

Guide to Judiciary Policy

Vol. 14: Procurement

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§ 610 Bonds

§ 610.10 In General

- (a) A bond is a written instrument executed by a bidder or contractor (the “principal”) and a second party (the “surety” or “sureties”) to assure fulfillment of the principal’s obligations to a third party (the “obligee” or “judiciary”) identified in the bond. If the principal’s obligations are not met, the bond assures payment, to the extent stipulated in the bond, of any loss sustained by the obligee.
- (b) Bonds and performance guarantees will be obtained only when needed to protect the interest of the judiciary.
- (c) Procurement plans (**see:** Guide, Vol. 14, Ch. 2 (Procurement Planning and Preparations)) must describe and explain any requirements for bonds and performance guarantees.
- (d) If contemplating the requirement of a bond, the contracting officer (CO) must submit that request to the Procurement Management Division (PMD) of the AO’s Budget, Accounting and Procurement Office (BAPO). PMD must issue a one-time delegation of procurement authority before the CO may include the requirement for a bond in the solicitation.

§ 610.20 Performance Bonds for Other than Construction Contracts

§ 610.20.10 Requirement

A performance bond is a bond that secures performance and fulfillment of the contractor’s obligations under the contract. Performance bonds may be required only when the CO determines that performance bonding is essential to the interest of the judiciary. Examples of situations when a performance bond may be needed include:

- (a) when a contract provides for the contractor’s use of judiciary property, or judiciary funds in performance, or

- (b) when a contractor has sold all its assets to, or has merged with, another firm and the judiciary needs assurance of the new firm's responsibility (**see:** Guide, Vol. 14, § 745.55 (Novation and Change of Name Agreements)).

§ 610.20.20 Amount

The amount of the bond must be the minimum needed to protect the judiciary's interest.

§ 610.20.30 Clauses

- (a) Clause 6-1, Performance Bond Requirements must be included in solicitations for nonconstruction contracts that contain a requirement for both payment bonds (**see:** § 610.30 (Payment Bonds for Other than Construction Contracts)) and performance bonds.
- (b) Clause 6-1 Alternate I is included when only a performance bond is required.

Note: The CO must determine the amount of each bond for insertion in the clause. If the amount of the bond is less than 100 percent of the contract price, the provision must be appropriately modified. The amount must be adequate to protect the interest of the judiciary. The CO must also designate the period of time after contract award (normally ten days) for return of executed bonds.

§ 610.20.40 Annual Performance Bonds

Annual performance bonds may be used only for contracts other than construction. The amount of such a bond may not be more than the total amount of all contracts secured by the bond.

§ 610.30 Payment Bonds for Other than Construction Contracts

§ 610.30.10 Requirement

A payment bond is a bond that assures payments as required by law to all persons supplying labor or material in the prosecution of the work provided for in the contract. Payment bonds may be required only when the CO determines that payment bonding is essential to the interest of the judiciary. Examples of situations when a payment bond may be needed include:

- (a) when a contract is for products or services unique to the judiciary that can be obtained only from a source that is not the producer of the products or services;

- (b) when a contractor has sold all its assets to, or merged with, another firm and the judiciary needs assurance of the new firm's responsibility (**see:** Guide, Vol. 14, § 745.55 (Novation and Change of Name Agreements)); or
- (c) uninterrupted provision of the products or services is essential to the continued operation of judiciary functions.

§ 610.30.20 Amount

The amount of the bond must be the minimum needed to protect the judiciary's interest.

§ 610.40 Fidelity Bonds

- (a) A fidelity bond, in an amount sufficient to protect the judiciary's interest, may be required for any contract that requires contractor employees to handle judiciary funds or judiciary employee funds.
- (b) When a fidelity bond is required, Clause 6-5, Fidelity Bond Requirements must be included in the solicitation and contract and the amount must be reviewed periodically to ensure that the judiciary's interest is adequately protected.
- (c) The CO will indicate the amount of the bond required by filling in the blank in Clause 6-5, Fidelity Bond Requirements.

§ 610.50 Other Types of Bonds

Bonds, other than those discussed in this chapter, may be required only when the CO determines such bonds are necessary to protect the judiciary's interest.

§ 610.60 Execution of Bonds

§ 610.60.10 Prescribed Formats

If the applicable clause has not specified a prescribed format for a bond, a suitable commercial bond form may be used. An appropriate format may also be prepared with the PE's assistance and in consultation with the AO's Office of the General Counsel (OGC).

§ 610.60.20 Original Copy

Retain an original signed copy of any bond in the solicitation or contract file.

§ 610.60.30 Authority of Agents

Bonds signed by persons acting in a representative capacity must be accompanied by proof that the agent is authorized to act in that capacity. Proof may be a notarized

power of attorney, a properly executed corporate certificate, or resolution attested to by the corporate secretary.

§ 610.60.40 Partnership as Principal

When a partnership is a principal, the names of all members of the firm must be listed in the bond following the trade name of the firm (if any) and the phrase: "a partnership composed of." When a corporation is a principal, the state of incorporation must be listed.

§ 610.60.50 Date

Unless an annual bond is accepted, performance or payment bonds must be dated after the effective date of the contract.

§ 610.60.60 Modifications

- (a) When a modification changes the contract scope or increases the contract price by 10 percent or more, or when the CO determines that the original bond amount must be increased, the contractor and the surety must execute a consent of surety and increase of penal amount of the bond. This is then submitted to the CO. When more than one surety's consent is required, each surety must execute the form.
- (b) When an increased bond amount is obtained from a party other than the original surety, the original surety must execute a consent of surety. Novation agreements require the execution of a consent of surety. **See:** Guide, Vol. 14, § 745.55 (Novation and Change of Name Agreements).

§ 620 Sureties and Bond Alternatives

§ 620.10 Sureties

§ 620.10.10 In General

Bonds must be supported by acceptable corporate sureties (**see:** § 620.10.20 (Corporate Sureties)), individual sureties (**see:** § 620.10.30 (Individual Sureties)), by assets acceptable as security for the contractor's obligation (**see:** § 620.20 (Deposit of Assets Instead of Surety Bonds)), or irrevocable letters of credit (**see:** § 620.30 (Irrevocable Letter of Credit)).

§ 620.10.20 Corporate Sureties

Any corporate or individual surety offered for a bond furnished the judiciary must appear on the list contained in Treasury Department Circular 570 (Companies Holding

Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsuring Companies).

§ 620.10.30 Individual Sureties

On a case by case basis, the judiciary may accept individual sureties.

§ 620.10.40 Amount

The penal amount of the bond should not exceed that surety's underwriting limit as stated in Circular 570. "Penal amount" means the amount of money specified in a bond as the maximum payment for which the surety is obligated or the amount of security required to be pledged to the judiciary in lieu of a corporate or individual surety for the bond.

§ 620.20 Deposit of Assets Instead of Surety Bonds

§ 620.20.10 Assets in Lieu of Bond

In lieu of any bond, the contractor may deposit certain kinds of assets with the judiciary instead of furnishing a bond.

§ 620.20.20 Acceptable Assets

The only assets acceptable in place of a surety bond are described below:

- (a) United States bonds or notes with a maturity date less than five years from the date of the contract, together with an agreement authorizing collection or sale in the event of default. The par value of the bonds or notes must be at least equal to the penal amount of the bond.
- (b) A certified check, cashier's check, bank draft, postal money order, or currency. The deposit must be at least equal to the penal amount of the surety bond and payable to the finance office of the judiciary organization that required the bond (i.e., individual court unit, Federal Judicial Center (FJC), Judicial Panel on Multidistrict Litigation (JPML), Federal Public Defender Organization (FPDO), or the AO's Finance and Accounting Division (FAD) or other judiciary organization).

§ 620.20.30 Deposit of Assets

The CO must turn all assets over to finance or another authorized judiciary official for deposit into an interest bearing account at a Federal Reserve Bank (or branch with requisite facilities) with instructions to hold the funds for the benefit of the contractor. A perpetual inventory of all deposited items must be kept by the senior contracting official at the purchasing office.

§ 620.20.40 Bond Form Requirements

When the contractor pledges assets instead of providing a surety bond, the contractor must complete the bond form as principal and the bond form must describe the assets pledged.

§ 620.20.50 Clauses/Provisions

- (a) Provision 6-10, Deposit of Assets Requirements must be included in solicitations if the resulting contract will require furnishing of bonds.
- (b) Clause 6-15, Deposit of Assets Instead of Surety Bonds must be included in every solicitation and contract requiring a bond for which assets may be deposited in lieu of bonds.

§ 620.30 Irrevocable Letter of Credit

§ 620.30.10 In General

Any person required to furnish a bond has the option to furnish a bond secured by an Irrevocable Letter of Credit (ILC) in an amount equal to the penal sum required to be secured. A separate ILC is required for each bond.

§ 620.30.15 Requirements

The ILC must be irrevocable and expire only as provided in § 620.30.40 (Expiration Dates). ILCs over \$5 million must be confirmed by another acceptable financial institution that had letter of credit business of at least \$25 million in the past year.

§ 620.30.20 Issuing Institution Requirements

- (a) The ILC must be issued or confirmed by a federally insured financial institution rated investment grade or better.
- (b) The contractor must provide the CO a credit rating that indicates the financial institution has the required rating(s) as of the date of issuance of the ILC.
- (c) If the CO learns that a financial institution's rating has dropped below the required level, the CO will give the contractor 30 days to substitute an acceptable ILC or will draw on the ILC using a sight draft.

§ 620.30.25 Cancellation of ILC

Letters of credit must indicate that the financial institution may not cancel the letter of credit before 90 days following the scheduled contract completion date. For contract

completion disposition of assets after final contract payment, **see:** § 620.40.30(b) (Contract Completion).

§ 620.30.30 Failure to Furnish Replacement ILC

If the contractor does not furnish an acceptable replacement ILC, or other acceptable substitute, at least 30 days before an ILC's scheduled expiration, the CO will immediately draw on the ILC.

§ 620.30.35 Drawing on the ILC

To draw on the ILC, the CO will use a sight draft and present it with the ILC to the issuing financial institution or the confirming financial institution, if any.

§ 620.30.40 Expiration Dates

The expiration dates of the ILC will be the later of:

- (a) 90 days following final payment, or
- (b) until completion of any warranty period for performance bonds only.

§ 620.30.45 Extended Contract Performance

When the contract performance period is extended, the CO will require the contractor to provide an ILC with an appropriately extended maturity date that meets the requirements in § 620.30.40 (Expiration Dates).

§ 620.30.50 ILC in Lieu of Payment Bond

If, after the period of performance of a contract where ILCs are used to support payment bonds, there are outstanding claims against the payment bond, the CO will draw on the ILC before the expiration date of the ILC to cover these claims.

§ 620.40 Administration of Contracts Requiring Bonds

See also: Guide, Vol. 14, § 740.50 (Assignment of Claims), § 745.55 (Novation and Change of Name Agreements), and § 755.45 (Actions Following Issuance of Termination).

§ 620.40.10 Information and Notice to Sureties

- (a) Correspondence

A copy of all correspondence relating to contract modification, termination, renewal, or nonperformance must be provided to each surety with proof of delivery requested. Additional information on contract performance and payment must be provided to sureties on request.

(b) Failure to Perform

The CO must send each surety a copy of any notice of impending termination, demand for adequate assurances, assessment of liquidated or other damages, or other formal notice of failure to perform under the contract with a notice that the surety may be liable for damages suffered by the judiciary.

(c) Claims Against Sureties

If a contractor's failure to perform necessitates a claim against a surety, the CO must give the surety written notice of the amount of and reasons for the claim. If the surety refuses to pay or does not respond, the CO must obtain advice from the PE, who will consult with OGC.

§ 620.40.20 Surety Takeover Agreements

- (a) Because of the surety's liability for damages resulting from a contractor's default, the surety has certain rights and interests in the completion of the contract work and the application of any undisbursed funds. Before terminating a contract for default, the CO must consider any offer by the surety for completion of the work. The surety must be permitted to complete the work unless the CO has reason to believe that the persons or firms proposed by the surety to complete the work are not competent or qualified.
- (b) Because of the possibility of conflicting demands for the defaulting contractor's unpaid earnings (including retained percentages), the surety may condition its offer of completion on the execution of a takeover agreement establishing the surety's right to payment from the unpaid earnings. If so, with the PE's written pre-concurrence and after consulting with OGC, the CO may enter into such an agreement with the surety in writing after the effective date of contract termination. The CO must consider including the defaulting contractor as a party to the agreement to preclude any disagreement on the contractor's residual rights.
- (c) The agreement must provide that the surety will complete the work according to all contract terms and conditions and that the judiciary will pay the surety the balance of the contract price unpaid at termination but not more than the surety's costs and expenses, subject to the following conditions:
- (1) Any unpaid earnings of the defaulting contractor, including retained percentages, for work accomplished before termination, are subject to debts owed the judiciary by the contractor except to the extent that the unpaid earnings are required to pay the completing surety

the actual costs and expenses it incurs in completing the work exclusive of the surety's payments and obligations under the payment bond given in connection with the contract.

- (2) The agreement may not waive or release the judiciary's right to liquidated damages for any delay in completion of the work that is not excusable under the contract.
- (3) If the contract proceeds have been assigned to a financing institution, the surety may not be paid from unpaid earnings unless the assignee consents to the payment in writing.
- (4) The surety may be reimbursed for discharging its liabilities under the payment bond of the defaulting contractor only when:
 - (A) there is mutual agreement among the judiciary, the defaulting contractor, and the surety, or
 - (B) a court of competent jurisdiction orders payment.

§ 620.40.30 Contract Completion

- (a) Following contractor completion of all contract obligations, the CO must issue a Certificate of Completion to any surety. The certificate's terms may not release the surety from any obligation under a payment bond.
- (b) When the contractor has deposited assets instead of providing a surety on a payment bond, the CO must refund the assets, with accrued interest (**see:** § 620.20.30 (Deposit of Assets)), within 90 days after final completion of contract performance, unless notice of a claim is received during the 90-day period. If a claim is received, the assets may be released only by order of a court of competent jurisdiction.
- (c) Assets deposited to secure any other bond may be refunded, with accrued interest, following final completion and receipt of the contractor's written release of claims.

§ 630 Insurance

§ 630.10 In General

Contractors are required by law to provide insurance for certain types of perils (e.g., workers' compensation). Insurance is mandatory also when commingling of property, type of operation, circumstances of ownership, or condition of the contract make it necessary for the protection of the judiciary.

§ 630.20 Types of Insurance

The kinds of insurance and coverage amounts specified in Clause 6-20, Insurance – Work on or Within a Judiciary Facility are minimums. The CO may require additional coverage and/or higher limits, but should document the reasons for the additional coverage and/or higher limits in the contract file. The CO is authorized to modify Clause 6-20 when such additional coverage and/or higher is required.

§ 630.20.10 [Reserved]

§ 630.20.20 [Reserved]

§ 630.20.30 [Reserved]

§ 630.20.40 Clauses

- (a) Clause 6-20, Insurance – Work on or Within a Judiciary Facility is included in solicitations and contracts when:
 - (1) a fixed-price contract is contemplated;
 - (2) the contract amount is expected to exceed the judiciary's small purchase threshold (**see:** Guide, Vol. 14, § 325.10 (Applicability)); and
 - (3) the contract will require work on a judiciary facility; unless only a small amount of work is required (i.e., a few brief visits per month).
- (b) Clause 6-25, Insurance – Liability to Third Persons is included in solicitations and contracts (other than those for construction contracts and architect-engineer services) when a cost-reimbursement contract is contemplated.

§ 630.30 Self-Insurance

- (a) The CO must obtain the PE's written approval before accepting any contractor proposal for self-insurance.
- (b) A qualified program of self-insurance covering any kind of liability may be approved in place of any type of insurance discussed in § 630.20 (Types of Insurance) when found to be in the interest of the judiciary.
- (c) However, in a jurisdiction where workers' compensation does not completely cover employers' liability to employees, a program of self-insurance for workers' compensation may be approved only if:

- (1) the contractor also maintains a written approved program of self-insurance for any employer's liability that is not covered, or
- (2) the contractor has shown that the combined cost to the judiciary of self-insurance for workers' compensation and commercial insurance for employers' liability will not exceed the cost of covering both kinds of risks by commercial insurance.

§ 630.40 Errors and Omissions Insurance

§ 630.40.10 Professional Services

Contractors providing the following categories of services must carry errors and omissions (malpractice) insurance:

- accountants;
- architects;
- engineers; and
- fiscal agents.

§ 630.40.20 Amount

Insurance coverage must be at least \$200,000. However, the CO may determine that a greater amount is needed to protect the interest of the judiciary. Any greater amount determined necessary may be indicated by filling in the blank in Clause 6-35, Errors and Omissions.

§ 630.40.30 Waiver

The CO may waive the requirement for errors and omissions insurance, in whole or in part, after first conferring with the PE, who will consult with OGC.

§ 630.40.40 Other Professional Services

The CO may require other professional services contractors to carry errors and omissions insurance when in the interest of the judiciary.

§ 630.40.50 Clauses

Clause 6-35, Errors and Omissions is included in solicitations and contracts when errors and omissions insurance is required under this section.

§ 630.50 Insurance Policies

When insurance is required, it may be provided either by a specific insurance policy or by the contractor's existing insurance policy. When an existing policy is used, it must be

amended to name the loss payee as the finance office for the judiciary organization that required the insurance.

§ 630.60 Notice of Cancellation or Change

When the CO requires insurance (other than errors and omissions insurance issued on an occurrence basis), the insurance policy must contain an endorsement. The endorsement must state that a cancellation of, or material change in, the policy that adversely affects the judiciary's interest will not be effective until at least 30 days after the CO receives written notice of the cancellation or change.

§ 640 Taxes

§ 640.10 In General

Contract tax problems are essentially legal in nature and vary widely. Specific tax questions must be resolved by reference to the applicable contract terms and pertinent tax laws and regulations. Therefore, when tax questions arise, COs generally must confer with the PE, who will consult with OGC.

Note: Telecommunications services are a special case. For guidance on these taxes, **see:** Guide, Vol. 15, § 555 (Taxes and Fees for Communications Services and Computers).

§ 640.20 Federal Excise Taxes

§ 640.20.10 Applicability

Federal excise taxes are levied on the sale or use of particular products and services. The judiciary is subject to the federal excise tax on firearms and ammunition, and vendors for these items may charge this tax. The judiciary is not subject to the federal excise tax on telecommunications (**see:** Guide, Vol. 15, § 555 (Taxes and Fees for Communications Services and Computers)). Questions on the applicability of other federal excise taxes must be directed to the PE, who will consult with OGC.

§ 640.20.20 Solicitations

COs must solicit price offers on a tax-exclusive basis when it is known that the judiciary is exempt from federal excise taxes and on a tax-inclusive basis when no exemption exists.

§ 640.30 State and Local Taxes

§ 640.30.10 Definition

State and local taxes are taxes levied by the states, the District of Columbia, Puerto Rico, possessions of the United States, or their political subdivisions.

§ 640.30.20 Applicability

- (a) As a federal government establishment, the judiciary is constitutionally immune from state and local taxes imposed directly on it. However, the applicability of particular taxes is a legal question often requiring OGC's advice and assistance.
- (b) The applicability of a tax depends on the nature of the tax and whether its legal incidence falls directly on the judiciary (as the purchaser) as compared with a tax imposed directly on a contractor with the contractor passing the cost of the tax onto its customers (including the judiciary) as part of its cost of doing business. In this latter instance, the legal incidence would not fall directly on the judiciary, but on the contractor, and the judiciary would probably not be immune.
- (c) Each state's taxing laws are different; therefore, immunity in one state does not automatically transfer to another state. Most states have provided the General Services Administration (GSA) with a copy of their respective state tax exemption letters, regarding purchases made with the government purchase card. These letters may be found in the State Tax Information area of GSA's SmartPay website. These may provide helpful information concerning an individual state's taxes.

§ 640.30.30 Exemptions for Contractors

- (a) Prime contractors and subcontractors may not normally be designated as agents of the judiciary for the purpose of claiming exemption from state and local taxes. Such designation, when appropriate, must be accomplished in the solicitation and only after coordination with the PE, who will consult with OGC.
- (b) Similarly, when contractors purchase goods or services for the performance of a judiciary contract, the right to an exemption of the transaction from a state or local sales or use tax may not be based on the judiciary immunity from direct taxation by states and localities. If an exemption exists, it must be based on the provisions of the particular state or local law involved.

§ 640.30.40 Exemption from Tax

- (a) Whenever a state or locality asserts its right to tax judiciary property directly or to tax a contractor's possession, use of, or interest in, judiciary property, the CO must obtain advice from the PE, who will consult with OGC, concerning the appropriate course of action.
- (b) In fixed-price solicitations and contracts that include Clause 6-40, Federal, State and Local Taxes or Clause 6-45, Federal, State and Local Taxes (Noncompetitive Contract), it is the offeror's responsibility to determine to what extent state and local taxes are applicable to its offer. The CO must make no representations concerning the applicability of any state or local tax and, except as provided in paragraph (c) below, the judiciary will have no involvement in resolving any dispute between the contractor and a taxing authority concerning tax applicability.
- (c) The judiciary will, at the contractor's request, furnish the contractor evidence to establish exemption from any specified tax if a reasonable basis for the exemption exists.

§ 640.30.50 Evidence of Exemption

Evidence needed to establish exemption from state or local taxes, if an exemption is available, depends on the grounds for the exemption claimed, the parties to the transaction, and the requirements of the taxing jurisdiction. Such evidence may include:

- (a) a copy of the contract;
- (b) copies of other documents identifying the judiciary as the buyer (e.g., shipping documents, credit card imprinted sales slips, invoices);
- (c) a United States Tax Exemption Form (Standard Form (SF) 1094);
- (d) a state or local form indicating that the products or services are for the exclusive use of the judiciary or the federal government;
- (e) any other state or locally required document for establishing exemption; or
- (f) shipping documents indicating that shipments are in interstate or foreign commerce.

§ 640.30.60 Matters Requiring Special Consideration

The resolution of tax issues requiring special consideration must be coordinated with the PE, who will consult with OGC, in the course of solicitation preparation. The following are examples of state and local tax issues that may require special treatment:

- (a) When there is a reasonable question of the applicability or allocability of a tax or when the applicability of a tax is in litigation, the contract may:
 - (1) state that the contract price includes or excludes the particular tax and is subject to adjustment following resolution of the tax question, or
 - (2) require the contractor to take specific actions regarding payment, non-payment, refund, protest, or other treatment of the tax.

For additional guidance on cost allocability, **see:** Guide, Vol. 14, § 470.30 (Determining Allocability).

- (b) When the applicability of state and local taxes depends on the place and terms of delivery and the effect of tax on the contract price will be substantial, alternative places of delivery and contract terms should be considered in light of tax consequences.

§ 640.30.70 Clauses

- (a) Clause 6-40, Federal, State and Local Taxes is included in solicitations and contracts if the contract is to be performed wholly or partly within the United States, its possessions, or Puerto Rico, when a fixed-price competitively awarded contract is contemplated and the contract is expected to exceed the judiciary's small purchase threshold, unless Clause 6-45, Federal, State, and Local Taxes (Noncompetitive Contract) is included in the contract.
- (b) Clause 6-45, Federal, State, and Local Taxes (Noncompetitive Contract) is included in fixed-price noncompetitive contracts exceeding the judiciary's small purchase threshold to be performed wholly or partly within the United States, its possessions, or Puerto Rico, and when the CO is satisfied that the contract price does not include contingencies for state and local taxes, and that, unless the clause is used, the contract price will include such contingencies.
- (c) Clause 6-105, California E-Waste Fee is included in all solicitations and contracts for electronic products purchased in the State of California.

§ 650 Rights in Data and Copyrights

§ 650.10 Data Rights Policy

§ 650.10.10 In General

It is the judiciary's policy to acquire only those rights in data that are necessary to the fulfillment of its mission and programs. For purposes of this chapter, the term "data" means recorded information, regardless of the form or media on which it is recorded. The term includes technical data and computer software but does not include information incidental to contract administration (e.g., financial, administrative, cost or pricing, or management information). The judiciary requires rights to data to:

- (a) obtain competition among potential suppliers of products and services;
- (b) fulfill certain responsibilities for disseminating and publishing the results of activities;
- (c) meet specialized acquisitions needs and ensure logistics support; and
- (d) meet other programmatic and statutory requirements.

§ 650.10.20 Contractor Proprietary Interest

The judiciary recognizes that its contractors may have a legitimate proprietary interest (a property or other economic interest) in data resulting from private development and investment. Protection of such data from unnecessarily wide dissemination and use is necessary to:

- (a) avoid jeopardizing the contractor's commercial position and economic interest;
- (b) preclude impairment of the judiciary's ability to obtain access to or use such data; and
- (c) encourage prospective contractors to contract with the judiciary.

§ 650.10.30 Determining Scope of Data Rights

Because of the considerations identified in § 650.10.10 (In General) and § 650.10.20 (Contractor Proprietary Interest), COs should pay particular attention to the interests of the judiciary and the contractor when deciding the scope of data rights protection to be included in each solicitation or contract. All contracts that require data to be produced, furnished, acquired or specifically used in meeting contract performance requirements must contain terms that delineate the respective rights and obligations of the judiciary and the contractor regarding the use, duplication and disclosure of such data.

§ 650.15 Unlimited Rights Data

§ 650.15.10 Unlimited Rights under Clause 6-60

Data in the following categories is acquired with unlimited rights (except for copyrights) under Clause 6-60, Rights in Data – General:

- (a) data first produced in the performance of the contract, including computer software (except to the extent the data constitute minor modifications to data that are limited rights data or restricted computer software);
- (b) form, fit and function data delivered under the contract;
- (c) data (except as may be included with restricted computer software) that constitute manuals or instructional and training material for installation, operation, or routine maintenance and repair of items, components, or processes delivered or furnished under a contract; and
- (d) all other data delivered under the contract unless it is limited rights data.

§ 650.15.20 Contractor's Right to Use Data

Clause 6-60, Rights in Data – General recognizes that the contractor has the right to use, release to others, reproduce, distribute, or publish data first produced in the performance of the contract. The CO may, however, place restrictions on the contractor's right to use the data for these purposes. However, such restrictions should not be imposed unless they are determined to be necessary to the furtherance of judiciary mission objectives, needed to support specific judiciary programs, or necessary to meet statutory requirements.

§ 650.20 Limited Rights Data

The contractor must identify any data it proposes to deliver as limited rights data in its proposal consistent with Provision 6-50, Representation of Rights in Data. The contracting officer must include this provision in any solicitation that includes Clause 6-60, Rights in Data – General if the contracting officer desires to have an offeror state in response to a solicitation whether limited rights data or restricted computer software are likely to be used in meeting the data delivery requirements provided in the solicitation. Such limited rights data will not, without the permission of the contractor, be used by the judiciary for manufacture, and will not be disclosed outside the judiciary except for certain specific purposes as may be provided in the notice.

§ 650.25 Restricted Computer Software

§ 650.25.10 In General

Restricted computer software normally is acquired with restricted rights. The contracting officer must include Provision 6-50, Representation of Rights in Data in any solicitation that includes Clause 6-60, Rights in Data – General if the contracting officer desires to have an offeror state in response to a solicitation whether limited rights data or restricted computer software are likely to be used in meeting the data delivery requirements provided in the solicitation. Contractors claiming that software is restricted computer software must identify such software according to Provision 6-50, Representation of Rights in Data and, when it is delivered to the judiciary, place on it the required restricted rights legend.

§ 650.25.20 Rights Needed with Restricted Software

Unlike other data, computer software is also an end item in itself, such that if withheld and form, fit and function data are provided instead, an operational program may not be acquired. Thus, if delivery of restricted computer software is anticipated to be needed to meet contract performance requirements, the CO should assure that the restricted rights acquired permit the computer software to be:

- (a) used or copied for use in or with the computer or computers for which it was acquired, including use at any judiciary facility or office to which such computer(s) may be transferred;
- (b) used or copied for use with a backup computer if any computer for which it was acquired becomes inoperative;
- (c) reproduced for safekeeping (archives) or backup purposes;
- (d) modified, adapted, or combined with other computer software, provided that the modified, combined or adapted portions of any derivative software incorporating restricted computer software are subject to the same restricted rights to the extent to which the original product is recognizable;
- (e) disclosed to and reproduced for use by support service contractors, or their subcontractors consistent with paragraphs (a) through (d) above, and
- (f) used or copied for use in or transferred to a replacement computer.

§ 650.25.30 Scope of Restricted Rights

- (a) The restricted rights provided above are the minimum rights the judiciary will obtain with restricted computer software.

- (b) However, the CO may specify either greater or lesser rights, consistent with the purposes and needs for which the software is to be acquired, in a particular solicitation or contract. For example, consideration should be given to any networking needs or any requirements for use of the computer software from remote terminals.
- (c) Also, the scope of the restricted rights may be different for the documentation accompanying the computer software than for the programs and databases.
- (d) Any additions to, or limitation on the restricted rights provided in the Restricted Rights Notice are to be expressly stated in the contract or in a collateral agreement incorporated in and made part of the contract.

§ 650.30 Copyrighted Data

§ 650.30.10 In General

To facilitate the dissemination of information produced at judiciary expense, contractors are normally authorized, without the CO's pre-approval, to establish claim to copyright in technical or scientific articles based on or containing data first produced in performance of work under a contract containing Clause 6-60, Rights in Data – General and published in academic, technical, or professional journals, symposia proceedings and similar works. Otherwise, the permission of the CO must be obtained if the contractor desires to establish claim to copyright in data first produced in the performance of a contract.

§ 650.30.20 Denial of Copyright Request

- (a) Usually, permission for a contractor to establish copyright in data first produced under the contract will be granted when copyright protection will enhance the transfer or dissemination of data and the commercialization of products or the process to which it pertains.
- (b) The request for permission must be in writing, should identify the data involved or furnish copies of the data for which permission is sought, as well as a statement with the intended publication or dissemination media or other purpose for which copyright is requested.
- (c) The request will normally be granted unless:
 - (1) the data consist of a report that represents the official views of the judiciary or that the judiciary is required by statute to prepare;
 - (2) the data are intended primarily for internal use by the judiciary;

- (3) the data are of the type that the judiciary itself distributes to the public; or
- (4) the judiciary determines that data should remain in the public domain and be disseminated without restriction.

§ 650.30.30 Judiciary License

Under Clause 6-60, Rights in Data – General the judiciary is granted a paid-up, nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works, distribute to the public, perform publicly and display publicly by or on behalf of the judiciary, all data first produced in the performance of the contract, whether copyrighted or not.

§ 650.30.40 Copyright Notice Requirement

Under Clause 6-60, Rights In Data – General whenever a contractor establishes a claim to copyright, the contractor is required to affix the applicable copyright notices of 17 U.S.C. § 401 and acknowledgment of judiciary sponsorship (including the contract number) to the data whenever such data are delivered to the judiciary, published, or deposited for registration as a published work in the U.S. Copyright Office. Failure to do so could result in such data being treated as unlimited rights data.

§ 650.35 Data Not First Produced in Performance of a Contract

§ 650.35.10 In General

Contractors may not incorporate in data delivered under a contract any data that is not first produced under the contract (marked as required with the copyright notice of 17 U.S.C. § 401), without either:

- (a) acquiring for or granting to the judiciary a copyright license for the data, or
- (b) obtaining permission from the CO to do otherwise.

§ 650.35.20 Scope of Copyright for Such Data

The copyright license the judiciary acquires for such data will normally be of the same scope as discussed in § 650.30.30 (Judiciary License). However, the judiciary may, on a case by case basis, obtain a license of different scope, only with the concurrence of the PE, who will consult with OGC, and only if such a license will not interfere with the judiciary's use of the data as contemplated by the contract. If a license of a different scope is acquired, it must be so stated in the contract and clearly provided in a conspicuous place on the data when delivered to the judiciary. If the contractor delivers computer software not first produced under the contract, the contractor must grant the judiciary the license provided in paragraph (g)(4) of Alternate II of Clause 6-60, Rights in

Data – General or a license agreed to in a collateral agreement made part of the contract.

§ 650.40 Unmarked or Improperly Marked Data or Software

§ 650.40.10 In General

Data or software received without a restrictive legend are deemed to have been furnished with unlimited rights. However, the CO may permit the contractor to place a restrictive legend on the data or software within six months of delivery if the contractor demonstrates that:

- (a) its omission was inadvertent, and
- (b) use of the legend is authorized.

Even if the CO permits the addition of a restrictive legend after delivery, the judiciary has no liability with respect to the use or disclosure of data or software made before the addition of the legend to the data/software.

§ 650.40.20 Delivery of Data/Software with Unauthorized Legend

Data or software received with a restrictive legend not permitted by the terms of the contract may be used with limited rights only pending inquiry to the contractor. If no response has been received within 30 days, or if the response fails to show that the restriction is authorized, the CO, after consultation with the PE, who will consult with OGC, may obliterate the legend, appropriately notify the contractor, and use the data/software after that as if acquired with unlimited rights.

§ 650.45 Special Works

§ 650.45.10 Use of Special Works

Clause 6-65, Rights in Data – Special Works may be used in contracts, or may be made applicable to portions of them, that are primarily for the production or compilation of data (other than limited rights data or restricted computer software) for the judiciary's own use, or when there is a specific need to limit distribution and use of the data or to obtain indemnity for liabilities that may arise out of the content, performance, or disclosure of the data. Examples of such contracts may include those for:

- (a) the production of audiovisual works;
- (b) histories of the judiciary;
- (c) works pertaining to training or career guidance;

- (d) works pertaining to the instruction or guidance of judiciary employees in the discharge of their duties;
- (e) surveys of judiciary establishments;
- (f) the compilation of reports, books, studies, surveys, or similar documents;
- (g) the collection of data containing personally identifiable information such that their disclosure would violate the right of privacy or publicity of the individual to whom the information relates;
- (h) investigatory reports;
- (i) the development, accumulation, or compilation of data, the early release of which could prejudice follow-on acquisition activities or agency regulatory or enforcement activities; or
- (j) the development of computer software programs, where the program – may give a commercial advantage; or is agency mission sensitive, and release could prejudice agency mission, programs, or follow-on acquisitions.

§ 650.45.20 Additional Contract Considerations

Contracts using Clause 6-65, Rights in Data – Special Works may specify the purposes and conditions (including time limitations) under which the data may be used, released, or reproduced by the contractor for other than contract performance. In addition, contracts for the production of audiovisual works, sound recordings, etc. may include limitations in connection with talent releases, music licenses, and the like that are consistent with the purposes for which the data is acquired.

§ 650.50 Professional Services/Work for Hire

Contracts for professional consultant, research, or other highly specialized services (e.g., expert or consultant services under 5 U.S.C. § 3109) may require that the judiciary retain broad intellectual property rights. In such cases, the work may be specifically characterized in the contract as a work for hire, in which case the intellectual property rights that accrue to the judiciary are those that would arise if the work were performed by a judiciary employee. In such an instance, the contract must specify that the work is a “work for hire.” When the work is classified as a “work for hire,” the contractor enjoys no right to the data produced under the contract but rather, all materials, data and other information developed, delivered, furnished or otherwise called for under the contract are works of the United States and are in the public domain. Because the judiciary’s needs can generally be met by acquiring unlimited rights in data, as provided in Clause 6-60, Rights in Data – General, the inclusion of a clause treating all data as a work for

hire should be used cautiously and only in those instances where the judiciary or public's needs cannot otherwise be adequately met.

§ 650.55 Commercial Computer Software

§ 650.55.10 In General

- (a) When contracting other than from GSA Multiple Award Schedule contracts for the acquisition of commercial computer software — i.e., software that is privately developed and normally sold commercially under a license or lease agreement restricting its use, disclosure, or reproduction — no specific contract clause need be used, but the contract must specifically address the judiciary's right to use, disclose, and reproduce the software, and these rights must be sufficient for the judiciary to fulfill the need for which the software is being acquired.
- (b) Such rights may need to be negotiated and provided in the contract. If the computer software is to be acquired with unlimited rights, the contract must specifically provide for this.
- (c) In addition, the contract must adequately describe the computer programs and/or databases, the media on which it is to be recorded, and all the necessary documentation.

§ 650.55.20 License Terms

- (a) If the contract incorporates, makes reference to, or uses a contractor's standard commercial license, lease, or purchase agreement, the CO must review the agreement to assure that it is consistent with other contract terms and provisions and the judiciary's needs.
- (b) Caution should be exercised in accepting a contractor's terms and conditions since these may conflict with other contract provisions and may not be appropriate.
- (c) Any inconsistencies in a contractor's standard commercial agreement will be addressed in the contract and the terms will specify that the contract terms take precedence over the contractor's standard commercial agreement. **See also:** § 540 (Commercial Agreements).

§ 650.60 Rights to Data in Successful Offers

The judiciary may desire to acquire unlimited rights in technical data contained in a successful offer on which an award is based. However, before such unlimited rights are acquired, the prospective contractor must be afforded the opportunity either:

- (a) to advise the CO that the data, or portions thereof (to be identified by the prospective contractor) are covered by any restrictive notice regarding the disclosure and use of offer information, or
- (b) establish to the CO's satisfaction that identified portions of technical data do not relate directly to, or will not be used in, the work to be performed under the contract, and request that such portions be excluded from the judiciary's rights.

§ 650.65 Clauses	
Clause or Provision	Include in:
(a) Provision 6-50, Representation of Rights in Data	<p>Solicitations and contracts when:</p> <ul style="list-style-type: none"> (1) the solicitation includes Clause 6-60, Rights in Data – General; and (2) offerors must state in response to a solicitation whether limited rights data or restricted computer software are likely to be used in meeting the contract requirements. <p>Note: The offeror's response will determine whether to incorporate Alternate I or II for Clause 6-60 in the resultant contract.</p>
(b) Clause 6-60, Rights in Data – General	<p>Solicitations and contracts when data will be produced, furnished or acquired under the contract, unless the contract is for:</p> <ul style="list-style-type: none"> (1) the acquisition of existing data, commercial computer software, or other existing data; (2) architect-engineer services or construction work; (3) the production of special works.
(c) Clause 6-60, Rights in Data – General, Alternate I	<p>Solicitations and contracts when obtaining limited rights data. The CO must complete paragraph (g)(3) of the clause to state the purposes, if any, for which limited rights data are to be disclosed outside the judiciary. Examples of such purposes include:</p> <ul style="list-style-type: none"> (1) use by support contractors; (2) use by non-judiciary evaluators in evaluating contractor offers; and (3) use by other contractors participating in judiciary programs for use and information in connection with performance under the contract.
(d) Clause 6-60, Rights in Data –	<p>Solicitations and contracts when obtaining restricted computer software. Any greater or lesser rights regarding the use, reproduction,</p>

§ 650.65 Clauses	
Clause or Provision	Include in:
General, Alternate II	or disclosure of restricted computer software than those provided in the Restricted Rights Notice of paragraph (g)(4) of the clause must be specified in the contract and the notice appropriately modified.
(e) Clause 6-65, Rights in Data – Special Works	<p>Solicitations and contracts when contracting primarily for the production or compilation of data (other than limited rights data or restricted computer software) for the judiciary’s internal use, or when there is a specific need to limit distribution and use of the data or to obtain indemnity for liabilities that may arise out of the content, disclosure, or performance of the data. Examples of such contracts are listed at § 650.45 (Special Works). Also include when existing works are to be modified, as by editing, translation, addition of subject matter, etc. With the approval of the PE, who will consult with OGC, the clause may be modified as follows:</p> <p>(1) Paragraph (c)(1)(ii), which enables the judiciary to obtain assignment of copyright in any data first produced in the performance of the contract, may be deleted if the CO determines that such assignment is not needed;</p> <p>(2) Paragraph (e) of the clause, which requires the contractor to indemnify the judiciary against any liability incurred as the result of any violation of trade secrets, copyrights, right of privacy or publicity, or any libelous or other unlawful matter arising out of or contained in any production or compilation of data that are subject to the clause, may be deleted or limited in scope when the CO determines that, because of the nature of the particular data involved, such liability will not arise;</p> <p>(3) When the audiovisual or other special works are produced to accomplish a public purpose other than acquisition for the judiciary’s own use (e.g., for production and distribution to the public of works by organizations outside the judiciary), the clause may be modified with rights in data provisions that meet judiciary needs yet protect free speech and freedom of expression as well as the artistic license of the creator of the work.</p>
(f) Clause 6-70, Work for Hire	Solicitations and contracts when the contract involves the procurement of professional services and it is determined by the CO that the contract should be treated as a “work for hire”
(g) Clause 6-75, Rights to Data in an Offer	Solicitations and contracts when it is desired to acquire unlimited rights in technical data contained in a successful proposal on which a contract award is based. Rights to technical data in a proposal are not acquired by mere incorporation by reference of the proposal in the contract.

§ 650.65 Clauses	
Clause or Provision	Include in:
(h) Clause 6-80, Rights in Data – Existing Works	Solicitations and contracts when acquiring, without modification, existing audiovisual and similar works of the type provided in § 650.45 (Special Works). The contract may provide limitations consistent with the purposes for which the work is being acquired. The clause is not required for the off-the-shelf purchase of books, publications, etc. However, if reproduction rights are to be acquired, the contract must include terms addressing such rights.
(i) Clause 6-85, Commercial Computer Software License	Solicitations and contracts when acquiring commercial computer software (other than from GSA's Multiple Award Schedule contracts).
(j) Clause 6-110, Deferred Ordering of Technical Data or Computer Software	<p>Solicitations and contracts when a firm requirement for a particular data item(s) has not been established before contract award but there is a potential need for the data.</p> <p>Under this clause, the contracting officer may order any data that has been generated in the performance of the contract or any subcontract thereunder at any time until three years after acceptance of all items (other than technical data or computer software) under the contract or contract termination, whichever is later. The obligation of subcontractors to deliver such data expires three years after the date the contractor accepts the last item under the subcontract.</p> <p>When the data is ordered, the delivery dates must be negotiated and the contractor compensated only for converting the data into the prescribed form, and for costs of reproduction and delivery.</p>

§ 660 Patents and Copyrights

§ 660.10 In General

- (a) Under 28 U.S.C. § 1498, the exclusive remedy for patent or copyright infringement by or on behalf of the judiciary is a suit for monetary damages against the judiciary in the Court of Federal Claims. There is no injunctive relief available, and there is no direct cause of action against a contractor that is infringing a patent or copyright with the authorization or consent of the judiciary (e.g., while performing a contract). The judiciary may expressly authorize and consent to a contractor's use or manufacture of inventions covered by U.S. patents by inserting Clause 5-30, Authorization and Consent.

- (b) Because of the exclusive remedies granted in 28 U.S.C. § 1498, the judiciary requires notice and assistance from its contractors regarding any claims for patent or copyright infringement by inserting Clause 6-90, Notice and Assistance Regarding Patent and Copyright Infringement.
- (c) The judiciary may require a contractor to reimburse it for liability for patent infringement arising out of a contract for commercial items by inserting Clause 6-95, Patent Indemnity.

§ 660.20 Clauses	
Clause or Provision	Include in:
(a) Clause 6-90, Notice and Assistance Regarding Patent and Copyright Infringement	all solicitations and contracts that include Clause 5-30, Authorization and Consent
(b) Clause 6-95, Patent Indemnity	solicitations and contracts over the small purchase threshold that may result in the delivery of commercial products or services, unless the CO determines, after consultation with legal counsel, that omission of the clause would be consistent with commercial practice
(c) Clause 6-95, Alternate I (identification of excluded items)	solicitations and contracts when Clause 6-95 applies and: <ul style="list-style-type: none"> (1) the contract includes delivery of both commercial and non-commercial items; or (2) the CO determines, after consultation with legal counsel, that limitation of applicability of the clause would be consistent with commercial practice
(d) Clause 6-95, Alternate II (identification of included items)	solicitations and contracts when Clause 6-95 applies and: <ul style="list-style-type: none"> (1) the contract includes delivery of both commercial and non-commercial items; or (2) the CO determines, after consultation with legal counsel, that limitation of applicability of the clause would be consistent with commercial practice
(e) Clause 6-95, Alternate III	solicitations and contracts for communication services and facilities where performance is by a common carrier, and the services are unregulated and are not priced by a tariff schedule set by a regulatory body
(f) Clause 6-100, Waiver of Indemnity	solicitations and contracts when it is in the interest of the judiciary to exempt specific U.S. patents from the patent indemnity clause