

An Open Letter to Procurement Professionals: Government Property Disposition-Abandonment

BY JAMES L. GRIFFIN, CPPM, DENVER ROCKY MOUNTAIN CHAPTER

It appears from a growing number of requests for abandonment on the part of contractors, and questions from government procurement professionals, that a discussion of government property disposition, especially abandonment, would be helpful to clear the air of some misunderstandings. This general discussion of disposition and abandonment of government property excludes any aspect relating to environmentally hazardous property for obvious reasons. All classes of government property of a non-hazardous nature may be implied. The purpose of this discussion is to inform government procurement professionals about abandonment as a method of government property disposal, its meaning, key personnel in its accomplishment, and when it can be employed.

When should government property in the possession of a contractor be dispositioned?

Both primary property clauses, FAR 52.245-2 and 52.245-5, provide congruent direction on government property disposition in paragraph "(i) Final accounting and disposition of Government property." This direction states in part, "upon completing the contract or at such earlier dates as may be fixed by the Contracting Officer, the contractor shall submit, in a form acceptable to the Contracting Officer, inventory schedules covering all items of Government property (including any resulting scrap) not consumed in performing this contract." These paragraphs continue, "The Contractor shall prepare for shipment, deliver f.o.b. origin, or dispose of the Government property as may be directed by the Contracting Officer. The net proceeds of any such disposal shall be credited to the contract price or shall be paid to the Government as the Contracting Officer directs." FAR 52.245-5 continues with specific direction relating to scrap (personal property that has no value except for its basic material content.)

Another key contractual requirement is found in FAR 45.502(g), "The contractor shall promptly report all Government property in excess of the amounts needed to complete full performance under the contracts providing it or authorizing its use."

Bottom line: When government property in the possession of a contractor is no longer required for full performance of the contract providing it, the contractor should submit it on the appropriate inventory schedule, i.e., the SF 14XX series.

What methods may be employed to disposition government property?

An owning agency has the right to require delivery of ANY contractor inventory. Contractor inventory is defined in FAR 45.601 and includes government furnished property, contractor acquired property and even termination inventory. How is this "delivery" affected? There needs to be language *in the contract* specifying a disposal action or location. If the owning agency chooses not to require delivery of excess government property or to transfer it to another government contract which has firm requirements, the following disposition methods described in FAR 45.603 will be employed by the DCMA Plant Clearance Officer (PLCO) in the priorities indicated. In other words, these actions are to be followed *in order*. They are:

- (a) Purchase or retention at cost by prime contractor or subcontractor of contractor-acquired property.
- (b) Return of contractor-acquired property to suppliers.
- (c) Use within the government through the use of prescribed screening procedures.
- (d) Donation to eligible donees.
- (e) Sale (including purchase or retention at less than cost by the prime contractor or subcontractor).
- (f) Donation to public bodies in lieu of abandonment.
- (g) Abandonment or destruction.

What is abandonment?

Abandonment is an authorized method of property disposal.

For background Black's Law Dictionary provides the

following concerning abandonment of property: “ ‘Abandoned property’ in a legal sense is that to which the owner has relinquished all right, title, claim, and possession, but without vesting it in any other person, and with the intention of not reclaiming it or resuming its ownership, possession or enjoyment in the future... There must be concurrence of act and intent, that is, the act of leaving the premises or property vacant, so that it may be appropriated by the next comer, and the intention of not returning. Relinquishment of all title, possession or claim; a virtual throwing away of property.” The owner in our situation is the government.

Please note that it is not a cure for financial shortfalls on the part of the government at contract completion nor is it an expedient to shorten the contract closeout period. Just because there is no money left on the contract to effect proper disposal of government property does not authorize the contracting officer to abandon government property.

When is abandonment an appropriate method of disposition?

FAR 45.603 provides DoD government procurement personnel direction pertaining to the abandonment of government property. It is clear that abandonment is the least favored disposition method by its placement at the bottom of the prioritized listing of methods found in FAR 45.603. It is commensurate with destruction of the property in that the DCMA PLCO must exhaust the previously listed six disposal methods prior to entertaining the disposition method of destruction or abandonment. Both methods are considered at the same time – the DCMA PLCO choosing which is the most reasonable and effective. Further, FAR 45.611 requires that every effort be made to dispose of the surplus property by other authorized methods prior to destruction or abandonment. FAR 45.611 also provides that the following determinations must be made and documented in writing by the DCMA PLCO prior to any decision to destruction or abandonment of government property:

- The property can have no commercial value or value to the government.
- The estimated cost of care and handling is greater than the probable sale price; or
- Because of its nature, the property constitutes a danger to public health, safety, or welfare. [It is important to note that this last item is clearly in error. In numerous iterations of the proposed FAR Part 45 rewrite the language was corrected to read “Because of its nature, the property DOES NOT (emphasis added) constitute a danger to public health, safety, or welfare.” It is obvious that the PLCO would not document that government property is hazardous and then turn around and abandon it. The PLCO can only abandon government property that is *not* hazardous.]

One further item is noted under FAR 45.611. It states, “Unless specified in the contract, the Government must gain the Contractor’s written consent prior to abandoning Government property at the Contractor’s premises.” Many people have misinterpreted this to mean that the PLCO has to ask the contractor’s permission to abandon Government Property. Such is not always the case. Fact: If the government property clause of FAR 52.245-2, or -5, or -7 or -11 is in the contract the contractor has *already* agreed to abandonment. But, there are times when a government property may not be in the contract and government property is created, e.g. Termination Inventory, and as such THEN we must ask and obtain the contractor’s written permission. Otherwise, with a government property clause we have that authority “specified in the contract.”

Which DoD procurement official(s) has the authority to dispose of government property by destruction or abandonment?

The Code of Federal Regulations, 41 CFR 101-45.901, “Abandonment or Destruction of Personal Property,” states in part, “Property may be abandoned or destroyed by an executive agency in accordance with this subpart when a written determination is made by a duly authorized official that the property has no commercial value, or the estimated cost of its continued care and handling would exceed the estimated proceeds from its sale...” FAR 42.202 discusses to the standard delegation of authority to perform contract administration functions listed in FAR 42.302(a). Performing Plant Clearance is item (28). This process is generally delegated to DCMA.

FAR 45.611(a) identifies that duly authorized official as the PLCO. Therefore, unless a PCO or ACO obtains a FAR deviation from the Director Defense Procurement and the Administrator GSA or, per FAR 45.608-6, obtains a waiver by the Agency Head or his designee and provides written notification to GSA of this action, the proper official to make the written determination to destroy or abandon government property is the PLCO. Further, should the PCO/ACO circumvent the required deviation, any problems arising from Trade Security, demilitarization, hazardous wastes and competition advocacy arenas would rest squarely on that individual who ignored the regulation.

FAR 45.601 defines the Plant Clearance Officer “... as used in this subpart, means an authorized representative of the contracting officer assigned responsibility for plant clearance.” Therefore, the PLCO is your key contract administration team member with the knowledge, training and experience to properly dispose of government property accountable to your contract.

What is the correct process to follow when destruction or abandonment of surplus government property is appropriate?

Abandonment and destruction of property are the least favored methods of disposition. Abandonment is not a cure for financial shortfalls and should not be implemented as such.

The contractor, through the government property and termination clauses, is directed to submit all excess government property on inventory schedules to the PLCO or enter the items into the new Plant Clearance Automated Reutilization Screening System (PCARSS), if the contractor is voluntarily using PCARSS, in a timely manner. Contractor letters requesting disposition instructions may, in many cases, merely delay the disposition process except as noted below. "Timely" in this case may vary somewhat. However, in my opinion it is not unreasonable to expect the contractor to submit government property to the plant clearance process within 30 days of excess determination. Technically, this should be addressed in the contractor's written procedures as part of the contractor's Property Control System. Further, the contractor performs in-plant and interdivisional screening of excess property in order to identify another government contract with a requirement for the excess property. Should this screening and a recommendation to the CO to transfer the property to another government contract be accomplished, it in no way should extend the 30 day period as the intent of the FAR to promptly dispose of excess is plainly evident. Once this declaration of excess government property has been accomplished, the FAR "clocks" begin to tick and disposition must follow in a timely manner. Please note: once initiated this process is self-contained. Other than insuring that screening the excess property for reutilization within the agency has been accomplished, the CO's remaining actions are minimal. Once in the plant clearance process, government property disposition is the responsibility of the prime PLCO and his or her supporting PLCOs.

In conclusion, after a review of 41 CFR 101-45 and FAR 45.611, comments I ask that COs and other government procurement specialists consider the following:

- Abandonment or destruction of surplus government property must not occur outside of the plant clearance process as specified in the FAR and DFARS unless the PCO assumes all of the MANDATORY SCREENING REQUIREMENTS.

- The PLCO is the proper authority to make the determination and authorize destruction or abandonment of government property. By reason of knowledge, training and experience he/she is the logical individual on your contract administration team to perform this determination.

- The property in question can have NO value other than scrap (and if the item IS scrap then the item should be disposed AS scrap through sale or through an approved scrap procedure – versus abandonment – with the net proceeds of which would be credited to the contract price, overhead account or as otherwise directed by the contracting officer).

- If there is value in the property in question either to the government or the contractor, abandonment is *not* the proper method of disposal. The proper official to make this determination is the Plant Clearance Officer. The best alternative at this point may be a competitive sale.

- If there is a question pertaining to the public good, the property would be destroyed rather than abandoned and the resulting scrap would be treated in accordance with this subsection. The proper official to make this determination is the PLCO.

- Once the property is properly abandoned, the government severs title, rights and all concerns relating to this property.

Abandonment of government property is a proper method of disposition when the government acts in compliance with the applicable federal regulations and authorizing statute. Abandonment and destruction of property are the least favored methods of disposition. Abandonment is not a cure for financial shortfalls and should not be implemented as such. The key government disposition authority or subject-matter-expert within the government for this disposition method is the Plant Clearance Officer. When an item of government property is abandoned, it means:

- the government relinquishes all connection with or concern in said property;

- the government severs title, rights and all concerns relating to the property being abandoned; and,

- the government can gain no further advantage or benefit from the abandoned property. ♦

If you have questions or comments, please contact James L. Griffin, Property Administrator, DCMDW-RCTC, 303-977-3054 or jgriffin@nwest.dcmdw.dla.mil