



Do's and Don'ts

for Conditional Acceptance of Nonconforming Supplies or Services

Anthony J. Nicolella

If you stay in Department of Defense (DoD) contracting long enough, you will have to deal with the dreaded issue of contractors trying to deliver nonconforming supplies or services. As a government contracting professional, you have quite a few options in dealing with this problem, including conditional acceptance. The purpose of this article is, first, to share a personal experience I had with conditional acceptance, and, second, to discuss some of the do's and don'ts of conditionally accepting nonconforming items.

Before going any further, let's determine what is meant by "conditional acceptance." According to Federal Acquisition Regulation (FAR) 46.101, conditional acceptance means "acceptance of supplies or services that do not conform to contract quality requirements, or are otherwise incomplete, that the contractor is required to correct or otherwise complete by a specified date." Conditional acceptance is not supposed to be a long-term solution but an option that the government can consider if it is in the government's best interest to do so.

The first time I had to deal with a nonconforming item was as an administrative contracting officer (ACO) of a major Army acquisition weapon system. I had just been appointed the ACO and one of my first tasks was to approve several conditional DD Form 250s—Material Inspection and Receiving Reports. After speaking with the Quality Assurance (QA) Division Chief, I discovered that our agency had been conditionally accepting this weapon system for several months. Only a few select people like the former ACO, project manager (PM), commander, and QA chief in the agency knew about this. After researching the circumstances surrounding this decision, it became apparent to me why this action was being kept close hold.

Nicolella is a professor of Contract Management at the Defense Acquisition University's South Region in Huntsville, Alabama.



U.S. Army Staff Sgt. Joshua Wheeler fabricates a metal mud flap bracket for a vehicle on Joint Base Balad, Iraq, in 2009.
Department of Defense photo.

As a brand-new ACO unfamiliar with conditional acceptance, I decided to investigate this concept further before making any decision. What I already knew was that the weapon system in question was not a new one but one that had been around for quite some time. Because of this, I was perplexed as to how a legacy system of this caliber and in its third year of production could have a critical nonconformance issue. There had been no change to the production process, no change to major subcomponents, and no change to subcontractors or main suppliers. So why is this happening at this time in the contract's period of performance (POP)? Is conditionally accepting this weapon system in the best interest of the government?

Finally, and most important, what am I going to do about it? My first step was to read the *FAR Section 46.407* on Nonconforming Supplies or Services. This section provides many viable options in dealing with nonconforming items and the contractors providing them. After reading this *FAR* section, one would think conditional acceptance would be an effective way of dealing with a nonconformance issue. This might be true, but only after a number of conditions have been met, including strict adherence to the *FAR Section 46.407* which, unfortunately, had not happened.

In our case, conditional acceptance meant that the contractor got full payment and credit for an on-time delivery. Was this in the government's best interest? To answer this question, we need to review *FAR 46.407 (c)(1)*, which states that a contracting officer's determination of whether acceptance or conditional acceptance is in the government's best interest must be based on:

- Getting advice from the technical activity that the item is safe to use and will perform as intended
- Gathering information about the nature and extent of the nonconforming item
- A contractor request for acceptance of the nonconforming item
- A recommendation for conditional acceptance or rejections with supporting rationale
- Considering contract adjustment, if appropriate

Let's take each of the above items one at a time. First, get advice from the technical activity that the item is safe to use and will perform as intended. This did happen, and the advice, according to the QA chief, was not to conditionally accept the item because the nonconformance was critical. According to *FAR 2.101* and *FAR 46.101*, a critical nonconformance means "a nonconformance that is likely to result in hazardous or unsafe conditions for individuals using, maintaining or depending upon the supplies or services; or is likely to prevent performance of a vital agency mission."

While *FAR 46.407(c)(1)* does allow acceptance or conditional acceptance of a nonconforming item with a critical nonconformance in appropriate circumstances such as "economy or urgency," *FAR 46.407(c)(2)* requires that "Before making a decision to accept, the contracting officer must obtain the concurrence of the activity responsible for the technical requirements of the contract" Here, the technical activity not only did not concur but it actually recommended rejecting the nonconforming goods.

Second, gather information regarding the nature and extent of the nonconforming item. This issue was quality related and impacted U.S. and Foreign Military Sales (FMS) contracts. The contractor promised to fix the problem “sometime in the near future.” The government accepted this “soft” promise rather than setting a firm date by which the deficiency would have to be corrected (or the conditional acceptance revoked), as required by the very definition of conditional acceptance in FAR 46.101 (“... contractor is required to correct or otherwise complete by a specified date”). The government assumed that this fix would be made at no additional cost to the government. The fix required the swapping out of parts. However, since the fix would take several months to complete, contractor teams

Was conditionally accepting the weapon system, in this case, in the best interest of the government? Based on the requirements of FAR 46.407 (c)(1), it does not appear so. Besides failing to adhere to FAR 46.407(c)(1), the government did not comply with FAR 46.407 (e) or (f). In reference to paragraph (e), the ACO by his or her actions or inactions (failure to withhold monies, failure to establish a firm date for fix, failure to obtain the concurrence of the activity responsible for the technical requirements of the contract, etc.), did not discourage the repeated tender of nonconforming supplies. To the contrary, his or her actions or inactions encouraged the contractor to repeat and perpetuate the issue month after month. In reference to paragraph (f),

This is not to imply that conditional acceptance is not a viable option when dealing with a nonconformance issue; it may be. DoD contracting professionals must look at and consider a number of factors when contemplating conditional acceptance.

would be needed to periodically perform checks such as starting equipment, replacing batteries (if needed), exercising the hydraulics system, etc., in order to keep weapon system in good working order. The contractor submitted a cost proposal to the government for this additional work. Since hundreds of weapon systems were impacted, these ancillary costs were material and growing each day.

Regarding the last three items (Numbers 3, 4 and 5), since nothing was documented in the contract file, it was assumed that no written request, recommendation or adjustment was submitted to or considered by the ACO. This does not bode well for the government. The contractor on the other hand was enjoying full payment and credit for on-time delivery of its nonconforming item.

So going back to my original three questions:

Why was this happening at this time in the contract POP? I could not really find an answer to this question. I can only speculate. Up to this point, the contractor was performing well on the contract. The end user and other stakeholders were very happy with the contractor and the item produced. The contractor assumed (correctly) that if it asked the government to do a conditional acceptance, the government would accommodate that request. Out of all the choices (reject, rework at no additional cost, replacement or terminate for default) available under FAR sub-part 46.407 to the government, conditional acceptance was probably thought to be the easiest and most expeditious choice. But for whom? Government complacency also may have played a role in its decision.

when accepting supplies with a critical nonconformance, the ACO must modify the contract to provide for an equitable price reduction or other consideration. The government did not modify the contract or receive an equitable adjustment or any type of consideration in return.

What am I going to do about it? After speaking with the PM and other concerned government acquisition team members, as well as legal counsel, about our conditional acceptance approach, I discontinued conditionally accepting this item. The contractor balked at the decision and tried to claim that this was a past practice and that a precedent had been set. Yes, and a bad, totally one-sided precedent. Faced with a united government acquisition team, the contractor grudgingly gave up its quest to seek further conditional acceptance of its nonconforming item.

This is not to imply that conditional acceptance is not a viable option when dealing with a nonconformance issue; it may be. DoD contracting professionals must look at and consider a number of factors when contemplating conditional acceptance. Some of the “Do’s” of conditional acceptance are:

Do safeguard the government’s interest by doing extensive research of the FAR/Defense Federal Acquisition Regulation Supplement and by strictly adhering to the guidance of FAR Section 46.407, including the requirement to obtain technical concurrence.

Do properly document the contract file. Good or bad, this information needs to make it into the contract file to ensure others,



Got opinions to air?

Interested in passing on lessons learned from your project or program?

Willing to share your expertise with the acquisition community?

Want to help change the way DoD does business?

Write an article (1,500 to 2,500 words) and *Defense AT&L* will consider it for publication. Our readers are interested in real-life, hands-on experiences that will help them expand their knowledge and do their jobs better.

What's In It for You?

First off, seeing your name in print is quite a kick. But more than that, publishing in *Defense AT&L* can help advance your career. One of our authors has even been offered jobs on the basis of articles written for the magazine.

Now we can't promise you a new job, but many of our authors:

- Earn continuous learning points
- Gain recognition as subject-matter experts
- Are invited to speak at conferences or symposia
- Get promoted or rewarded

For more information and advice on how to submit your manuscript, check the writer's guidelines at <http://www.dau.mil/publications/ATLdocs/Writer's%20Guidelines.pdf> or contact the managing editor at datl@dau.mil.

including future contracting officers, are aware of the decisions made and, importantly, the rationale for those decisions.

Do ensure you have a well-informed and united government acquisition team. When it comes to contractual issues, the ACO is the decision maker of the government acquisition team. In this role, one must establish open and honest communications with each team member, ensure everyone is educated on the issue at hand and united in the approach to resolve it.

Do understand your contract's terms and conditions so you and your team can perform contract administration properly.

Do have the moral courage to make an unpopular decision when that decision is in the best interest of the government.

In reference to Number 5 above, I cannot stress enough the importance of having the moral courage to make an unpopular decision when doing so is in the best interest of the government. No amount of training can prepare a person for this. As business advisors and warranted contracting professionals, we must do the right thing, even when doing the right thing is unpopular with not only the contractor but with some members of our own government acquisition team.

In hindsight, the government's decision to grant the contractor conditional acceptance was not wise, and that brings us to some of the "Don'ts" of conditional acceptance:

Don't make a decision that is not clearly in the best interest of the government.

Don't fail to properly document the contract file. This is a cardinal sin in contracting. There is an old saying in contracting, "If it is not documented, then it never happened."

Don't be a non-team player. The government acquisition team did not work well together in this case. Much of the blame lies with the ACO since he or she had the warrant and thus the authority. However, other key leaders were misinformed, ignorant or unengaged regarding the nature or extent of the conditional acceptance.

Don't become complacent. Complacency combined with too much faith in the contractor's judgment and intentions may have allowed this situation to continue longer than it should have.

Don't take the path of least resistance or base your decision solely on ease and expediency.

When contemplating conditional acceptance, remember to focus on accomplishing the "Do's" and avoiding the "Don'ts." The old adage that "Some of the best lessons learned are sometimes learned the hard way" is not one to live by in contracting because even a single lesson learned the hard way may involve a price that is too high for us to pay. &

The author can be contacted at anthony.nicolella@dau.mil.