptance of their bids, to extend the time for acceptance (with consent of sureties, if any). In the event of failure to obtain such extension, award may be made if deemed in the best interests of the Government.

c. Protests After Award. Where a protest is received after award and removal of the property has not been made, withhold delivery of the property pending resolution of the protest and notify the affected purchaser, unless the protest is clearly without merit, or unless it does not reasonably appear that the contract may be held invalid.

#### **D. DISPUTES**

1. General. SBR Part 2, Condition No. 32, entitled "Disputes," relates only to disputes concerning questions of fact arising under the contract. It is not, for example, applicable to a dispute by the purchaser over the rejection of his bid because there is no contract. Such a dispute should be handled as protest. It is not applicable to a dispute as to the existence of a contract, as for instance when a purchaser alleges a mistake in his bid after award. Screen disputes arising under the contract to ensure that findings and decisions applicable under the disputes clause are rendered only on disputes concerning questions of fact or dispute otherwise made subject to the disputes procedures by specified contract provisions. Where contracts are terminated after a Notice of Default for failure to pay or remove, issue applicable findings and decisions only in those instances that involve a dispute as to questions of fact. In all instances, the SCO must obtain approval for his proposed findings of fact from assigned counsel prior to issuing a finding of fact and decision or referring the contractor to the Disputes Clause and the appeal procedures provided there. To assist counsel in this area, SCOs will submit all pertinent, relevant documents that formed the basis for the decision. Refer any questions with regard to which documents to submit to assigned counsel on a case-by-case basis.

2. Definitions. For the purpose of this part, the following definitions are applicable:

a. Decision. The document furnished by the SCO that states the findings of fact and the conclusion of the SCO deciding the matter in dispute. This document will contain the appeal rights required by the Disputes Act.

b. Findings of Fact. The portion of the SCO's decision that states his determination of the facts in dispute. The document will contain the appeal rights required by the Disputes Acts.

c. Notice of Appeal. A written communication from the purchaser indicating that he appeals the decision.

d. Complaint. A written statement from the purchaser filed with the Armed Services Board of Contract Appeals (ASBCA) stating the reasons which he believes entitled to relief from the SCO's decision. It need not be labeled as a complaint and may be submitted as part of or simultaneously with, the Notice of Appeal or in a letter or memorandum subsequent to the filing of the Notice of Appeal.

e. Rules. The rules of the Armed Services Board of Contract Appeals.

3. Procedures

a. When it becomes necessary to render a decision on a dispute the SCO will prepare and sign a decision, and send the original to the purchaser after complying with the requirements of paragraph D1, this chapter. If mailed, the SCO will send it by certified mail and file the return receipt in the contract file. Property will be held intact for 15 calendar days from date of certified return receipt. If no response is received from the purchaser by this date, the DRMO can take appropriate action to dispose of the property. Copies of the decision will receive the same distribution as the contract and also be furnished to any assignee, guarantor or surety of the

purchaser. The decision will be in a letterform, will be dated and will reference the contract number. The decision will summarize the essential elements in dispute between the parties, including any evidence in support of the purchaser. The SCO's determination of the facts, with supporting reasons and any applicable contract terms, will be fully stated. It will also contain the following paragraph:

This is the final decision of the contracting officer. This decision may be appealed to the Armed Services Board of Contract Appeals (ASBCA), Skyline 6, 5109 Leesburg Pike, 7<sup>th</sup> Floor, Falls Church, Virginia 22041. If you decide to appeal, you must mail or otherwise furnish written notice thereof to the ASBCA within 90 days from the date you receive this decision. Also furnish a copy of the notice to the contracting officer from whose decision the appeal is taken. The notice will indicate that an appeal is intended, should reference this decision, and identify the contract by number. In lieu of appealing to the ASBCA you may bring the action directly in the U.S. Claims Court within 12 months of the date you receive this decision. Should you appeal to the ASBCA, there is available at the sole option of the contractor a Small Claims (Expedited) Procedure for appeals in an amount in dispute of \$50,000 or less wherein a decision will be rendered, whenever possible, within 120 days after the ASBCA receives written notice of such election. Also, in cases where the amount in dispute is \$100,000 or less, the contractor may elect to have the appeal processed under an Accelerated Procedure that provides, whenever possible, a decision by the ASBCA within 180 days from receipt of written notice of such election. The details of these procedures are fully set forth in the Rules of the ASBCA, which will be provided to you in the event of an appeal.

b. It is emphasized that, while there are many types of disputes that are not subject to the disputes procedure, when the contract provides for a decision or determination to be made by the SCO, he must make the determination or decision with the aid of all available technical and legal advice.

c. When a notice of appeal in any form has been received, the SCO must indicate the date of receipt and, also, where apparent, the date of mailing or, if dispatched by the appellant by other means, the date of dispatch. Evidence of mailing or dispatch such as the stamped envelope will be retained in the contract file to show timeliness of the notice of appeal.

d. Action by SCO

(1) Immediately upon receipt of a notice of appeal or a complaint from a purchaser, the SCO will forward the original and three copies to the Board through assigned counsel, or the DRMS chief trial attorney if no counsel has been assigned. The SCO must not delay forwarding the notice of appeal or complaint for preparation of any report. The SCO will transmit the report to all levels to ensure forwarding to the Board by assigned counsel or the DRMS chief trial attorney within 10 days of receipt by the SCO.

(2) Within 15 days after the receipt of the notice of appeal, SCO will forward to assigned counsel, or the DRMS chief trial attorney, a comprehensive report in narrative form concerning the dispute. Include the following in quadruplicate, with the report:

(a) The Findings of Fact supporting the decision and the decision from which the appeal is taken; and the letter or other document of claim in response to which the decision was issued.

The complete contract including all amendments, supplemental agreements and change orders.

(b) All correspondence and memoranda or transcripts of meetings or telephone conversations pertinent to the appeal.

(c) The names and addresses of all potential witnesses, including those of the purchaser, if known, having information concerning the facts in dispute. A statement signed by each Government witness reflecting the fact to which he will be able to testify (or a summary thereof if it is impossible to get the signed statement), and a statement as to the expected availability of each Government witness at the hearing.

(d) An opinion of the validity of the reasons submitted by the purchaser for setting aside the decision of the SCO.

(e) Such additional information as the SCO may consider pertinent, including interoffice memoranda, sample photographs, and inspection reports.

(f) If the SCO receives a complaint after sending the original comprehensive report referred to in paragraph D3d(2), the SCO, within 5 days, will forward to assigned counsel, or the DRMS chief trial attorney, if no counsel has been assigned to the case, a supplemental report of matters stated in the complaint that were not previously covered in the comprehensive report. If the original report is sufficient to answer the matters alleged in the complaint, the SCO will forward the complaint with a statement to this effect and need not forward a supplemental report.

(3) Copies of all correspondence and all other data and information pertinent to the dispute received by the SCO after the comprehensive report has been submitted will be forwarded to assigned counsel, or the DRMS chief trial attorney, DRMS.

(4) Where the complaint is filed with the SCO with notice of appeal under Rule 2 (rules of the ASBCA), the SCO will immediately forward the original and two copies each of the Notice of Appeal and the complaint to the Board through assigned counsel or the DRMS chief trial attorney. Within 15 days after receipt of the notice of appeal and complaint from the purchaser the SCO will prepare and forward to assigned counsel or the chief trial attorney, a single comprehensive report containing the items described in paragraphs B4c(a) and (b), this chapter, and substantiating the position taken by the SCO.

(5) In order that assigned counsel or the chief trial attorney may file an answer under Rule 6(b) (rules of the ASBCA) within 30 days after service of the complaint, or in order that he may have justification for any request for extension of time, the above time limits must either be met or the chief trial attorney or assigned counsel, as appropriate, must be notified of the reason for the delay and the estimated extent thereof.

## E. CLAIMS

1. Claim Settlement. By statute, generally all claims by and against the Government are settled in the General Accounting Office (GAO). However, there are many types of claims that may be settled locally, as for example, when a purchaser has defaulted by not paying the balance due on a contract, but the amount of his bid deposit is in excess of that required by the sales terms and conditions. A claim by the purchaser for the amount of the excess may be paid locally. If, however, the terms of the contract do not authorize payment, or if there is a question of law or question of fact not included in the Disputes article, the claim should be processed as provided in paragraph E3, this chapter.

### 2. Identification Numbers in Connection with Claims

a. The following supplements DLAM 7000.1.

b. The GAO now requires the use of identification numbers when the following are forwarded to GAO for settlement or collection: Every claim by or against the United States, and every debt reported for collection according to Federal Claims Collection Standards, as well as all related correspondence. Similarly, identification numbers will be used when reporting the names of contractors to the Department of Army for inclusion in the Army Hold-Up List in accordance with the GAO Manual, Title 4, Section 61.2, Reporting Debts to Department of the Army for Inclusion On the Hold-Up List.

c. All claims reported to DRMS for settlement/collection action or for review and transmittal to GAO (excludes Guaranteed Descriptions claims) will contain the applicable identification number. If the claimant or debtor is an individual, the identification number to be used for this purpose is their Social Security Number. If the claimant or debtor is a business entity, the number to be used is the Employer's Federal Identification Number as assigned by the Internal Revenue Service (IRS) for withholding and tax reporting.

d. Further, the Employer's Federal Identification Number will be included in all reports of Notification of Instigation of Bankruptcy or Insolvency Proceedings as required by DLAM 7000.1, Chapter 12, paragraph 120803.

3. Claims Against the Government

a. Action will generally be expedited if claimants file their claims initially with the SCO. All such claims should be in writing over the signature and address of the claimant or over the signature of the claimant's authorized agent or attorney. If filed by an agent or attorney it must be supported by a duly executed power of attorney or other documentary evidence of agent's or attorney's right to act for the claimant.

b. The SCO will prepare an administrative report as indicated below and will forward the claim through assigned counsel to DRMS Counsel. Separate letter addressed to DLA will then transmit the claim, who will review the claim for administrative accuracy prior to transmittal to the GAO/or the CG/US. An administrative report containing the following will accompany all claims:

(1) A statement of the facts out of which the claim arose.

(2) A statement of the doubt or other reason for forwarding the claim.

(3) A recommendation as to the disposition believed to be proper.

(4) A citation to payment and collection vouchers.

(5) A statement that the claim has not been paid and will not be paid except pursuant to certification in the name of the Comptroller General.

(6) Copies of all pertinent documents and supporting papers.

(7) A citation to the funds chargeable if the claim is approved by GAO, or where payment is recommended, a voucher in six copies. (If approved by GAO the voucher will be certified by GAO and returned for payment.) If funds are not available, include a statement to that effect in the file.

(a) SF 1034 will be used when a claim is valid and payment is recommended by the SCO and will include a citation of funds. This form is not required for claims that are not valid and payment is not recommended; however, a citation of funds will be included in the claim.

(b) Approved claims endorsed by DRMS-G will include authority to charge subject account for settlement thereof.

(8) The Social Security Number if the claimant is an individual, or the Employer's Federal Identification Number assigned by IRS if the claimant is a business entity.

b. Claimants may be advised that their claims have been submitted to the GAO for settlement but will not be advised of the administrative recommendation.

c. Generally, all claims against the Government are barred by the Statute of Limitations unless received in the GAO within 10 full years after claim accrued. If any claims are received to which the right accrued more than 8 years before receipt, they will be transmitted immediately to the General Accounting Office, Claims Division, Washington, DC 20548, with a request that, after docketing, they be returned for the preparation of the necessary administrative report and compilation of required documentation. A copy of the transmittal letter will be forwarded to DRMS-G.

4. Claims of the Government against Purchasers Other Than That Involved in Bankruptcy Procedures.

a. It is the primary responsibility of the Government to determine as soon as possible that a debt exists, document the debt, initiate collection action, transfer the debt to the appropriate office if not collected within the time prescribed elsewhere in this volume, from the first request for payment. When a request for a deferment is received, the appropriate governmental entity will withhold and/or offset against the debt as provided in the terms and conditions. The appropriate governmental entity will furnish such additional information on the specific debt as may be required by higher command or the GAO or the Department of Justice.

b. Sales offices will document and report all debts of contractors arising under sales contracts according to procedures established by DRMS.

c. In most sales contract debt cases, including those resulting from dishonored checks, the SCO has primary responsibility. DFAS should return any dishonored checks immediately to the SCO for further action.

d. Purchasers of surplus personal property must make arrangements to pay promptly all amounts administratively found to be due the U. S. Government arising out of prior purchases of surplus personal property. Failure to pay any such amount upon demand will be cause for rejection of all future bids until such time as the debt is paid.

e. Regardless of whether the SCO or DFAS has primary responsibility, each is required by DoD Directives and the DAR to render every needed assistance to the other in discharge of primary responsibility.

5. Claims Arising from Sale of Abandoned Vehicles with Liens. If an SCO receives a claim from either the purchaser of a vehicle which was sold with an undisclosed lien on it or from one who has a provable lien on such a vehicle, the SCO will:

a. Advise the purchaser that the vehicles have a lien on it if the lien holder has asserted the claim.

b. Request the purchaser of the vehicle to return the vehicle to the nearest DRMO for a full refund of the purchase price.

c. If the purchaser returns the vehicle, notify the lien holder that it can repossess the vehicle.

d. If the purchaser refuses to return the vehicle, and the lien holder asserts a claim, forward the lien holder's claim to assigned counsel who will forward the claim to the General Accounting Office. Any claim from the purchaser of the vehicle will be processed according to paragraph E4 of this chapter.

6. Handling Guaranteed Description Claims. The following procedures apply to those sales where the Guaranteed Description condition of sale applies, i.e. and normally national sales only.

a. Claims Register

(1) Sales Office: Maintain DRMS Form 564, Claims Register, according to instructions on the back and the instructions below.

(2) Register all claims as soon as they are received. If a claim is not a Guaranteed Description, i.e., Risk of Loss, annotate DRMS Form 564.

(3) Maintain the claims register to reflect the current status of each claim. In addition, close out the register at the end of each fiscal year and transfer all open claims to a new claims register using the original case number. Begin new case numbers with "001" with each new fiscal year register.

(4) In updating DRMS Form 564 to indicate "Status" of claim, make entries in the STATUS and STATUS DATE columns. When "Status Code" number changes, line out previous number and delete date and the updated number and date entered. When coded "5," enter the date the case is closed in the STATUS DATE column.

(5) For each case closed and identified as code "5" in the STATUS column, make the following appropriate entry in REMARKS column:

(a) Dollar amount of adjustments, e.g., ADJ \$102.20.

(b) Dollar amount of adjustment and items canceled if the case involved both situations, e.g., Item 16-ADJ \$410.03; Item 44-CANCELED.

(c) If a case is reopened for any reason after it is coded "5" (not appeal case), enter as a new entry on the register; however, use the same Sales Office case number previously assigned, e.g., REOPENED - 16 Dec 1991.

(d) If the case is originally registered as Guaranteed Descriptions claim and subsequently handled under Risk of Loss, Variation in Quantity, etc., identify the case as such.

(6) For each case closed and identified as code "5" in the STATUS column, check the appropriate block in the RESULTS column:

(a) Canceled - when an item is canceled (deleted) from a contract under paragraph a of the Guaranteed Descriptions clause. Do not show dollar amount of canceled items. If canceled pursuant to paragraph c of the clause, also check RETURN OF PROPERTY.

(b) Denied - denied for any reason.

(c) Appealed - if purchaser appeals the case.

(d) Closed - if purchaser withdraws the claim or fails to furnish requested information. This entry is not required for cases completed and coded "5."

(e) Adjustment - if Remarks block indicates an adjustment was made.

(f) Not Guaranteed Description - if Remarks block indicates claim was handled under other than Guaranteed Descriptions.

(7) It is the responsibility of the Chief NSO, or his designee, to review twice monthly the status of all cases that are not closed and insert his initials and date at the bottom of each DRMS Form 564 reflecting unclosed cases and to initiate any action deemed appropriate to have the case completed, including any follow-up necessary. If the case has been delayed over 45 days for any reason write a letter to the purchaser advising reason for delay and expected completion date.

b. Administration of Guaranteed Descriptions Claims

(1) DRMS Form 69, Guaranteed Descriptions Worksheet, may not be required by the sales chief for claims resolved at the marketing division level, but will be prepared for all claims referred to assigned counsel for concurrence. All claims must have the appropriate concurrence required by paragraph B5e (3), this chapter. When "Other" in Blank 11 is checked, state the type of case, e.g., Condition, Estimated Weight. The form will contain a brief chronology of events and have pertinent documents attached (see Supplement 4 for list of enclosures - original documents should not be furnished).

(a) Purchaser's request for adjustment (complaint).

(b) DRMS Form 1427 (indicating date of release of property, if applicable).

(c) Copy of the applicable IFB description page.

(d) In addition, the following enclosures will be included, in chronological sequence, if applicable.

(1) All correspondence with the DRMO, with enclosures.

(2) Request for inspection of property and report, or affidavit from purchaser supported with photos, etc.

(3) Correspondence with bidders.

(4) Telephone or verbal conversation records.

(5) Evidence of market value

(6) Transportation cost estimate.

(Z) Any other data considered pertinent.

(2) Misdescription Alleged Prior to Removal. Items alleged by the purchaser to be misdescribed after award and before removal may be canceled from the contract (all sales including local) on oral authority of the SCO, providing the DRMO has orally confirmed the misdescription to the SCO and will confirm same in writing on DRMS Form 1427 or on a memo or letter forwarded to the SCO with the DRMS Form 1427. In these cases, written requests from the purchaser are not required for canceling misdescribed items. When items are canceled on local spot bid or local auction sales and have not been paid for, collection is not required to be made.

(3) Misdescription Alleged Subsequent to Removal

(a) The SCO will acknowledge receipt of written, mailed complaints within 1 workday (advising whether to hold the property intact, if applicable), except that written acknowledgment is not required if other written communication regarding the complaint is forwarded to the purchaser within 5 workdays. When claims are handcarried to the Sales Office (or to the DRMO for transmittal to the Sales Office) and the SCO determines that the property must be held intact, the purchaser must be so advised in writing. A copy of a suggested form letter to the purchaser is at Supplement 4 and may be used to expeditiously acknowledge receipt of a written complaint or claim (or to advise to hold property intact); the date of the acknowledgment should be recorded, preferably on the written complaint.

(b) If an oral request is made to the SCO or the DRMO, the person hearing the complaint will advise the purchaser that the property must be held intact and that the complaint must be in writing, including specific adjustment or settlement desired. The complaint must be mailed to the SCO within the 30-day notice period (60-day notice from the date of removal or 30 calendar days from the date of importation, whichever is less for property to be imported into the United States) prescribed in the Guaranteed Descriptions clause. (The SCO is cautioned to retain the envelope in which the request for adjustment is mailed as evidence of the timeliness of the claim.) Make a record of this conversation on OF 271, Conversation Record, and place in the contract file. The prime purpose of requiring the purchaser to maintain the property intact is to permit the Government to identify the property as being the same as that delivered and verifies the alleged misdescription. Once the determination is made, notify the purchaser immediately that the property need not be further held intact.

(4) Within 2 workdays after receipt of notice of alleged misdescription, the SCO will contact the applicable DRMO to verify the precise property delivered. If it is determined that the DRMO has nothing to contribute to the case, the SCO will make a record of this fact and make it a part of the case file, and will forward a copy of the complaint to the DRMO for information. If, after initial contact with the activity, the SCO determines that the DRMO can contribute toward resolution of the case, he will forward a letter to the DRMO requesting a reply within 1 week to verify the precise property delivered (to be accomplished by statements of personnel having actual knowledge of items delivered - statement need not be in affidavit form or notarized) and obtain other pertinent information. A format for such transmittal is shown at Supplement 4. The SCO should not use a form or stereotype letter to DRMOs. Each letter should request only the specific information required to arrive at a logical conclusion. If item actually delivered cannot be verified by the DRMO, data should be obtained indicating any facts that verify the property delivered. Such data would include but not be limited to the extent of physical inspection upon which the description was predicated; controls exercised to preclude change or damage to property from inspection time to delivery; method of identification of the property actually delivered; method of delivery; and, if available, a legible list of individuals or firms who may have inspected the property. **THE REPLY FROM THE DRMO TO THE CONTRACTING OFFICER SHOULD IN NO WAY RECOMMEND ANY ADJUSTMENT OR SETTLEMENT TO THE CLAIM.**

(5) If economically feasible, the SCO should request verification of property received by purchaser through actual physical inspection by Government personnel. Generally, claims involving \$100 or less, and in some instances larger amounts, are not economically feasible to perform inspections on.

(a) If the cost of inspection exceeds the adjustments requested or the property involved is of such low sales value as to preclude the expense of a physical inspection by Government personnel, the purchaser should be requested to furnish the SCO an affidavit within 15 days stating in detail the basis for his alleged misdescription. Such affidavit should be accompanied by photographs, drawings, etc., that would support his

allegations. In lieu of an affidavit, the SCO may require the purchaser to submit a statement that includes the following sentence: "I declare under penalty of perjury that the above statements are true."       (Signed)       This statement must be signed by the purchaser in order to be accepted in lieu of an affidavit.

(b) The SCO is authorized to communicate directly with any DRMO in order to arrange to have technically qualified personnel inspect the property and make a written report of findings. Prior to making the inspection, the person conducting the investigation should contact the SCO to assure he understands what is required.

(c) The letter requesting verification of the property should include the following:

(1) Purchaser's complaint letter.

(2) Copy of description page from IFB.

(3) Copy of DRMS Form 1427.

(4) Data received from DRMO.

(5) Special instructions as to specific areas to observe; such as condition codes, modification markings, shop tags and special packaging.

(6) Any specific questions that should be answered in order to preclude the necessity of further or additional correspondence with the purchaser.

(7) Suggested aids to help in making a proper determination; such as, calipers, micrometers or other special devices.

(8) A request that, in those cases where a determination cannot be made from the physical inspection, the person conducting the inspection make additional inquiries of the purchaser, his employees or agents for statements, affidavits or other evidence that will reasonably establish that the property offered for inspection by the contractor is, in fact, the same property sold or alleged to be misdescribed.

(d) Upon receipt of the above request, the inspecting office will immediately coordinate with the purchaser the date on which to make the inspection.

(e) The inspection should be accomplished and the inspection report furnished the SCO as soon as practicable but no later than 30 calendar days from the date of the request. The inspection report should contain sufficient information for the SCO to make an independent determination as to whether or not the property was misdescribed as alleged by the purchaser. **THE REPORT SHOULD NOT CONTAIN A CONCLUSION IN THE FOREGOING RESPECT NOR SHOULD IT INCLUDE A RECOMMENDATION AS TO THE SETTLEMENT OF THE CLAIM. THE INSPECTOR MUST NOT DISCUSS HIS OPINION OF THE CLAIM WITH THE PURCHASER OR PURCHASER'S EMPLOYEES OR AGENTS.**

(6) Upon receipt of the investigation report or affidavits verifying the property at purchaser's facility, the SCO will evaluate all evidence to determine whether:

(a) The property inspected at purchaser's facility is the same property that was delivered.

(b) The property was or was not misdescribed.

(c) The property released by the DRMO was in fact the property described in the IFB.

(d) The alleged discrepancy existed at time of delivery.

(7) If the evidence does not support a definite conclusion to subparagraph (6) above, the SCO may communicate with other bidders to determine whether the specific property was in fact inspected and whether the property was as described in the IFB. In this respect, the SCO will exercise his best judgment and utmost

discretion. A format of suggested letter is shown at Supplement 4. If at any point it becomes apparent that the complaint is supported and proper, the SCO may discontinue the inquiry and submit his report for review prior to any information being furnished the purchaser as to the action the Government will take in the case.

(8) In all cases requiring prior written concurrence (see paragraph E6c), the SCO will, within 10 workdays after the investigation is completed, submit the case to assigned counsel on DRMS Form 69 (original and one copy) with one set of enclosures (copies). (See paragraph E6b). The NSO Branch Chief will indicate concurrence or nonconcurrence on DRMS Form 69. The original of DRMS Form 69 (with any photographs or samples furnished) will be returned to the Sales Office upon completion of the reviewing action. Additionally, SCOs will not advise the purchaser as to adjustment recommended to counsel. If queried only the fact that the case has been referred to assigned legal counsel will be communicated. When any doubt exists as to the proper action to be taken, the SCO will contact assigned legal counsel for guidance prior to making any comments or statements to the purchaser as to the proposed action.

(9) When a determination has been made to either make an adjustment in the contract price or have the property returned to Government control, and the necessary concurrence has been obtained according to paragraph E6c, the SCO will prepare a supplemental agreement (S/A) on SF 114D, in original and four copies, using substantially the same language shown at Supplement 4. The SCO will assure that whenever a formal offer of an adjustment is made to the purchaser, the contract file will contain an explanation as to the basis for that offer with necessary backup documents. If an oral understanding has been reached with the purchaser as to the adjustment or return of the property, the SCO will send the S/A (original and two copies) to the purchaser with an accompanying letter using substantially the same language shown at Supplement 4. If an oral understanding has not been reached as to an adjustment, the letter will also contain a detailed explanation as to the basis for the adjustment offered. Should the purchaser not agree to accept the offer, he should furnish an equitable adjustment within 15 calendar days from the date of the letter. The purchaser may request additional time to consider the offer, take issue with the offer, or advise the SCO that he intends to submit additional evidence. In any event, the SCO will follow up with the purchaser immediately after the 15-day notice to assure that the matter is resolved as soon as practicable. The follow-up notice should advise the purchaser that failure to submit the information requested within 15 calendar days from the date of the follow-up notice will form a basis for the SCO to close the file. Upon receipt of the signed S/A (original and one copy), the SCO will sign the documents and place the original in the contract file and forward a copy to the purchaser. The Sales Office suspense copy may be used to furnish a copy to the DRMO as prescribed in paragraph E6b (13), this chapter.

(10) In handling combined cases, adjustment for one or more contract line items involving \$500 or less per contract line item, and adjustment for one or more contract line items on the same contracts involving more than \$500, the SCO must determine whether to complete the adjustment transaction on those of \$500 or less and forward the other to assigned legal counsel, or handle as one adjustment transaction. The SCO should contact the purchaser to determine his desires prior to making this determination.

(11) When property is to be returned to Government control, pursuant to paragraph c of the Guaranteed Description clause, the SCO will inform the receiving DRMO of the situation and of the forthcoming shipment, furnish a return authorization and request that a copy of the receiving document be forwarded to the SCO as evidence of receipt. It will be the responsibility of the SCO to notify the DRMO receiving the property as to the distribution of proceeds received from the resale of the property, if appropriate. Upon receipt of evidence that property has been returned to Government control, the SCO will prepare the necessary documents to effect refund of the purchase price to the purchaser.

(12) If removal is delayed until pending verification of misdescription, the SCO will extend the removal period accordingly.

(13) The SCO will notify the DRMO of the final disposition of a guaranteed description claim by providing them with copies of DRMS Form 69 or SF 114D.

c. Concurrence Required on Claims

(1) Prior to Award. With prior concurrence of the NSO Branch Chief, the SCO may:

(a) Withdraw the misdescribed item (make no award) if it is possible that proper competition may not have been obtained or that the property might bring a greater return upon reoffering.

(b) Offer the high bidder the misdescribed item at the price bid, if it is positively concluded (if any doubt exists, contact assigned legal counsel) that competition was not affected or that resale of the item would result in an inconsequential increased return to the Government. Make award if the bidder agrees to sign a waiver on DRMS Form 65. If purchaser refuses to sign waiver but requests an adjustment, the matter will be referred to assigned legal counsel for resolution.

(c) Proceed with award of contracts prior to receipt of signed waivers; however, the property involved will not be released until the signed waiver is received by the Sales Office or DRMO.

(2) After Award and Prior to Removal. Without prior concurrence, the SCO may:

(a) Permit the purchaser to accept the misdescribed property at the contract price after executing a waiver on DRMS Form 65. If purchaser refuses to sign waiver but requests an adjustment, the matter will be referred to assigned counsel for resolution.

(b) Cancel items from the contract when the misdescription is verified.

(c) Deny claims for misdescription when supporting evidence does not confirm misdescription or the purchaser fails to establish by reasonable evidence that a misdescription exists.

(3) After Removal of Property

(a) Without prior concurrence, the SCO may:

(1) Authorize return of property to the Government (at purchaser's expense, pursuant to paragraph c of the Guaranteed Descriptions Clause) in cases where the misdescription has been confirmed and the purchaser has agreed to return property at his expense.

(2) Document the case as closed when a purchaser subsequently withdraws a claim or fails to furnish additional information within a time specified in writing by the SCO.

(3) Return of Property in Lieu of Adjustment. If an SCO has determined that an adjustment is in order and the purchaser refuses such adjustment, the purchaser may be given an option to return the property, at his expense, in order to avoid protracted litigation.

(b) With prior concurrence of the NSO Branch Chief, the SCO may:

(1) Act upon requests for adjustment in the amount of \$500 or less per contract line item, but not to exceed the contract price of any item involved.

(2) Deny untimely requests for adjustment. Care must be exercised in the determination as to timeliness when the 30<sup>th</sup>/60<sup>th</sup> day falls on a Sunday or national holiday, i.e., if the Monday, the 31<sup>st</sup>/61<sup>st</sup>, it would be considered as timely; or if the 31<sup>st</sup>/61<sup>st</sup> day, and the request is mailed on the following day, Tuesday, the 32<sup>nd</sup>/62<sup>nd</sup> day would be considered timely.

(3) Deny requests for adjustment for shortage within a lot when such shortage was not alleged before removal. (Caution: Missing components or parts of a subitem within a delivered lot may be alleged, in which case a misdescription may exist.) SCOs will assure that all the material in the lot has in fact been delivered. If it is determined that the shortage can be established from Government records, The SCO will not deny the claim.

(4) Deny requests for adjustment based solely on condition (Caution: Condition may sometimes result in loss of identity of an item, in which case misdescription may exist); total cost; estimated total weight; estimated shipping dimensions; suggested uses; or fitness for any use or purpose if purchaser has not offered to return property at his expense. The denial letter will inform the purchaser of his option under paragraph c of the clause (see Supplement 4 for language).

(c) With prior written concurrence of assigned legal counsel, the SCO may:

(1) Act upon claims for adjustments in excess of \$3,000 per contract line item.

(2) Deny claims for adjustment when supporting evidence does not confirm misdescription or the purchaser fails to establish by reasonable evidence that a misdescription existed.

(3) Return of property at purchaser's expense. A purchaser of misdescribed property has limited rights to return such property under the provisions of subparagraph c of the Guaranteed Descriptions provision. However, in some instances, it would be uneconomical for the Government to accept return of such misdescribed property considering its condition, the handling costs that will be incurred, the property's resale value and the costs of resale. When an SCO makes a determination that it would be uneconomical to have such property returned, even at the purchaser's expense, he should advise assigned legal counsel. In these cases, assigned legal counsel may authorize the purchaser a full refund and allow him to retain or dispose of the property locally.

(4) Return of property at Government's expense. There are rare occasions when the return of misdescribed property at Government expense may be authorized. Those instances would depend on the facts surrounding the misdescription. SCOs must obtain guidance and approval from assigned legal counsel prior to authorizing such return in all instances.

(5) Extreme care must be exercised in the use of this authority outlined in paragraphs B4e(1) through (3) to assure that:

(a) The contract file contains the postmarked envelope establishing the date of mailing of an untimely claim.

(b) Denials are proper; e.g., in the case where the unit is "lot", allegations of shortages must be made prior to removal of the property. However, if within the 30/60-day period after removal, the purchaser alleges a shortage, verifiable from Government records, the claim will be considered and settled on the basis of an equitable adjustment.

(c) The contract file contains proper documentation to support the action taken, especially inspection reports, affidavits where the Government, evidence supporting the value of misdescribed property, and appropriate concurrences, has not inspected property. Each contract file should be able to stand on its own merit, and documentation should support the adjustment, denial, cancellation or other action as proper.

(d). Claims are not denied under these procedures that may be eligible for consideration under the Risk of Loss provision or other applicable legal concepts, such as the unascertained goods doctrine, and the "as was" theory. Guidance on the applicability of these concepts will be obtained from DRMS-G or assigned counsel.

(6) Request for Reconsideration after Denial of Claim. All purchaser requests for further consideration by the SCO after denial of a claim will be forwarded to assigned counsel for appropriate action. Pertinent documents will be furnished as enclosures to a letter of transmittal signed by the NSO Chief.

## **F. SUSPENSION AND DEBARMENT PROCEDURES**

1. Requirements. DoD 4160.21-M, Chapter 7, Paragraph Q, sets forth the authority, policy and reporting requirements for suspensions and debarments or sales contractors.

2. Causes. FAR 9.406.2, 9.407-2 and DoD FAR Supplement 209.473-5 contains the causes for which a sales contractor can be suspended or debarred.

3. Reasons. Some of the more common reasons for recommending that a sales contractor be debarred are:

- 
- a. Conviction of a criminal offense in connection with obtaining, attempting to obtain, or performing a public contract or subcontract;
  - b. Conviction of violating Federal or State antitrust statutes relating to the submission of offers;
  - c. Conviction of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements or receiving stolen property;
  - d. Conviction of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of the contractor.
  - e. Violation of the terms of a Government contract or subcontract so serious as to justify debarment, such as:
    - (1) Willful failure to perform according to the terms of one or more contracts; or
    - (2) A history of failure to perform, or of unsatisfactory performance of one or more contracts.
4. Recommendation. An SCO does not have to recommend suspension or debarment of parties charged or convicted with one of the offenses identified in paragraphs F3a-d, this chapter. Any employee obtaining information that a party doing business with DRMS has been officially charged with or has been convicted of one of the offenses identified in paragraphs F3a-d, this chapter should immediately provide this information to their servicing legal office.
5. Reports. An SCO must recommend the suspension or debarment when the proposed action is based on one of the reasons set forth in paragraph F3, this chapter. When recommending a suspension or debarment, Sales Contracting Officers must prepare reports according to DoD FAR 209.406.3.
6. Servicing Legal Office Contact. SCOs should contact their servicing legal office for advice and assistance in preparing reports recommending suspension or debarment. Completed reports will be submitted to the suspension/debarment authority through the servicing legal office.
7. Failure to Perform. A recommendation to debar a sales contractor for willful failure to pay for and/or perform according to the terms of one or more contracts can be made by referring all supportive documents to the servicing office of counsel.
8. Debarment Procedures for Local/Zone Sale Defaults:
- a. Flagrant Defaults. An SCO may recommend a buyer for debarment using the procedures provided in paragraph F5, this chapter, in the event a buyer defaults in the performance of a local sales contract and the default has a significant impact on the results of the sale. The basis of such a recommendation would be "A willful failure to perform according to the terms of one or more sales contracts of such a serious nature as to justify debarment". An example of such an egregious default is where the buyer is awarded a significant portion of the property offered for sale and subsequently fails to pay for and remove any of the property.
  - b. Other Defaults. In other cases, SCOs may send a warning letter to buyers who have defaulted in the performance of a local sales contract, advising them that future defaults may result in the initiation of debarment proceedings (see Supplement 4 for an example of the warning letter). In the event of a subsequent default on a local sales contract at any DRMO, a sales contracting officer may forward a recommendation for debarment to DRMS-G, or to DRMS OCONUS sales occurring in Europe or Pacific (see Supplement 4 for an example of such a recommendation). In making a recommendation for debarment, the sales contracting officer should consider the buyer's performance history.
  - c. Non-removals resulting from bona fide mis-description claims are exempt from the above stated procedures.