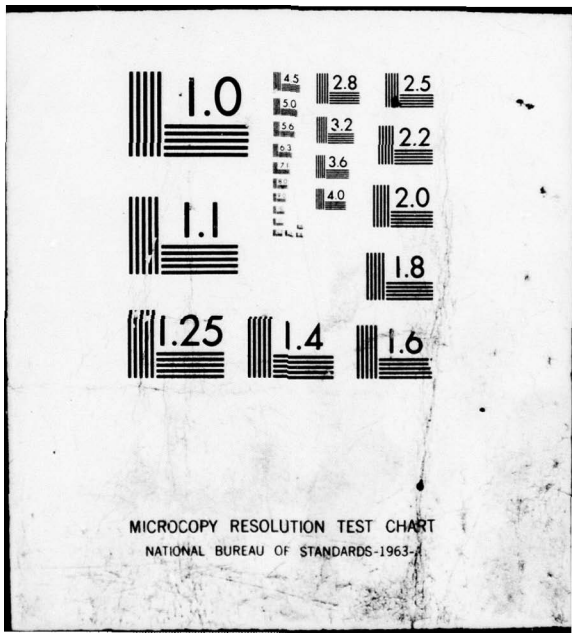
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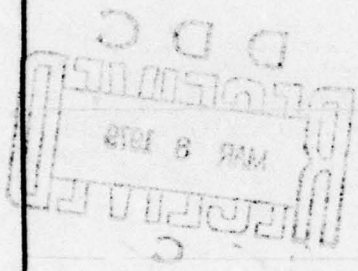
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THE SUSPENSION OF WORK CLAUSE

by

Jeffrey Michael Denson

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J.D. March 1971, University of Florida

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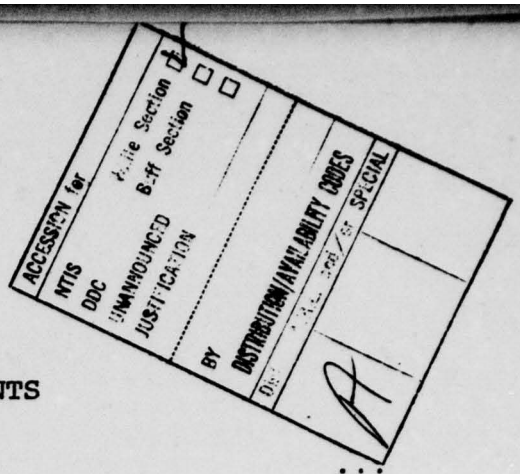


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FOREWORD

The author is a Captain, United States Air Force, and is designated a Judge Advocate by the Office of The Judge Advocate General, Department of the Air Force, Washington, D.C. The views and opinions expressed herein are solely those of the author and do not purport to reflect the position of the Department of the Air Force, Department of Defense, or any other agency of the United States Government.

I. INTRODUCTION TO THE SUSPENSION OF WORK CLAUSE

The Problem of Delay

Delays in the performance of Government contracts probably have accounted for more losses and a greater percentage of business failures among Government contractors than any other single complication that can arise in the field of Government procurement.[1] This is particularly true in construction contracts. For in this area, Government contractors must risk large amounts of capital to achieve performance within a restricted time period. In addition, the ultimate *success* of a construction project can often depend on the cooperation received from the Government. The contractor himself or the Government can be the cause of delay in construction work. The Court of Claims and the various administrative boards established to handle factual disputes under Government contracts are continually required to resolve disputes arising from delays caused by the Government.

The purpose of this thesis is first to briefly examine the law relating to the Government's responsibility for delay which it causes; second, to trace development and ascertain the impact of the Suspension of Work clause which affects this responsibility. The impact of the Suspension

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of Work clause is on fixed-price construction contracts, advertised or negotiated, and consequently the examination is limited to this contract type.

There are many different ways in which the Government can delay the contractor. Among these are issuing faulty specifications, delays in furnishing Government property, interfering with contract performance, delays in issuing a notice to proceed, delays in inspection and testing, and delays in granting necessary approvals.

Regardless of how caused, delays increase the contractor's costs in at least three ways: first, certain expenses continue whether or not work is being performed (normally called standby costs); e.g., salaried supervisors, field office expenses, equipment remaining on the site. Second, there are costs directly related to stopping and starting; e.g., protective maintenance of idle equipment and retraining of new workers. Third, there are costs which result from an extension of time necessary to complete the work; e.g., wage and price increases, additional premiums for bonds and insurance.

Compensable Delay

In the absence of a Suspension of Work clause, in order to recover the additional costs for delay, a contractor must establish three elements.

First, he must show that the Government promised to perform or not perform a particular act. In the case of

actual Government interference, the contractor need not prove the existence of an express promise by the Government to avoid the delay, but rather he may rely on an implied provision in the contract not to interfere with performance.[2] In the case of interference by third parties, the contractor must prove that the Government made a specific promise or warranty to prevent the delay.[3]

Second, the contractor must prove that the Government's failure to fulfill its promise amounts to a breach of the contract.[4]

The first two elements must be considered together. When the Government exhibits due diligence in discharging its obligations, recovery is granted only if the contractor can demonstrate that the circumstances fall under a specific contract provision or warranty.[5] In the absence of such a warranty, the contractor must show that the Government breached its implied duty to cooperate.[6]

> . . . It is settled, of course, that mere delay, per se, incident to the Government's making work or material available to a contractor is not compensable, in a claim for breach of contract, without a specific warranty . . . Absent a warranty, the contractor's recourse for mere delay is to seek an extension of the time of his performance . . . But this general principle presupposes that the Government has met the ever-present obligation of any contracting party to carry out its bargain reasonably and in good faith . . . Unless expressly negatived, that duty is read into all bargains. It would be intolerable if the Government could disregard that responsibility, or were free to stretch its tardiness for however long it fancied, without sterner control than mere prolongation of the completion date of the contract. The rule is, rather, that when the Government's delay in furnishing work or material stems from its failure to do what it should under the particular contract,

> it will have to respond in damages for the resulting additional outlays which are proved to have been caused the contractor . . . Under this principle, the plaintiff cannot prevail merely by proving that there was a lapse of time in receiving materials or even that the defendant was the source of the lapse. The lapse of time must be tied to the defendant's breach of its obligation of reasonable cooperation. The nature and scope of that responsibility is to be gathered from the particular contract, its context, and its surrounding circumstances . . .[7]

The type of Government conduct necessary to constitute a breach of the implied duty to cooperate has been the subject of much litigation. The cases seem uniform in holding that if the delay occurs despite the Government's diligence and lack of fault, the contractor will not recover.[8]

As a third prerequisite to recovery for compensable delay, the contractor must show that the Government-caused delay actually caused damage to the exclusion of other concurrent causes.[9]

> . . . Plaintiff must admit that, no matter how unreasonable the Government's delay, there can be no recovery without proof that that delay caused material damage . . . In the evidentiary record made in this case there is much to support the Commissioner's determination that such proof has not been made . . . The case suffers from more than the absence of specific proof of causation. There is an affirmative showing that other causes, for which the defendant was not responsible, contributed most materially to the delay in production. Plaintiff has not separated these delays from that charged to the defendant, and, on this record, the Commissioner has been unable to do so. Since, as we will show, we cannot say that he was wrong, we must apply the rule that there can be no recovery where the defendant's delay is concurrent or intertwined with other delays.[10]

Moreover, the cases cited demonstrate that even with the presence of the three aforementioned elements, the Government will not be held liable for damages due to delay

caused by it in its contractual capacity unless it has breached an express obligation or a representation on which the contractor was entitled to rely, or in the alternative, has exhibited a lack of diligence or other similarly unreasonable conduct in carrying out any of its contractual obligations. In the absence of one of these conditions, the Government cannot be held liable no matter how great are the increased costs resulting from Government-caused delays. Increased costs alone, even though unanticipated, cannot constitute a basis for recovery.[12]

Development of the Suspension of Work Clause

The Rice Doctrine

The Suspension of Work clause was at least in part an outgrowth of the agitation following the decision of the Supreme Court in United States v. Rice.[13] The rule in that case was a restatement of the rule the Supreme Court had earlier advanced in Chouteau v. United States.[14] In Chouteau, the Government had contracted under a fixed-price agreement for an ironclad ship. Exercising its right under the contract to order alterations and additions, the Government caused the contractor to delay completion of the project for eighteen months. This delay resulted in increased costs for labor and material. The Supreme Court rejected a contract breach suit for the costs of performing the unchanged work. The Court further reasoned that the contract clauses provided for compensation for alterations

but none for the unchanged work.

In Rice, the contractor was delayed when the Government exercised its contractual right to issue changes upon discovery of a changed condition. In denying the contractor's claim for standby costs and increased costs resulting from working into the winter months, the Supreme Court set forth what has become known as the Rice doctrine:

> It seems wholly reasonable that "an increase or decrease in the amount due" should be met with an alteration of price, and that "an increase or decrease . . . in the time required" should be met with alteration of the time allowed; for "increase or decrease of cost" plainly applies to changes in cost due to the structural change required by the altered specification and not to consequential damages which might flow from delay taken care of in the "difference in time" provision.[15]

Thus, from the standpoint of the suspension concept, the important effect of the Rice decision was the finding that contractor recovery under the contract clauses for Government delays preceding the issuance of a change order was limited to a time extension. Of course, the Court in Rice was dealing with reasonable Government conduct not amounting to a contract breach, thus precluding recovery under a suit in court.

In a similar vein, the Court in United States v. Howard P. Foley Co.[16] found that the Government delay in making the work site available did not amount to a breach of contract. Relief for delay costs was limited to that provided for in the contract clauses--i.e., a time extension.

In sum then, the case law as developed by Rice et al

provided that Government delays amounting to a contract breach were not monetarily compensable under the terms of the contract. Rather, the contractor's remedy was to seek recovery for delay damages in a court suit. The contract clauses would provide for a time extension of the performance period, but no other relief for Government-caused delays.

The Corps of Engineers' Clause

After the Court's decision in Rice, contractors sought to include a clause in construction contracts to compensate for delay costs. They reasoned that administrative recovery of these costs would be less costly and time-consuming than pursuing a breach of contract claim in court. During World War II, the Army Corps of Engineers did issue the following clause:

> The Contracting Officer may order the Contractor to suspend all or any part of the work for such period of time as may be determined by him to be necessary or desirable for the convenience of the Government. Unless such suspension unreasonably delays the progress of the work and causes additional expense or loss to the Contractor, no increase in contract price will be allowed. In the case of suspension of all or any part of the work for an unreasonable length of time causing additional expense or loss, not due to the fault or negligence of the Contractor, the Contracting Officer shall make an equitable adjustment in the contract price and modify the contract accordingly. An equitable extension of time for the completion of the work in the event of any suspension will be allowed the Contractor, provided however, that the suspension was not due to the fault or negligence of the Contractor.[17]

By its express terms, the clause promised the contractor that the Government would pay the added costs resulting from

unreasonable delays caused by the Government's exercise of its contractual right to suspend the work. The clause was recognized as creating an exception to the limitations imposed by the Rice doctrine in that it provided for administrative recovery under the contract for costs resulting from Government-caused delay.[18] Of course, the delay had to meet certain conditions: The suspension had to be ordered by the contracting officer; it had to be for an unreasonable length of time; it had to result in additional expense or loss.

The most limiting feature of the clause was the fact that it depended upon an affirmative act of the contracting officer. However, the Army Board of Contract Appeals in its decision in Guerin Brothers[19] expanded the clause's applicability to de facto or constructive suspensions. In Guerin, the board declared that even in the absence of an affirmative suspension order, if the facts were such that an order should have been issued, the board would hold that to be done which should have been done. Thus, the board would in such circumstances treat the contractor's claim as if a proper suspension order had been issued and order an adjustment nunc pro tunc.

> . . . we hold that where an action by the Government through its authorized representatives in the performance of the contract "unreasonably delays the progress of the work and causes additional expense or loss to the Contractor" it becomes the duty of the contracting officer, under contracts identical with that now under consideration, to provide for such delay by a suspension order as contemplated by (the Suspension of Work clause).[20]

The decision in Guerin is important in two respects. One, it recognized that the contracting officer is under a duty to issue a suspension order when the Government in its contractual capacity unreasonably delays the contractor. Two, Guerin demonstrated that a compensable delay clause could be used as an administrative remedy for a set of circumstances that would otherwise constitute a breach of contract. It is well-established that Boards of Contract Appeals do not, in the absence of such a clause, have jurisdiction to compensate a contractor for Government-caused delays amounting to a breach of contract.[21]

Toward a Government-Wide Clause

Further efforts after World War II to draft a standard suspension clause for Government-wide use were initially unsuccessful. Proponents of a Suspension of Work clause cited a growing realization that unreasonable delays, not contemplated when the contract was initiated, inflict grave hardship on the contractor.

> When a contractor has scores of employees, who must be paid for semi or total idleness during a period of delay through no fault of his own, but which is due to the wrongful acts or omissions of the other party, and at the same time his bonds, his interests, his capital investments, his overhead, his employees' wages, and his rental or use of machinery must go on, there is brought home to him in a very real and sometimes bankrupting way the heartbreaking realization that no mere extension of time will compensate him for additional outlay of these expensive items.[22]

Proponents contended that the existing law on compensable delays was not adequate.[23] They argued that a

uniform Suspension of Work clause would serve to eliminate many of the legal difficulties, such as the costly and uncertain nature of court litigation, which prevail where relief for Government-caused delay was attainable only in the courts. In addition to providing the contractor with an expeditious avenue of recovery, the Suspension of Work clause was also felt would result in long-range savings to the Government through the submission of lower bids which would no longer have to take into account the hazards attendant upon Government delays in contract performance.

Adverse reaction to a Suspension of Work clause was based on several arguments.[24] One, it was contended that the law precluded the executive branch of the Government from settling a claim for unliquidated damages arising from delays by the Government in the performance of its contracts. Two, it was argued that the general adoption of a work suspension clause would be no assurance that bid prices would still not include a contingency for Government delays, since a bidder would not necessarily conclude that relief would be granted for the circumstances occurring in the performance of the particular contract. Three, it was reasoned that the actual quantity of cases demonstrated that there was no real need of a Suspension of Work clause. In those rare instances where the need was evident, relief could be granted under a private congressional bill, a special claims statute, or in a judicial cause of action

for breach of contract. It was argued that a Government-wide Suspension of Work clause would constitute "an open invitation to conjectural damage claims, administrative incompetency, and illegal charges against public funds."[25]

The advocates of a uniform Government-wide Suspension of Work clause gained support from two opinions of the Comptroller General. In one opinion, the Comptroller General stated that a proposed Suspension of Work clause similar to the one used by the Army Corps of Engineers appeared to be consistent with the provision for administrative settlement upon termination of the contract for the convenience of the Government. In addition, the Comptroller General thought it was a reasonable assumption that use of a Suspension of Work clause would result in a corresponding benefit to the Government in that bidders would not need to include an amount for such delay contingency in their bid prices.[26] In a later opinion, the Comptroller General held,

> There is no legal objection to the inclusion in Government contracts of a provision permitting changes and suspensions by the Government and providing for additional payment therefor . . . Further we have held that a contract may be modified to provide for additional compensation to the contractor as reimbursement for increased costs resulting from delays caused by the Government.[27]

The 1957 Clause

Despite the lack of objection by the Comptroller General to a Suspension of Work clause, no action was taken to include the clause in the Armed Services Procurement

Regulation, and the matter was, in effect, turned over to a Government Task Force which was established to standardize Government procurement practices.[28] The Task Force, in turn, referred the matter to a Study Group for recommendations. The Study Group recommended a suspension clause for mandatory use throughout the Government. The recommended clause was staffed through forty different Government agencies. As a result of objections from some agencies, the mandatory idea was dropped in favor of optional use. The language of the clause which was adopted in 1957 for optional Government-wide use in fixed-price construction contracts incorporated the constructive suspension rule. The clause read as follows:

> Price Adjustment for Suspension, Delay, or Interruption of the Work
> (a) The Contracting Officer may order the Contractor in writing to suspend all or any part of the work for such period of time as he may determine to be appropriate for the convenience of the Government.
> (b) If, without fault or negligence of the Contractor, the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted by an act of the Contracting Officer in the administration of the contract, or by his failure to act within the time specified in the contract (or if no time is specified, within a reasonable time), an adjustment shall be made by the Contracting Officer for any increase in the cost of the performance of the contract (excluding profit) necessarily caused by the unreasonable period of such suspension, delay or interruption, and the contract shall be modified accordingly. No adjustment shall be made to the extent that performance by the Contractor would have been prevented by other causes even if the work had not been so suspended, delayed, or interrupted. No claim under this clause shall be allowed (i) for any cost incurred more than twenty days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved (but this requirement shall not apply where

> a suspension order has issued), and (ii) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of such suspension, delay, or interruption but not later than the date of final payment under the contract. Any dispute concerning a question of fact arising under this clause shall be subject to the Disputes clause.[29]

The 1957 clause was similar to the Suspension of Work clause used by the Corps of Engineers. The two differed in that under the 1957 clause, (1) a formal suspension order was not required, (2) delays not caused by the Government were expressly excluded, (3) profit was excluded, and (4) a delay notice by the contractor was required. Consequently, since there are differences between the Corps of Engineers clause and the subsequent Government-wide compensable delay clauses, cases arising under the Corps of Engineers clause may not always be taken as precedent for a proper interpretation of the Government-wide Suspension of Work clause.

The 1968 Suspension of Work Clause

In 1968, a new Suspension of Work clause was adopted for mandatory use in fixed-price Government construction contracts.[30] It has remained in effect to this date.

> Suspension of Work
> (a) The Contracting Officer may order the Contractor in writing to suspend, delay, or interrupt all or any part of the work for such period of time as he may determine to be appropriate for the convenience of the Government.
> (b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted by an act of the Contracting Officer in the administration of this contract, or by his failure to act within the time specified in this contract (or if no time is specified, within a reasonable time), an adjustment shall be made for any increase in

the cost of performance of this contract (excluding profit) necessarily caused by such unreasonable suspension, delay, or interruption and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent (1) that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor, or (2) for which an equitable adjustment is provided for or excluded under any other provision of this contract.
(c) No claim under this clause shall be allowed (1) for any costs incurred more than 20 days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved (but this requirement shall not apply as to a claim resulting from a suspension order), and (2) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of such suspension, delay, or interruption, but not later than the date of final payment under the contract.[31]

II. COVERAGE OF THE CLAUSE

Types of Suspensions

Affirmative Suspensions

Paragraph (a) of the present Suspension of Work Standard clause retains the affirmative suspension right which was incorporated in the Corps of Engineers clause.

> (a) The Contracting Officer may order the Contractor in writing to suspend, delay, or interrupt all or any part of the work for such period of time as he may determine to be appropriate for the convenience of the Government.[32]

In terms of actual use, this affirmative authority to suspend work is rarely exercised.[33] In fact, in earlier editions of ASPR, the affirmative suspension right was cited as a secondary purpose of the clause.[34] Affirmative suspensions, i.e., the actual issuance by the contracting officer of a suspension directive, were intended for infrequent use, under strict supervision, and for as limited a period as practicable.[35]

It should be noted that by its express language, paragraph (a) does not explicitly limit the contractor to compensation for only the unreasonable portion of a delay. In E.V. Lane Corp., The ASBCA stated that in the case of a Government suspension order, the purpose of the monetary adjustment is to make the contractor whole for the costs caused by the order.[36] This case would thus infer that

the reasonable time rule, discussed below, does not apply where the Government actually issues an order suspending the work. However, the boards of contract appeals have not followed this inference.[37] In J.A. LaPorte, Inc., the board expressly held that paragraph (a) suspensions, like paragraph (b) constructive suspensions, are limited to the unreasonable periods of delay.[38] Furthermore, the exclusion-of-profit principle, explicit in paragraph (b), was found also to apply to paragraph (a) affirmative suspensions.[39] As a consequence, except for the fact that the twenty-day notice provision,[40] discussed below, is not applicable to claims resulting from authorized suspension orders, affirmative suspensions are subject to the same limitations as paragraph (b) constructive suspensions.

As noted from the language of the clause, paragraph (a) suspensions are predicated on an order of the contracting officer. By contract definition, the term "contracting officer" includes a duly appointed successor or authorized representative.[41] Additionally, in certain circumstances, other individuals may be found to have been invested with suspension authority. In Stamell Construction Co., the contracting officer wrote a letter to the contractor in which he threatened to withhold progress payments for already completed work unless the contractor submitted some design plans for additional structure protection. At the same time, the Government inspector at the job site issued a

field memorandum in which he strongly suggested that the contractor suspend further work pending the design submission. The board held that the contractor reasonably interpreted the combined contracting officer and Government inspector communications as constituting an order to stop work.[42]

In M.A. Santander Construction, Inc., the contractor was installing security fencing around a weapons storage area. On several occasions, the Officer-in-Charge (OIC) of weapons storage denied the contractor any access to the weapons area when weapons were being moved. The combined delays amounted to thirteen days. The ASBCA found that the OIC was never designated a representative of the contracting officer for any purpose related to the contract. However, the fact that the Government knew at the time of contracting that the OIC would enforce security rules in the area led the board to hold that the OIC was actually the contracting officer's representative for the limited purpose of ordering the work suspensions that occurred.[43]

In contrast, the ASBCA in an earlier decision in Frank K. Blas Plumbing & Heating found that a plant security officer's order to the contractor's employees to vacate the building because of a bomb scare was not a suspension of work. The board held, inter alia, that the officer was not authorized by himself to order a suspension of work.[44] See also Chapter III regarding delays related to sovereign acts.

It is difficult to reconcile the two decisions. The board in Santander apparently gave great weight to the fact that the Government was a direct beneficiary of the delay it caused. In contrast, the delay in Blas was for the benefit of all in the work area, and thus of no direct benefit to the Government. Furthermore, the Government in Santander had exclusive knowledge at the time of contracting that it would cause the delays actually encountered.

Constructive Suspensions

As is apparent from the express language of paragraph (a), the affirmative suspension concept affords no relief where the contracting officer acts improperly in such a way as to delay performance and yet refuses to recognize either his action or the consequences of such action. Under these circumstances, it is the constructive suspension concept embodied in paragraph (b) that makes the clause a viable avenue of relief for the contractor.

> (b) If the performance of all or any part of the work is, for an unreasonable time, suspended, delayed, or interrupted by an act of the Contracting Officer in the administration of this contract, or by his failure to act within the time specified in this contract (or if no time is specified, within a reasonable time), an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by such unreasonable suspension, delay, or interruption and the contract modified in writing accordingly.[45]

As noted in Chapter I, the constructive suspension doctrine is tied to the landmark decision of Guerin Brothers.[46] As previously discussed, the board in Guerin Brothers held

that even though the Contracting Officer did not issue an affirmative suspension order, if one should have been issued, the board would hold that what should have been done was done.

Paragraph (b) embodies the constructive suspension doctrine by explicitly providing that the clause becomes operative by an act or failure to act on the part of the contracting officer that interferes with the performance by the contractor of the contract work. Thus, the doctrine of constructive suspension of work holds that when the Government, by virtue of its conduct, has suspended the contract work for an unreasonable portion of time, the Government is obligated to pay for the resulting delay.

Unreasonable Delay

Central Theme of the Clause

The concept of reasonableness is central to the suspension doctrine. As stated by the ASBCA, "the crucial issue is always . . . whether a determination can be made that the act of commission or omission attributable to the Government was unreasonable."[47]

By the terms of the clause, contractors are only allowed adjustments for the unreasonable portion of a delay resulting from an affirmative or constructive suspension.[48] In this regard, the boards have recognized that some Government-caused delay can reasonably be expected in any construction job; e.g., deciding on a change order.[49] The rationale behind this is that the Government, having reserved

the right to make changes under the Changes clause, is allowed a reasonable time to do so. Consequently, there can be no recovery of standby costs incurred during this period.

> Some delays must be anticipated and discounted in advance. The contractor is not guaranteed immunity from every interruption, but only against unreasonable interference with the progress of the work.[50]

Unreasonable Delay as Coextensive With Contract Breach

Initially, the Suspension of Work clause was construed as permitting administrative recovery only for what would constitute a breach of contract were it not for the clause.

> The Suspension of Work clause has two main functions: (1) it negates the notion that a contractor's exclusive remedy for delays caused by acts of the Government is a time extension, and (2) it provides an administrative remedy for losses and increased costs incurred by the contractor because of suspension of work caused by the Government. This latter function is actually an administrative substitute for a breach of contract claim.[51]

Chapter I discusses the elements necessary to prove contract breach in the area of Government-caused delays.

Under this construction, the Suspension of Work clause is viewed as not increasing the contractor's substantive rights. Rather, the application of the clause provides a contract administrative remedy without creating any new or additional substantive rights.

Note should be taken that the Comptroller General conditioned his approval of a suspension of work clause

with the provision that there should be some fault or negligence on the Government's part before it comes into play. He reasoned that the primary purpose of a suspension clause was to permit administrative payment of amounts which would otherwise be collectible by the contractor through litigation as damages.[52]

The ASBCA followed the above view in T.C. Bateson Construction Co. where it held that the Suspension of Work clause did not give the contractor any rights in addition to those he would have had in a suit for damages.

> In the absence of a contract clause giving the Government the right to suspend the contractor's work or otherwise delay the contractor's performance, a work stoppage caused by the Government would ordinarily be a breach of contract giving rise to an action at law for damages, but a suspension of work caused by the Government is not a breach of contract when done pursuant to a right granted to the Government by the terms of the contract itself. The Suspension of Work clause gives the Government the right under the contract to suspend the contractor's work, in exchange for which it gives the contractor the right under the contract to an equitable adjustment in price for the loss or additional expense incurred by the contractor as a result of the Government's exercise of its right of suspension.
>
> Except for repelling any idea that a time extension is the contractor's exclusive remedy for a Government-caused delay, we are not aware of any right of recovery created by the Suspension of Work clause that would not otherwise exist in an action at law for damages . . . [it] provides a contract administrative remedy without creating any new or additional substantive rights.[53]

In a review of the pre-Bateson decisions rendered by the Boards of Contract Appeals involving the Suspension of Work clause, one author concluded that one common element was that unreasonable delay in all cases was caused by

action or inaction on the part of the Government which would have been sufficient to charge it with breach of contract.[54]

As discussed in Chapter I, the Government's breach of contract causing delay and increased costs of performance may be a breach of either an express or an implied provision of the contract. Thus, the Government's liability for damages for delay under the Suspension of Work clause may arise out of the Government's failure to discharge an express duty under the contract, such as a failure to furnish materials on the date the Government warranted it would furnish such materials[55] or its failure to meet its express promise to issue a notice to proceed within a certain number of days after the award of the contract.[56]

Also, the Government's liability for delay damages may arise out of the Government's interference with or hindrance of the contractor's performance.

> . . . It is, however, an implied provision of every contract, whether it be one between individuals or between an individual and the Government, that neither party to the contract will do anything to prevent performance thereof by the other party or that will hinder or delay him in its performance.[57]

Thus, the Government can breach the implied duty to cooperate when it issues defective plans for a building construction contract,[58] or when it prevents access to the job site.[59] When the Government has breached a duty of some kind, the resulting period of the delay is unreasonable, and thus compensable. As the board stated in Patti, Massman & MacDonald,

> While the courts have held that the failure to disclose vital information is a breach of contract, we think it

> also of application in determining whether delays are reasonable or unreasonable under the Suspension of Work article. Delays following a breach of duty on the part of the Government are unreasonable.[60]

The reported case law underscores the fact that a distinction must be drawn between the situation described above where the Government failure to perform immediately makes all delay thereafter compensable, and the situation where the Government has a reasonable period of time within which to take some action which it is contractually permitted to do. As an example of the latter, the Government has a right to delay for a reasonable time to issue a change order.[61] Similarly, the Government is permitted a reasonable time to investigate a changed condition,[62] to inspect,[63] and to approve shop drawings.[64] This is because the contracts at issue provide for such activities by the Government. If the Government takes just a reasonable amount of time to accomplish these above purposes, the contractor is not entitled to relief under the Suspension of Work clause. However, if the initial suspension of work was a reasonable Government interference, but the work was suspended beyond a reasonable time, the Government has breached its implied duty to cooperate. The contractor can recover his increased costs resulting from the unreasonable segment of the delay. Thus frequently, the total delay is divided into reasonable and unreasonable portions, with payment restricted to that portion which is held to be unreasonable. For example, in Robert McMullan & Sons, Inc., work was suspended for thirty

days while the Government made a decision with respect to installation of some soffits. The ASBCA held that a period of five days was ample time in which to arrive at such a decision. Consequently, the balance of twenty-five days used was unreasonable, and thus the contractor was entitled to the overhead cost incurred during the twenty-five day period of the unreasonable delay.[65]

In summary then, where the Government-caused delay to the contractor's work constitutes a breach of contract, relief is also available under the Suspension of Work clause.

Unreasonable Delay as Broader than Contract Breach

However, in contrast to the above rationale, a broader view of the coverage of the Suspension of Work clause has emerged. In overruling the board's decision in Bateson, the Court of Claims first noted the factual context of the case.[66] The contractor was required by contract to construct a heating plant containing four boilers. After two boilers were completed, the Government, in accordance with its rights under the contract, took possession of the plant and began operating the two boilers with Government personnel. Prior to the Government takeover, the unions involved in the project had made it clear that they would not permit union men to work in the same building with non-union employees. When the Government began operating the boilers, a work stoppage

occurred. The court held that the Government, while fulfilling all ordinary contractual duties, was liable for a price adjustment under the Suspension of Work clause where delay results from a strike precipitated by the Government's failure to comply with union demands, knowing that a strike will result.

> Article GC-11 of the contract was designed to incorporate and go beyond the principle that it is an implied provision of any contract that neither party will do anything to prevent performance thereof by the other party or will hinder or delay him in his performance . . . In this posture of the case, our opinion is that the provisions of Article GC-11 are brought into operation. The Government's action demonstrates that, knowing all the consequences, its determination to use civil service employees which caused the strike could only be for the convenience of the Government. Under these circumstances, when it did cause delay and additional expense, and since it was not the fault of the contractor, we think the contracting officer should have suspended the work and an equitable adjustment of the contract price should have been made under Article GC-11. Failing in this, we think the Government is liable.[67]

The distinction between a cause of action for breach of contract and an adjustment for unreasonable delay contemplated by the Suspension of Work clause was further explained by the Court of Claims in John A. Johnson & Sons.

> But the plaintiff's right to a price adjustment under the Suspension of Work clause does not depend on a breach of the contract by the defendant. The issue is whether the defendant, for its own advantage and convenience in administering the project, has taken action which delayed the plaintiff's access to its worksites for an unreasonable length of time and thereby caused the plaintiff additional expense not due to the plaintiff's fault or negligence. If it has, the Suspension of Work clause directs that the contracting officer shall make an equitable adjustment in the contract price.[68]

In a similar vein of thought, the Court of Claims in Schmid Plumbing & Heating, [69] and C.H. Leavell,[70] awarded the contractor the costs incurred during a delay caused by the Government for its own benefit.

In Schmid, the contracting officer had ordered the contractor to perform the work in accordance with an erroneous interpretation of the specification. The contractor refused to follow the order and appealed to the head of the procuring agency. The head of the agency sustained the position of the contractor and the contracting officer reversed his order. The court awarded the contractor the cost of the delay. The court reasoned that the contractor could have been terminated for default when he failed to follow the order of the contracting officer (as required by the Disputes clause), but that since the Government chose not to so terminate and the delay by the contractor saved the Government money, the Government should pay for the delay which turned out to be to its benefit.[71]

In C.H. Leavell, the Army Corps of Engineers suspended a dam contractor after funds for the project were exhausted. After receiving additional funding, the Government lifted the suspension order. Pursuant to the Suspension of Work clause, the contractor claimed an adjustment in the contract price for the cost of the delay. The Government denied the claim on the basis of the exculpatory language in the contract's "Funds Available" clause, which read in part,

> It is understood and agreed that the Government is in no case liable for damages in connection with this contract on account of delay in payments to the Contractor due to lack of available funds.[72]

In construing the clause, the Court of Claims interpreted the exculpatory language as disclaiming liability only where the unavailability of funds causing the work suspension amounted to a breach of contract. Therefore, the court reasoned that the clause did not preclude an adjustment under the Suspension of Work clause.

> . . . it is fair to conclude that the suspension is one for the convenience of the Government within the intendment of the Suspension of Work clause. Such a suspension is clearly designed to keep the contractor available for a period of time after exhaustion of funds while the contracting agency awaits either additional funding from the Congress or from discretionary allocations of appropriated funds within its own organization. In these situations, when funding again becomes available, the Government is spared the expense, delay, and inconvenience incident to reletting the contract. Surely the Government should expect to pay for this extra contract right by reimbursing the contractor for his additional costs incurred while in standby status . . .[73]

In Merritt-Chapman & Scott Corp., the Court of Claims followed the view that the Suspension of Work can operate in the absence of Government fault amounting to a contract breach.[74] In that case, work was delayed for 419 days because of the discovery of an unknown ancient river channel. This channel necessitated considerable additional excavation and fill for the dam under construction. While this fill work was proceeding, the Government suspended the work on the main construction project. Although the court found that the Government conduct did not amount to a breach of

duty, it did find that work was suspended for the Government's convenience. An adjustment was ordered because the delay lasted so long that the contractor could not be expected to reasonably bear the resultant delay costs.

> There is no doubt as the trial commissioner holds, that the work was in fact suspended and delayed for the Government's convenience, and also that there was a significant change in design. It is immaterial, in this instance, whether or not the suspension and delay was due, in whole or in part, to the Government's fault. There are occasions for the Suspension of Work clause to operate when the Government is at fault, as we recently noted (See Chaney & James Construction Co. v. United States, 190 Ct. Cl. 699, 705-08, 421 F.2d 728, 731-33 (1970), but the clause can likewise be effective, as we have also held, when there is a suspension not due to the Government's fault, dereliction, or responsibility. See T.C. Bateson Construction Co. v. United States, 162 Ct. Cl. 145, 319 F.2d 135 (1963); John A. Johnson & Sons v. United States, 180 Ct. Cl. 969 (1967). An instance of the latter category is a suspension and delay which lasts so long (regardless of the absence of government fault) that the contractor cannot reasonably be expected to bear the risk and costs of the disruption and delay. That is one type of suspension and delay "for an unreasonable length of time causing additional expense," within the meaning of the clause. Depending on the circumstances, a delay due to a non-fault suspension by the Government can obviously be so protracted that it would be unreasonable to expect the contractor to shoulder the added expense himself. We think that in its terms and its purpose the Suspension of Work clause covers that situation, among others.[75]

Although the Court of Claims has been in the forefront in broadening the scope of the Suspension of Work clause, the Boards of Contract Appeals have followed the trend also. Citing Merritt-Chapman & Scott Corp. as precedent, the ASBCA in M.D. Funk held that the application of the Suspension of Work clause was not dependent upon a showing that the Government is some way at fault.[76] Although the facts of the case did not amount to a Government breach of contract, the Govern-

ment was found to have unreasonably delayed in reacting to a contractor request for priority assistance under the Defense Material System.

In view of the Court of Claims reasoning in Bateson and the subsequent decisions discussed above, it seems well-established that the Suspension of Work clause does more than compensate the contractor for action by the Government which would amount to contract breach. Rather, it appears evident that the clause insures the contractor that the Government will do nothing which will unreasonably delay performance, even though the Government may owe no ordinary contractual duty to abstain from the action.

In conclusion then, there is substantial support for the view that the clause is broader in scope than an administrative substitute for contract breach. This interpretative expansion of the clause appears to be consistent with the clause language. By its express terms, a price adjustment under the Suspension of Work clause is not predicated on Government fault, breach or dereliction. On the contrary, the clause's operation is premised on an unreasonable Government-caused delay. Although "unreasonable delay" clearly covers the breach of duty situation, nothing in the clause precludes a broader coverage. Thus, the Court of Claims reasoning in Bateson et al seems to be at least consonant with the clause language itself.

In sum then, unreasonable delay under the Suspension of Work clause may exist if (1) the delay resulted from the

Government's breach of some obligation or duty under the terms of the contract; or (2) the delay was caused by an act of the Government, which, although not a breach of any obligation, was undertaken by the Government for its own convenience and benefit.

Factors in Determining if A Delay is Unreasonable

Reduced to its simplest terms, the issue of whether the Suspension of Work clause applies is a question of whether the Government-caused delay amounts to a breach of duty or to a convenience suspension. However, to satisfactorily answer that question requires further inquiry. For whether the Government has breached a duty or whether the Government has for its own convenience suspended the work is a question which must often be resolved with reference to the individual circumstances of each case. The boards have cautioned that each case has to be considered on the merits and that the question of reasonableness of the delay cannot be reduced to a formula.[77] Often from the contracting officer's viewpoint, the reasonable delay test is satisfied if the action taken by the Government during the time the work was suspended was performed in a reasonably expeditious manner.[78] On the other hand, the contractor will generally assert the view that the reasonableness of the delay must be determined by assessing the effect of the delay on the contractor's costs and operations.[79] Although there is no

precise definition of what amounts to a reasonable period of time, the boards and the Court of Claims take into account both of the above factors. In addition, they consider the overall tight contract performance period, the urgency of the Government's request, priority of other work, contemporaneous representations and understandings of the parties, and the relative complexity or simplicity of the work.[80]

In R-M-R Construction Co., the board concluded that the determination of reasonableness depends "upon an evaluation of the surrounding contract environment, including the contract's allocation of risks, the contractor's particular need at the time, the convenience of the Government's interest and the foreseeable consequent action of failure to act."[81]

Although it may be evident from the above discussion, it can be emphasized here that an unreasonable period of delay is not synonymous with a lengthy delay. In fact, the case law makes it apparent that a firm rule with respect to the length of the delay cannot be established. A short-term delay can be legally unreasonable.

In Royal Painting Co., the contractor requested a contracting officer's interpretation of a particular contract provision. The board found that the eight-day delay for the contracting officer to issue a decision should have taken one day. Consequently, seven days of the delay, although not lengthy, was unreasonable and thus compensable under the Suspension of Work clause.[82]

The above situation should be distinguished from the situation where the Government conduct at the outset amounts to a breach of duty. In that situation, the entire period of the delay is compensable under the Suspension of Work clause. Thus, two days[83] or even one hour[84] can constitute unreasonable delay by the Government within the meaning of the clause.

Burden of Proof

As a general rule, the contractor bears the burden of proof in order to recover delay costs under the Suspension of Work clause.[85] One, as a prerequisite to recovery, the contractor must show that the Government conduct was the proximate cause of the delay. In J.M. Brown Construction Co.,[86] during the time when a stop-work order was in effect, a flood severely damaged a partially-constructed building. Recovery was denied because the flood, and not the stop-work order, was shown to be the proximate cause of the damage.

> The issuance of the order suspending the work was not the cause of the damage. The proximate cause was the flood, an act of God, for which neither party is responsible. The subcontractor's claims for losses and damage resulting from the flood are accordingly denied.[87]

Using this same principle to deny a contractor's claim under the clause, the ASBCA in Altman-Wolfe Associates held:

> The substance of events, in short, is that appellant . . . was in fact and effect delayed by severe weather damage as a real cause . . . So factually, no delay is chargeable against the Government's action. Certainly, we say nothing to condone the Government's misapplication of concrete classifications. But, under

> the circumstances, it was not a real cause contributing to the delay . . . Appellant can derive no right here under the Suspension clause.[88]

In addition to establishing that the Government was the proximate cause of the delay, the contractor also bears the burden of proof that the delay was unreasonable.[89] As noted in the previous discussion, this key concept of unreasonable delay has been interpreted to include delays caused by a Government breach of duty, and delays caused by the Government for its own convenience. As discussed in Chapter I, where the contractor is predicating his claim on a Government breach of duty, the contractor bears the burden of proof that the Government conduct amounted to a breach.[90] Delays following a breach of duty on the part of the Government are unreasonable.[91]

On the other hand, where the contractor is predicating his claim on the broader view of the clause, proof of Government breach is not a necessary prerequisite to recovery.[92]

The existence of an unreasonable period of delay can be difficult in those instances where all knowledge relating to the Government's operations and the reasons for the delay are within the exclusive knowledge of the Government. In those circumstances, it may be incumbent upon the Government to establish that the delay was not unreasonable. An example of this shifting burden of proof occurred in M.A. Santander, Inc.[93] In that case, the Government delayed the contractor on several occasions by denying access to the job site near

a weapons storage area because of unexplained security precautions. Because the Government had exclusive knowledge that the delay would occur and had failed to inform the contractor at the time of bidding, the burden of proof fell on the Government to show that the delays were reasonable.

In addition to proving proximate cause and the existence of an unreasonable delay, the contractor must show the existence of increased costs. If the contractor is unable to show that a Government-caused delay, even though it may have been unreasonable, did cause an increase in costs, he cannot recover.[94]

Also, the contractor must prove that the additional costs resulted directly from the suspension. This is another way of saying that under the *Suspension of Work* clause, recovery of costs is restricted to those directly resulting from the unreasonable work suspension, and consequential damages are excluded.

> Under either the Suspension of Work clause of the contract or at law for breach, the recoverable damages must flow directly, proximately, naturally and inevitably from the actionable wrong, and that collateral, consequential, incidental, remote or speculative losses or damages are not allowed.[95]

The amount of the increased costs is not limited to additional costs incurred during the suspension period. On the contrary, an adjustment under the Suspension of Work clause includes all additional costs resulting from the suspension. Accordingly, the contractor can recover

any additional costs incurred after the suspension ended if such costs were actually caused by the suspension.[96] An example of this type of cost would be the additional expense required to remobilize men and equipment after the lifting of a suspension order.[97]

> The real question is neither how long the work was suspended nor how long the suspensions delayed the completion of the project, but how much additional expense resulted from the suspensions.[98]

Finally, the contractor must prove the amount of the increased costs. For a discussion of this topic, see Chapter V.

Types of Delay Covered

A review of the cases where the Suspension of Work clause has been applied reveals a variety of fact situations. As previously noted, the clause has been found to operate both in those instances where the Government is at fault and in those instances where the Government has not breached a duty. The central issue of whether the Suspension of Work clause pertains can only be resolved by applying the previously discussed views to the often unique facts of a particular case. In the cases where the clause has been applied, the types of delay have included:

(1) Delay resulting from Government interference with the contractor's work by Government action in excess of that which could be anticipated prior to bidding. In Ames & Denning, numerous interruptions were caused by the opening

and closing of airplane hangar doors upon which the contractor was working.[99] In M.J. Newsom, the contract was for repainting the exterior of three Atlas Missile Sites. On several occasions, the contractor's workmen were required by military personnel to come off the job and wait while military operations such as testing, raising and refueling missiles, and unloading fuel tanks were going on. The ASBCA held that although a reasonable and prudent bidder could anticipate that military operations going on during contract performance might interrupt him to some extent, "We do not consider that he need have anticipated that such would interrupt his work on stationary objects to the extent involved."[100]

(2) Delay caused by another Government contractor. In Warrior Constructors, Inc., the board found that the Government approved a progress schedule for one contractor with reckless disregard of the rights of the second contractor. Consequently, the Government failure to properly administer the first contract resulted in a compensable suspension of work for the second contractor.[101] The above decision should be contrasted with Asheville Contracting Co., where relief for a Government contractor-caused delay was denied because the Government exercised reasonable diligence in administering the other contract.[102] In reconciling the two decisions, the key distinction seems to be the ability of the first contractor to tie the delay caused by the second contractor

to some Government fault. However, note the previously-discussed view that the clause can operate in the absence of Government fault.

(3) Delay caused by a strike or labor shutdown.[103] As a prerequisite to recovery under the Suspension of Work clause, the contractor should show that (a) the Government's act or omission caused the work stoppage,[104] and (b) the Government knew or should have known that its act or omission could result in the strike.[105]

(4) Delay preceding issuance of a change order.[106] As noted in previous discussion, the Government has an implied obligation in all of its contracts to cooperate in order that the contractor fulfill his obligations in a timely manner. If the Government violates this duty by taking an unreasonable time to order changes, the resulting costs from this unreasonable delay are recoverable under the Suspension of Work clause. Delays included in this category are delays caused by defective specifications.[107] However, see Chapter III for a discussion of coverage of the Changes clause. In Utilities Contracting Co., the ASBCA addressed the issue of a delay that occurs after the Government notifies the contractor of an imminent substantial change order, but prior to the actual issuance of the order.

> The preponderance of the evidence clearly establishes that the [contracting officer's representative] did not order the appellant's superintendent to suspend per-

> formance pending issuance of a change order by the Government. It is also obvious the notice by the [contracting officer's representative] that an order substantially changing the terms of performance was to be issued placed the superintendent in the dilemma of continuing useless performance, for which the Government would certainly have been liable, or of suspending performance until the changed method of performance was made known by the Government. He chose the latter alternative and laid off all his laborers except two required to maintain barricades and safety lights. The notice of substantial change in method of performance by the Government was therefore the proximate cause of the disruption of the work. Such a notice has been held to constitute a constructive suspension of work.[108]

(5) Delay in making the work site available.[109] In this regard, note the ASBCA decision in Bateson Construction Co. The board held that an agreement in the contract to issue a notice to proceed by a certain date amounts to a warranty by the Government that the work site will be available on that date.[110] This decision is contrary to the weight of judicial and administrative authority.[111]

(6) Delay in the delivery of Government-furnished property.[112] See also Chapter III concerning coverage of the Government Furnished Property clause. This type of Government-caused delay normally arises under a breach-of-duty fact situation. Thus, as discussed in Chapter I, if the Government warrants that it will furnish materials by a specific date, any delay from that date will entitle the contractor to recover, even if the Government diligently attempted to meet the delivery date.[113] Where no specific date is contained in the contract, the Government still has an implied duty to cooperate by delivering the property

within a reasonable time.[114] However, as also noted in Chapter I, if the Government diligently attempts to deliver the property, it can in this case avoid all liability.[115] This is because the breach of the duty is premised on some Government fault. However, note again the view that the Suspension of Work clause can operate in the absence of Government fault.

Other examples of types of delay that have been found within the scope of the Suspension of Work clause include:

(7) Delay in investigating a differing site (changed) condition.[116] See also Chapter III for coverage of the Differing Site Conditions clause.

(8) Delay in approval of shop drawings.[117]

(9) Delay in funding.[118]

(10) Delay resulting from Government failure to make timely progress payments.[119]

(11) Delay in testing.[120]

(12) Delay in inspecting.[121]

(13) Delay resulting from faulty inspection which in turn resulted in the improper rejection of a first-scale model.[122]

(14) Delay in appointing a representative to approve materials.[123]

(15) Delay in issuing a Government construction permit.[124]

(16) Delay in the contracting officer's decision on a contract interpretation dispute.[125]

(17) Delay in issuing a notice to proceed.[126]

(18) Delay resulting from a partial notice to proceed.[127]

(19) Delay from a Government failure to complete an access road.[128]

(20) Delay from Government destruction of access bridges to the construction site.[129]

(21) Delay incurred when the Government first granted and then rescinded permission for the contractor to work on weekends.[130]

(22) Delay resulting from error by the Government in drafting the labor standards provision in the contract.[131]

(23) Delay incident to bureaucratic procedures imposed on the contracting officer by higher authority.[132]

The foregoing discussion describes only some of the more illustrative areas of application. Subject to the limitations discussed in the next two chapters, the Suspension of Work clause can be used in almost any situation where the Government unreasonably delays the contractor.

III. GOVERNMENT-CAUSED DELAYS OUTSIDE THE SCOPE OF THE SUSPENSION OF WORK CLAUSE

Notwithstanding the unreasonable nature of the Government-caused delay, certain delays fall outside the scope of the Suspension of Work clause.

Delays Cognizable Under Another Contract Provision

The present Suspension of Work clause expressly states a preference for the use of the other contract provisions, when applicable, for a determination of the compensability for a Government-caused delay.

> However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent . . . for which an equitable adjustment is provided for or excluded under any other provision of the contract.[133]

Note that this language was first incorporated in the 1968 version of the Suspension of Work clause. The provision was not used in the 1957 predecessor clause entitled "Price Adjustment for Suspension, Delay or Interruption of the Work." An explanation of the revision incorporated in the 1968 version of the Suspension of Work clause set forth the following:

> . . . For clarification, the second sentence of the clause as revised specifically indicates that an adjustment is not to be made under the clause in any

> instance where "an equitable adjustment is provided for or excluded under any other provision" of the contract. Accordingly, where a claim for delay expenses is cognizable under the Changes clause or the Government Furnished Property clause, for example, an adjustment will be for consideration under these clauses in preference to the Suspension of Work clause. Furthermore, a granting of an extension of time under the "Delays-Damages" clause (Clause 5 of the Standard Form 23-A) does not preclude a price adjustment under the Suspension of Work clause.[134]

Clearly, where an equitable adjustment for delay costs is available under the Changes clause, adjustment must be made under that clause and not the Suspension of Work clause. In this regard, it should be noted that the adjustment under the Suspension of Work clause excludes profit.[135]

Frequently, it happens that a particular set of circumstances comes within the coverage of both the Suspension of Work clause and the Changes clause. Since an equitable adjustment under the Changes clause includes profit, it is obviously in the contractor's interest to frame his claim within that clause.

The ASBCA decisions in M.A. Santander Construction Co.[136] and Reliance Enterprises[137] are cases in point. In Santander, the contractor was denied access to the contract work site on several occasions due to the movement of weapons in the adjacent security area. Recovery of delay costs was permitted under the contract's Suspension of Work clause. In contrast, the ASBCA in Reliance Enterprises held that the Government's failure to provide the contractor with adequate access to the construction site during a particular

time period constituted a change in the manner of contract performance. Thus, the contractor was entitled to the costs of the delay under the Changes clause.[138]

As previously noted in Chapter II, there have been numerous cases holding that the Government's delay in issuing a notice to proceed justified recovery under the construction contract's Suspension of Work clause.[139] However, the ASBCA's recent holding in Pan Arctic Corp.[140] raises the possibility of contractor recovery for a delayed issuance of a notice to proceed under the Changes clause, and thereby permitting the contractor to recover profit on his added performance costs. In negotiating a contract to construct a hydrant refueling system at an Air Force base in a remote Alaska location, the contractor and the Government in Pan Arctic Corp. reached a specific oral understanding that the contract would be performed concurrently with another Government contract (a generator project) on which the contractor was to work (for another firm) at the same location. The Government delayed in issuing a notice to proceed on the generator project, thereby depriving the contractor of the savings he had anticipated from performing the two jobs concurrently. The ASBCA found that the contract's Changes clause provided that the contractor can recover an equitable adjustment for increased costs resulting from a Government change in the method or manner of performing the work. The board further found that the delayed issuance of the notice

to proceed on the generator work was a change in the manner of performing the hydrant refueling contract work.

Further overlapping by the Changes clause and the Suspension of Work clause was evidenced in Hensel-Phelps Construction Co.[141] Prior to Hensel-Phelps, the reported cases indicate that contractor relief for delay damage caused by another contractor could be obtained under the Suspension of Work clause if the delay could be tied to some Government fault in administering the second contract.[142] In the instant case, the contractor was awarded a contract to build a bridge which was part of a dam construction project. One of the only two access roads to the construction site could be used in the winter. The contractor used that road during the winter and intended to use the second (all-weather type) road in the spring. However, the operations of another Government contractor in the autumn so damaged the all-weather road that it was unsuitable for the passage of construction equipment in the spring. After a fruitless protest to the contracting officer, the contractor repaired the road surface himself and claimed that he was entitled to recover the restoration costs from the Government. Citing Warriors Constructors, Inc.,[143] for the proposition that "the Government cannot ignore the necessities of one contractor's performance in its administration of the contract of another contractor," the EngBCA ordered that the contractor be compensated under the Changes clause for the extra work

performed.[144]

A curious deviation from the use of the Changes clause to compensate for delay costs associated with defective Government specifications occurred in Minmar Builders, Inc.[145] In that case, the construction contract drawings for a classrooms building were defective because the ceiling heights shown therein were too high to permit concealing the pipes to be installed. The defective drawings caused 39 days of delay in beginning the ceiling work. The GSBCA held,

> The delay, being attributable to a deficiency in the Government specifications, is considered unreasonable per se. Chaney & James Construction Co. v. United States, 190 Ct. Cl. 699, 421 F.2d 728 (1970). Appellant is therefore entitled to be compensated under the Suspension of Work clause for the extra costs attributable to the delay. The delay being unreasonable however is not compensable under the Changes clause.[146]

The board's holding in this case seems questionable. The case law is clear that the Changes clause does provide recovery for all delay resulting from defective contract specifications.[147] Since the Suspension of Work clause bars recovery of an adjustment thereunder for any delay for which an equitable adjustment is provided under any other provision of the contract, the adjustment for delay costs in Minmar should have arguably been awarded under the Changes clause. Significantly, post-Minmar defective Government specification cases appear to be exclusively argued by the contractor under a change order theory.

The major point of the foregoing discussion is that

under the standard Changes clause in fixed-price construction contracts, the contractor can recover the costs of delays and disruptions generated by the change. Moreover, the contractor is entitled to profit under the Changes clause, thus making that avenue of relief more attractive than relief under the Suspension of Work clause.

Usually, delay caused by Government failure to deliver promised material is compensable under the Government-Furnished Property clause.[148] The Government-Furnished Property clause for fixed-price construction contracts provides that the equitable adjustment for Government delay in furnishing the property shall be "in accordance with the procedures provided for in the clause of the contract entitled changes."[149] However, if the contract does not contain a Government-Furnished Property clause, the Suspension of Work clause can be used, subject to the limitations discussed above in Chapter II.[150]

Similarly, delays associated with differing site conditions are to be compensated for under that clause[151] rather than the Suspension of Work clause. The equitable adjustment in price includes profit, as well as the cost effects of the differing site condition upon any portion of the contract work, whether or not the same was changed thereby.[152]

Concurrent Delay

The Suspension of Work clause specifically addresses

the problem of non-Government-caused delay that occurs concurrently with Government-caused delay.

> However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent (1) that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor . . .[153]

By its terms, the clause requires that the contractor prove that the delays from which the claims arise must be caused by the Government to the exclusion of contractor causes or outside causes which might otherwise be excusable.[154] Thus, the contractor is not entitled to compensation under the Suspension of Work clause unless the delay is exclusively the result of Government conduct. From a factual standpoint, difficulty arises when the Government and non-Government causes for delay are so intertwined as to make differentiation impossible. Normally, a contractor can only justify entitlement to a time extension, but no monetary recovery, if the delay caused by the Government results at the same time when non-Government acts are also responsible for delay.[155]

The concept of concurrent delay was well-addressed by the ASBCA in Hardeman-Monier-Hutcherson.[156] In that case, the contractor was constructing a communications facility for the Navy at North West Cape, Western Australia. Delays due to defective welds were compounded by the Government's inadequate testing and delay in approving a corrected submittal. The contractor claimed additional expenses of $1,019,493 and a time extension of 56 days. The board found

that the contractor was entitled to a time extension for completion of the contract because the Government, while not solely responsible for the delays in his performance, contributed an unascertainable amount of delay to those which arose from other sources, including the contractor's own actions. However, since it was impossible to allocate responsibility for the delay among the various causes, the contractor was not entitled to standby costs and other expenses resulting from such delays.

> But, for the same reason that the respondent may not collect liquidated damages, the appellant may not recover for the delays. Where Government-caused delays are concurrent or intertwined with other delays which the Government is not responsible, the contractor cannot recover delay damages.[157]

A similar result was reached by the ASBCA in Acme Missiles & Construction Corp.[158] The radar tower construction contractor was not allowed to recover costs which he claimed were the result of delays caused by the Government because the Government-caused delays were inseparable from other delays for which the Government was not responsible.

The GSBCA utilized the concurrent delay impact on the Suspension of Work clause in denying the contractor's claim in William Passalacqua Builders, Inc.[159]

> The law is well settled that when a contractor's delay is partially its own cause and is concurrent with other delays, such as Government caused delays, there can be no recovery. [cite omitted.] The delays here were concurrent. Some were Government caused. Some were Appellant's fault. They occurred over the span of the contract and are intertwined. Since they cannot be separated and since no method is evident for apportioning the delays . . . Appellant may not collect delay costs.[160]

In contrast with Passalacqua Builders, Inc., the contractor in Fishbach & Moore International Corp. was able to satisfactorily segregate the delays.[161] The contract involved fabrication and erection of steel radio towers in the Philippines. During contract performance, the Government issued stop work orders concerning seam allowances of the steel specified for use in the legs of the towers. The stop work orders were eventually expanded to all critical operations. During the period of the work stoppage, the contractor experienced subcontractor difficulties which resulted in some delay. However, by using a critical path analysis of the entire work project, the contractor was able to satisfactorily show that the delay attributable to subcontractor operations did not delay the actual erection of the towers. The delay in tower fabrication and erection was shown to have solely resulted from the Government's actions. The contractor was thus entitled to compensation for the delay in completion of the contract.

> When Government-caused delays are concurrent or intertwined with other delays for which the Government is not responsible, a contractor cannot recover delay damages. We take no issue with the application of this rule to the facts of this case insofar as the concurrent delays for which appellant is responsible affected work in the critical path to timely completion of the contract. If the concurrent delays affected only work that was not in the critical path, however, they are not delays within the meaning of the rule since timely completion of the contract was not thereby prevented. With regard to the alleged intertwining of Government-caused and concurrent delays in this case, we have found, in the critical path analysis offered by appellant, a ready and reasonable basis for segregating the delays. If delays can be segregated, responsibility therefor may be allocated to the parties.[162]

In those cases where there is no basis in the record on which to make a precise allocation of responsibility, an estimated allocation may be made in the nature of a jury verdict.[163] For example, in the case of E.H. Marhoefer, Jr. Co.,[164] the Government furnished the contractor with defective gaskets which the subcontractor had difficulty installing. The contractor undertook to test the gaskets himself and the Government passively refused either to investigate itself or to approve the contractor's findings.

> Thus, it is clear that the Government was at fault by reason of its passive attitude and its failure to institute a thorough investigation of the gasket material when the possibility of its unsuitability became apparent.
>
> On the other hand, we think the contractor was not without fault in the matter either . . . Then again, when the test reports showed ozone failure, the contractor went off on a tangent challenging design considerations of the material rather than attempting to ascertain whether or not the material was suitable for use in the performance of the contract . . .
>
> In our view, nothing in the Suspension of Work clause precludes an apportionment of the responsibility for work suspension as between the parties . . . We can, therefore, compensate the contractor for that part of the work unreasonably delayed by the Government and deny compensation to the contractor for that part of the delay which was self-inflicted.
>
> The best we can do, considering all of the evidence taken as a whole, is to apportion the work suspension on the basis of a jury verdict. As we view it, we think that two-thirds of the risk of the suspension period should be borne by the appellant and one-third by the Government . . .[165]

It is apparent from the cases previously discussed that in seeking a recovery from the Government for delay in a concurrent delay situation, the contractor has a heavy burden to overcome. First, the existence of Government causes for delay must be established. Also, they must, in a reasonable

manner, be distinguished from other causes of delay. Thereafter, the contractor must prove what was the cost of the delay. In this latter regard, see Chapter V. In summary then, when faced with a concurrent delay situation, the contractor will recover if he can provide a basis for attributing to the Government that portion of the delay for which it is responsible.

Delays Caused by Sovereign Acts

As a contracting party, the Government theoretically enjoys no special position under the law, and is to be judged by the same principles that apply between private contracting parties.[166] However, the Government is not generally accountable for any actions taken in its sovereign capacity.[167] It is widely accepted that actions of a general and public character which implement programs in the national interest constitute sovereign acts and such acts create an immunity to contractual claims against the Government.[168]

A thorough definition of a sovereign act was established by the Court of Claims in 1865:

> The two characters which the government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States while sued in the one character be made liable for damages for their acts done in the other. Whatever acts the Government may do, be they legislative or executive, so long as they be public and general, cannot be deemed to alter, modify, obstruct or violate the particular contracts into which it enters with private persons. The laws of taxes and imposts affect pre-existent executory contracts between individuals, and affect those made with the government, but only to the same extent and in the same way. In this court the United States appear simply as contractors;

> and they are to be held liable only within the same limits that any other defendant would be in any other court. Though their sovereign acts performed for the general good may work injury to some private contractors, such parties gain nothing by having the United States as their defendants. Wherever the public and private acts of the government seem to commingle, a citizen or corporate body must by supposition be substituted in its place, and then the question to be determined whether the action will lie against the supposed defendant. If the enactment of a law imposing duties will enable the claimant to increase the stipulated price of the goods he has sold to a citizen, then it will when the United States are defendants, but not otherwise.[169]

Through case decisions, the courts and the Boards of Contract Appeals have developed the sovereign act doctrine to the point where it is now possible to identify those acts which may be held to be sovereign in nature and to distinguish them from those which generally are not.[170]

It is well-established that the sovereign acts doctrine is applicable to claims arising under the Suspension of Work clause. The Suspension of Work clause has been held not to transfer to the Government all risks incident to delays, but only those delays caused by the Government in its contractual capacity.[171]

The sovereign act doctrine's impact on the Suspension of Work clause was used by the ASBCA to deny a contractor's claim in Frank K. Blas Plumbing & Heating.[172] In Blas, a Government security officer ordered an evacuation of the industrial plant during a bomb scare. The ASBCA observed that the plant evacuation order applied equally to all persons in the plant regardless of whether they were or were not engaged in performing any Government contract.

Although purportedly not utilizing a sovereign act test, the board denied contractor recovery because:

> The order to vacate the building was a reasonable and humane action taken, not for the convenience or benefit of the Government, but with due regard to the safety of all persons in the plant.[173]

In the context used by the board, "reasonable," "humane," and "safety of all" can be roughly equated with the "general and public" criteria used by the Court of Claims in Wunderlich Contracting Co.[174] in defining a sovereign act.

The facts in Goodfellow Brothers, Inc.[175] involved a contract for reconstructing a road in a National Forest in Idaho. During contract performance, a severe drought in the area caused the Government Regional Forester to bar entry into the forest except by a forest service permit. When notified of the closure, the contracting officer ordered a total suspension of work and requested a permit on behalf of the contractor. The permit was denied. Subsequently, the contractor claimed entitlement to a contract price increase for costs incurred in connection with the 27-day suspension during the fire closure. The AGBCA held that the Forest Service closure order was a sovereign act, thus denying the contractor's claim for delay costs.

In Amino Brothers Co.,[176] the releasing of water from a dam was held to be a sovereign act since the action was part of the Government's duty to the general public. On a factually similar case arising under the differing site conditions clause, the board in Dunbar & Sullivan Dredging

Co.[177] denied a contractor's claim based on allegations that (1) the Government's release of water from upstream resevoirs created an unusual amount of fog in the contract work area, and (2) this fog hampered the contractor's performance and constituted a compensable differing site condition. The board held, inter alia, that the Government's operation of the upstream resevoirs was a sovereign act for which it could not be held liable.

In E.V. Lane Corp.,[178] one element of the claim was for delay of 138 days before the site was made available to the contractor for work at night. The location was the Tan Son Nhut Airport, Vietnam, and night work was not permitted until the Vietnamese Government could detail sufficient troops for guard duty to make night work safe. The United States had not warranted that the site would be available for night work. The contracting officer cooperated fully in presenting the contractor's request, though he was powerless to violate the security regulations or control the disposition of troops. The ASBCA held that the contracting officer did not thereby suspend the work by any act in the administration of the contract or by his failure to act within a reasonable time. The delay, being the result of sovereign acts and not contractual acts, was therefore not cognizable under the Suspension of Work clause.

In Granite Construction Co.,[179] the IBCA held that the presidential impounding of funds was a public act for the general good that was an exercise of the sovereign power of

the United States for which relief under the Suspension of Work clause was not available.

It is generally held that a contracting officer's issuance of a suspension order under the Suspension of Work clause does not convert a sovereign act into a contractual act.[180] However, the ASBCA reached a contrary conclusion in Empire Gas Engineering Co.[181] In that case, the contractor was performing runway work at Loring Air Force Base, Maine. During the contract performance period, the President ordered a world-wide military alert in response to conflict in Lebanon. At the direction of the base commander at Loring, the contracting officer issued a stop order to the contractor. Sixteen days later the order was lifted, but the contractor had sustained a loss of over $4,000 in delay costs. The board rejected the Government's contention that the contracting officer was a mere conduit through which the United States had announced a sovereign act which was general and public in nature. It feld the contracting officer's involvement was sufficient to grant recovery under the Suspension of Work clause.

> The Government cannot escape contractual liability for the suspension of work it ordered on the ground that such suspension of work was necessary to implement a military alert which was necessary to national security. The contract contemplated performance while the base was being operated in a state of normal peacetime readiness, and a state of alert was not anticipated by the terms of the contract. The fact that the suspension of work order was in writing addressed to the contractor by name, referring to the contractor by number, and signed by the contracting officer as contracting officer is almost conclusive proof that such

> order was (1) an act of the Government in its contractual capacity, and (2) issued in exercise of the Government's right to suspend the work under the Suspension of Work clause.[182]

The board's reasoning in Empire Gas has been subject to much criticism.[183] As noted, the opinion is a definite departure from the established case law in that apparently the act of the contracting officer transformed a sovereign act into a compensable contractual act. The criticism of the Empire Gas decision seems justified in that the ASBCA did not satisfactorily answer the question of why the action of the contracting officer should make the base commander's act compensable if it were not compensable in and of itself. Empire Gas was cited by the Comptroller General[184] in approving payment of the contractor's claim originally denied by the board in Lane Construction Corp.,[185] but submitted to the General Accounting Office after the Empire Gas decision. Other than that instance, the Empire Gas decision appears to have been relegated little, if any, precedential value. Rather than distinguish similar cases on the facts, boards appear to simply ignore the decision.

Although the Government cannot contractually agree to refrain from performing a sovereign act, it can agree to pay for increased costs resulting from a sovereign act.

> Defendant cannot enter into a binding agreement that it will not exercise its sovereign power, but it can say, if it does, it will pay you for the amount by which your costs are increased thereby.[186]

From the board decisions, it can be reasonably well-accepted that the inclusion of the standard Suspension of

Work clause does not, by itself, constitute an agreement to allow recovery for sovereign acts.[187] However, when the Suspension of Work clause is viewed in context with another contractual provision, it can serve as the basis for recovery.

For example, the Eng BCA in L.S. Matusek[188] faced a factually similar set of circumstances to that encountered in the Goodfellow Brothers[189] case discussed above. In Matusek, during performance of the contract to construct a road in a national forest, the Forest Service closed the contractor's job site for 27 days due to a fire hazard. However, the contract in Matusek, unlike the contract in Goodfellow, contained a fire plan clause stating that (1) the contract work was within a hazardous fire area, (2) the contractor's operations might be shut down for short periods of time during extremely hazardous conditions, and (3) delays due to this cause would not be a basis for a contractor claim for additional compensation.[190] As interpreted by the board, the clause only exempted the Government from liability for short delays--which was further construed by the board to be the average duration of forest shutdowns over the prior ten years; i.e., three days. Consequently, the remaining 24 days, when viewed from the context of the Suspension of Work clause and the special fire plan clause, constituted a compensable period of delay.

The above principle that additional costs to a contractor may be paid pursuant to a contractual clause was followed by

the ASBCA in M.D. Funk.[191] The contract contained a Priorities, Allocations and Allotments clause directing the contractor to use the Government's assistance program in obtaining scarce materials. When the contractor could not obtain a special steel on the open market, and incurred unreasonable delays under the Government's program, the board held that he could recover delay costs. The board reasoned that although the operation of a controlled materials system was a sovereign act, the Government, by its contractual direction to use the system, had contracted to be liable for the consequences.

> The appellant's contractual performance was affected by two sovereign acts of the Government; the control of materials and the control of prices . . . It is no defense to say that the increased cost incurred because of the untimely operation of the controlled material system was caused by the Government, if the Government, as is found here, has contracted to be liable for the consequences of such an act.[192]

In conclusion then, the sovereign act doctrine still remains a valid basis for denying contractor costs incurred by virtue of Government-caused delay, even though the delay would otherwise be compensable under the Suspension of Work clause. However, if the contractor can show that the Government, by contract provision, has agreed to pay for the sovereign act which caused the delay, he can recover under the Suspension of Work clause.

IV. NOTICE REQUIREMENTS

Notice of Constructive Suspensions

Paragraph (c) of the present Suspension of Work clause used in construction contracts sets forth the two notice requirements imposed on the contractor.

> No claim under this clause shall be allowed (1) for any costs incurred more than 20 days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved (but this requirement shall not apply as to a claim resulting from a suspension order), and (2) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of such suspension, delay, or interruption, but not later than the date of final payment under the contract.[193]

As is evident from the express terms of the clause, the 20-day notice requirement applies only to constructive suspensions and does not apply to affirmative suspension orders.[194]

The administrative guidance issued in conjunction with the adoption of the mandatory Government-wide Suspension of Work clause in 1968 makes it clear that the 20-day notice provision is to be strictly construed.

> No provision is contained in the clause whereby the Contracting Officer may waive a failure to comply with this notice requirement. However, this will not preclude adjustment where a notice of delay has been given by the contractor under another clause of the contract.[195]

Strict Construction

The Boards of Contract Appeals have generally demanded

strict compliance with the 20-day notice provision. Recovery for costs incurred more than 20 days prior to the submission of a written notice of suspension by the contractor has been frequently denied.[196]

For example, the contractor in Cameo Bronze, Inc.[197] claimed that the Government construction engineer harassed three of his employees to the point where they walked off the job site. In order to persuade them to return to the job, the contractor paid each of them a $200 bonus. Although these actions occurred in February (1972), the Government was not informed, either orally or in writing, of the quitting and rehiring of the workmen until it was billed in April for the added cost of performance. In resolving the claim adversely to the contractor, the board strictly applied the notice provisions of the Suspension of Work clause.

> . . . We find it unnecessary to determine whether the construction engineer did, as Appellant claims, interfere with performance . . . for the Suspension of Work clause requires, as a condition to such recovery, the giving, by the Contractor, of timely written notice to the Contracting Officer, within 20 days of the date the Contractor incurs costs arising from the Government's acts or its failure to act . . . Accordingly, Appellant is not entitled to recover the sums paid the workers as bonuses in order to persuade them to return to work.[198]

The notice requirement has been enforced even though the Government had actual knowledge of the alleged suspension and even though the Government was not in any way prejudiced by the delay in giving notice. This principle was controlling in Structural Restoration Co.[199] The contract called for the construction of expansion joints in the existing pavement at

the Air Force Academy. The contractor's claim under the Suspension of Work clause was denied because of his failure to give timely notice. As for the contractor's assertion that the Government was not prejudiced by the failure, the ASBCA held:

> It makes no difference that the Government has made no claim nor offered any evidence to show that it was in any way prejudiced by any failure on the part of the appellant to give notice sooner than it was actually given.[200]

Note should be taken that under the terms of the notice provision, not only must the notice be in writing and timely, but the notice must identify the act or failure to act involved. In Lane-Verdugo,[201] the contractor's letters to the Government claiming that his work on a construction project was delayed by wrongful Government conduct were not adequate notice to entitle him to additional compensation because the letters did not specify the Government action or inaction in a manner sufficient to enable the Government to take corrective action. The ASBCA in its opinion indicated that two important functions were served by the notice requirement: One, the Government is given an opportunity to abate the condition causing the delay; and two, timely notice allows the Government to more accurately assess the cost impact of the delay.

> The contract requirement for notice is not one to be lightly disregarded. If as a result of some wrongful Government act a contractor is being delayed, the Government has a duty to take appropriate action to eliminate the cause of the delay or to compensate the contractor therefor. The contractor also has a duty

> to the Government to assure that the Government is aware of the fact it is being delayed, including a reasonable identification of the claimed delay, thereby enabling the Government to take such action as may be necessary. Since delays normally result in idle time or inefficient work, it is essential that both parties be afforded the opportunity to maintain records concerning the effect of the delay so that when the time comes for the negotiation of a contract modification, negotiations can be conducted on the basis of first-hand observation and facts obtained at the time of the delay and not a significant period later. The very nature of delays which result in idle forces or inefficient work tends to preclude reasonably accurate identification of the losses incurred unless such data is assembled at a time proximate to the claimed delay. It is for this reason that this Board and the Court of Claims have held that a contractor must assure that the Government has adequate notice if a contractor is to be compensated for delays wrongfully caused by the Government.[202]

Liberal Construction

In general, the boards have strictly enforced the notice requirement. In contrast, the Court of Claims has not demanded strict compliance with the notice provision.

Hoel-Steffen Construction Co.[203] involved a suit by a ductwork contractor arising out of a claim for extra costs incurred in ductwork on the St. Louis Gateway Arch. The court found that the notice requirement under the Suspension of Work clause was satisfied if the Government "knew or should have known that it was called upon to act."[204] In reversing the IBCA decision in the same case, the court held:

> To adopt the Board's severe and narrow application of the notice requirements, or the defendant's support of that ruling, would be out of tune with the language and purpose of the notice provision, as well as with this court's wholesome concern that notice provisions in contract adjustment clauses not be applied too technically and illiberally where the Government is quite aware of the operative facts.[205]

Following the holding in Hoel-Steffen, the GSBCA in GMC Contractors found that Government awareness, as evidenced by an internal written Government memorandum, served the same purpose in giving notice as a written communication from the contractor.[206]

Although both Hoel-Steffen and GMC Contractors seem to indicate that Government knowledge is a substitute for written notice, it is interesting to note that both cases involved a written component, i.e., contractor letters referring to the delay in the former; a Government memorandum in the latter. The court addressed the written requirement of the clause in Hoel-Steffen. It found that the contractor letters to the Government which referred directly to delay caused by other contractors' interference with the contractor's access to the job site were sufficient to satisfy the written requirement of the Suspension of Work clause. Significantly, however, the court did express doubt whether a written component of the notice is essential.[207] Although neither case dispensed with the written requirement altogether, the thrust of the two opinions seems to be that the non-waivability of the 20-day notice provision (a) only applies where the Government has no notice at all about the claim, and (b) does not apply when the Government has timely notice which may merely be unwritten.

In addition to Hoel-Steffen and GMC Contractors, there is authority for a more liberal interpretation of the 20-day notice provision.

In John F. Cleary Construction Co.,[208] the GSBCA held that the notice provision will not be strictly interpreted to bar a claim where the claim is based on defective specifications. The board reasoned that because the Suspension of Work clause was an administrative substitute for an action for breach of contract, (citing Chaney & James discussed above), the contractor was entitled to the same relief he would be entitled to in a breach of contract action. Thus, since the contractor would not have had to prove that timely written notice was given in order to seek relief on a basis of a breach action, it was not necessary to prove notice for relief under the Suspension of Work clause. The precedential value of this case may be limited. The contract was awarded in 1967, i.e., prior to the development of the current construction contract Changes clause. It would appear that the entire amount of delay associated with defective specifications would be compensable today under the Changes clause without regard to the 20-day notice provision of the Changes clause.[209] However, the Cleary rationale could presumably overcome the timely notice requirement objections in those other Suspension of Work cases, previously discussed in Chapter II, where the delay was due to a Government action amounting to a breach of contract. Whatever the attractiveness of the underlying logic of the Cleary rationale, the boards and the Court of Claims have not followed it in subsequent decisions.

In two cases interpreting the Changes clause, where the equity of the situation was clearly balanced in favor of the contractor, the boards did not enforce the 20-day notice requirement.

In J.A. LaPorte,[210] the contract required the even distribution of land fill along the entire length of a beach. After a storm, the Government gradually changed the location of the fill as the work progressed, resulting in the fact that most of the contract amount was placed at the northern two-thirds of the project. Since the borrow area was located at the south end of the project, costs of transporting the fill were increased. The Government claimed that the contractor's claim for additional compensation under the Changes clause was barred from consideration by the 20-day notice provision of that clause in that the contractor knew early in the contract that the storm damage required moving much of the fill to the north end of the project. The board disagreed and found that the contractor was never informed of the magnitude of the storm damage.

> In consideration of the purpose to be served by the clause, the various boards have not hesitated to deny claims where the contractor has failed to give timely notice as required by the Changes clause or by the comparable provisions contained in the Suspension of Work clause. We find, however, that the 20-day notice provision of the Changes clause should not preclude consideration of a claim on the merits where there is no one action of the Government which can be pointed to as the identifiable event on which the claim is grounded and from which the contractor's delay in presenting the claim can be measured, particularly where, as here, the evidence of record indicates that the Government's

> actions contributed to and may even have been the principal cause of the delay in giving notice of the claim.[211]

In a similar vein, the ASBCA in Ionics, Inc.[212] held that the notice provision will not be strictly interpreted to bar a claim where the Government was instrumental in causing the contractor's failure to file a timely claim notice. In Ionics, the contractor failed to give timely notice because the Government assured him that it would issue a formal change order.

In drawing parallels from LaPorte and Ionics to the Suspension of Work clause, one can conclude that where the contractor's failure to give timely notice is the result of (1) a Government promise to issue an affirmative suspension order or (2) the lack of a single identifiable delay-causing Government action, some argument exists for the non-enforcement of the notice provision.

Deadline for Filing Claim

It is important to distinguish between the 20-day notice requirement, which sets a limit to the period within which incurred costs can be reocvered, and the other requirement of paragraph (c) that requires that the claim in a firm amount be presented in writing not later than the date of final payment under the contract. While the written notice of potential claim, that is, the first of the notices called for in the clause, is not always strictly enforced, the second notice is very strictly construed, and a claim asserted

after final payment is almost always barred.

For example, in Hewitt Construction Corp.,[213] the contract called for pavement repair at a Nike Missile site at Lorton, Virginia. Two months after final payment of the contract, the contractor asserted in writing a claim for costs incurred as a result of military activity which had prevented his access to the worksite on four occasions. The ASBCA found that at least two of the suspensions were clearly unreasonable. However, the board further held that the contractor was not entitled to additional compensation for a suspension of work because he failed to assert the claim prior to final contract payment.

> The integrity of time limitations such as this has been upheld by us and by the Court of Claims. Appeal of Specialty Assembling & Packing Co., ASBCA 4523 to 4532, 59-2 BCA 2370; P.L.S. Coat & Suit Corp. v. United States, 148 Ct. Cl. 296; Appeal of Terry Industries, Inc., ASBCA 5957, 1962 BCA 3549.[214]

This strict rule has been applied even in the absence of a clear demonstration by the Government that it was prejudiced by the untimely claim.[215]

However, there is some authority for the position that the contractor may assert a formal claim after final payment if he communicates to the Government, prior to final payment, an intention to assert the claim.[216] Although the cases supporting this position arose under the Changes clause, the finding would seem equally applicable to claims arising under the Suspension of Work clause.

As previously noted, the date of final payment is the

deadline for filing a claim under the Suspension of Work clause. Normally, this date coincides with the issuance of the last contract payment voucher. However, in Onsrud Machine Works, Inc.,[217] the ASBCA held that the contractor's claim for additional compensation was asserted during the life of the contract despite the fact that it was not asserted before the last contract payment (which was February 1967), because the payment was not a "final" one in view of the fact that the contractor had earlier (in November 1966) requested financial relief under the discretionary authority of P.L. 85-804 (50 U.S.C. 1431-35). The board reasoned that the request served to extend the life of the contract, and while the request was still pending, a formal claim was asserted under the clause.

In reviewing the number of case decisions that have arisen under the two discussed notice provisions of the Suspension of Work clause, it is evident that the 20-day notice provision is by far the more frequently litigated. It is also the one frequently not enforced. However, it is apparent that the more liberal approach of the Court of Claims as reflected in Hoel-Steffen Construction Co. is still not totally accepted. Strict compliance with the contract notice provision still seems to be the prevailing rule. This conservative view does not seem justified when one considers that the primary purpose of the notice provision is to assure that the Government realizes that the contractor is being injured by its act which is creating

the delay, and thus to assure that the Government has an opportunity to take corrective action if it desires. If the Government is otherwise aware of the problem, the primary purpose of the notice provision is fulfilled. Consequently, strict compliance only seems justified if the failure to give proper notice prevents the Government from an opportunity to take action.

V. NATURE OF THE PRICE ADJUSTMENT

Paragraph (b) of the present Suspension of Work clause sets forth the nature of the adjustment in the contract that shall result from a work suspension.

> . . . An adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by such unreasonable suspension, delay or interruption and the contract modified in writing accordingly . . .[218]

Profit Excluded

One of the more significant provisions of the Suspension of Work clause, in contrast with the Changes clause and the Differing Site Conditions clause, is that profit is expressly excluded as an element of recovery. The Boards of Contract Appeals and the Court of Claims have consistently followed this principle in interpreting the current Suspension of Work clause.[219]

The earlier version of the clause used by the Army Corps of Engineers did not incorporate the exclusion of profit principle.[220] However, the majority of decisions by the Corps of Engineers Board interpreting the clause refused to include profit as part of the equitable adjustment.[221] The board generally took the position that the contractor was entitled to profit only on work performed, and hence there was no basis for paying profit for work not performed, i.e.,

on standby costs.[222] A frequently-raised policy argument against including profit is that it discourages the contractor from mitigating delay costs, and thus in effect operates like a cost-plus-percentage-of cost contract.[223]

Contractors quite naturally favor the inclusion of profit. The position is that whenever a suspension makes idle a contractor's plant, equipment, and supervisory staff, he is deprived of an opportunity to put this same organization at some other profitable operation.[224] Whatever the validity of these policy arguments, it is clear that the contractor is not entitled to profit on delay costs under the present clause.[225]

Proof of Increased Costs

As discussed in Chapter II, as a fundamental requirement for recovery of costs which are permitted under the Suspension of Work clause, the contractor must show that the Government's conduct proximately resulted in an unreasonable delay, and that the delay directly resulted in increased cost. In addition, it is necessary to prove the amount of the increase.

In establishing the amount of the costs incurred as a result of the suspension of work, the burden of proof is on the contractor.[226] The boards will not assume the burden for the contractor.[227]

> Appellant has the burden of showing the specific costs that were increased by the suspensions and the amount of such increases . . . We cannot allow a suspension of work claim which is computed and presented on the

> unproved and unsupported theory that indirect costs continue during a suspension of work at the same rate as during performance of work without regard to the conditions present in the particular case.[228]

Although the burden of proof is on the contractor, absolute certainty in the computation of delay costs is not required.[229] It is sufficient if under all facets and circumstances, a reasonable approximation can be made.[230]

In accepting proof of increased costs, the boards are liberal. In Davho Co.,[231] the VACAB noted the lack of evidence relating to the dollar amount of the loss of use value of idle equipment. However, the board did find very clear that under the circumstances of the case, some financial loss must necessarily have been involved. On a jury verdict basis, the board awarded $600 increased compensation for the unreasonable period of delay.

> Where delay damages are concerned, it is now a well-established rule that where the evidence presented by the claimant is not so positive as to allow absolute determination of the amount of the precise excess costs resulting from the delay, an approximate and reasonable "jury verdict" determination of the amount should be made.[232]

While estimates are the preferred method of proof in computing delay costs,[233] a total cost approach can be utilized if (1) the original bid was fair, (2) no managerial ineptitude is evident, (3) no financial difficulties, (4) no contractor contribution to damages, and (5) no evidence that prices or costs are unreasonable.[234] In Robert McMullen & Sons, Inc., the ASBCA used a total cost method of proof, finding that it was superior to the use of estimates.

> This is a case where an adjustment based largely on actual costs is much more likely to produce a realistic measure of the damages suffered and a fair and just result than post-work estimates in which experts are pitted against each other leaving the bench wondering which to believe and provoking a jury verdict.[235]

Allowable Cost Items

The items of cost that a contractor may recover under the Suspension of Work clause for Government-caused delay are numerous. As previously indicated, they are dependent upon the practical effects of the delay on the contract work.[236]

Some common types of added delay costs that have been recognized as recoverable under the Suspension of Work clause are:

(1) The cost of replacing deteriorated material[237]

(2) The cost of increased material expense[238]

(3) Contractor insurance and bond premium costs during the suspension period[240]

(4) Salary paid to employees unable to work during the suspension period[240]

(5) Wage increases[241]

(6) Subcontractor delay claims.[242] The Severin[243] rule does not apply since the subcontractor's delay claims may be included as an adjustment under the prime contract.

(7) Clean-up operation made necessary by the shutdown of the job[244]

(8) Startup expenses after the suspension order is lifted.[245]

(9) Costs resulting from inefficiency due to additional winter work[246]

(10) Equipment maintenance expenses during the suspension period[247]

(11) Idle equipment. No payment should be made for equipment not used or not needed.[248] The Court of Claims stated the rule for computing compensation for idle equipent in Henry Ericsson Co.:

> In computing the plaintiff's damages resulting from delays caused by the Government's breaches of contract, we have included . . . compensation for machinery owned by the plaintiff and rendered idle by the delay . . . and because of the absence of wear and tear upon it, awarded one-half the fair rental value of it.[249]

The Boards of Contract Appeals, while adopting the 50 percent rule, have used the Associated General Contractors' (AGC) rates and not the Associated Equipment Distributors' (AED) rental rates.

> We are further of the opinion that rental values are not a proper basis upon which to compute the increase in cost of performance that results from enforced idleness of construction equipment where, as here, the equipment is not actually rented for the project but is owned by one of the contractors performing the work. Standard rental rates, reduced by one-half for the absence of wear and tear on the machines during the period of idleness, have in the past been used as the basis for idle equipment allowances in delay damages cases. But later precedent cases are critical of such determinations made on the basis of the Associated Equipment Dealers (AED) published rental rates for equipment items, as reflecting profit and other reasons. It is now accepted that where resort must be had to published value standards a formula that is based on several factors including acquisition cost, depreciation, etc., that are set forth in the Associated General Contractor's Ownership Expense Manual should be followed.[250]

The use of AGC rates by both the Court of Claims and the Boards of Contract Appeals seems well-established now.[251]

(12) Overhead.[252] The most difficult cost problem is that of determining the amount of overhead cost that should be attributed to the delay period. Frequently, overhead costs will comprise a major part of the total delay costs. A widely-followed formula for computing such overhead costs was set forth by the ASBCA in Eichleay Corp.:[253]

(a) $\frac{\text{contract billings}}{\text{total billings for contract period}} \times \text{total overhead for the contract period} =$ overhead allocable to the contract.

(b) $\frac{\text{allocable overhead}}{\text{days of performance}} =$ daily contract overhead.

(c) daily contract overhead x number of days delay = amount payable.

Finally, it should be emphasized that DAR Section 15--Contract Cost Principles and Procedures--applies to price adjustments made under the Suspension of Work clause.

CONCLUSION

The Suspension of Work clause is a versatile tool for handling the problem of delay in Government fixed-price construction contracts. Although purportedly the inclusion of the clause was initially understood to create no additional substantive rights for the contractor, the Court of Claims and the Boards of Contract Appeals have gone beyond the initial guidelines and have applied the clause in situations where the contractor would not have been likely to find similar relief in the courts on a breach of contract theory. In general, "unreasonable delay"--the key element in understanding the clause--has been interpreted liberally in favor of the contractor.

The continued use of the Suspension of Work clause by Government procurement agencies constitutes at least a tacit indorsement of it. Clearly, the clause seems to offer certain advantages: (1) it affords the Government needed flexibility in contract administration; (2) it prevents termination by the contractor in circumstances where evidence indicates a Government breach of contract; (3) it provides an expeditious administrative remedy for the contractor; (4) it furnishes a basis for bidding when considering the possible cost of delay; (5) it tightens contract administration; and (6) it reduces the necessity for litigation. As a consequence

of this last advantage, the already overloaded courts become a third party beneficiary to the suspension concept.

In sum then, the Suspension of Work clause has a demonstrated value in providing an administrative remedy to the problem of Government-caused delay.

However, in spite of this value, the larger problem of allocation of responsibility for increased costs due to delays encountered in the performance of Government fixed-price construction contracts remains. There is always a need to strike a balance between the Government's desire to obtain the lowest bid price for its contracted work and its desire to have the contractor assume delay risks under a fixed-price contract.

As generally recognized and accepted, if the Government, through contract provisions, assures the contractor that any expected costs resulting from delays not attributable to the contractor's fault will be compensated for by the Government, then bid prices presumably should be relatively lower. Even recognizing this, however, the question remains, to what extent should the Government relieve the contractor of the risk of delay in attempting to achieve bid prices without contingency items? With each assumption of the risk of delay by the Government goes the possibility of resultant increases in Government costs.

Viewed as a balance test, the question becomes, under what circumstances should the Government pay delay claims and under what circumstances should the Government in effect

pay premiums for delay by having the contractor incorporate a contingency in his bid for the cost of potential Government-caused delays that are not compensable?

One solution to the problem would be to simply place the matter on a purely pecuniary basis. If the Government's total premium for delay is greater than the Government's gain, then it would be in the Government's interest to expand its responsibility for delay by a modification of the Suspension of Work clause.

However, there is more involved in this question than financial advantage to the Government. There is a basic question of fairness that transcends mere dollars and cents. Is it fair for the Government to ask the contractor to assume the delay risks he is now bearing under the current Suspension of Work clause? Is it wise social engineering to include in Government contracts a clause which can place the risk of some Government-caused delays (e.g., sovereign act delays or "reasonable" delays) on the contractor which may result in substantial monetary losses regardless of the contractor's efficiency? It would seem not. Therefore, it is recommended that a redistribution of delay risks be accomplished with the Government increasing its responsibilities under the Suspension of Work clause.

As a step in this direction, I would propose a modification in the present Suspension of Work clause. By this modification, the Government would first assure that the contractor would not be denied a price adjustment under

the Suspension of Work clause because the delay resulted from a sovereign act of the United States. Secondly, an act of the Government which resulted in a delay not expressly provided for in the contract would be compensable. This would include delays preceding the issuance of a change order, unless such delay was expressly reserved by other than the standard Changes clause. As a consequence of this modification to the clause, the arcane and often elusive distinction between "reasonable" and "unreasonable" delay would no longer be necessary. By providing for compensation for all Government-caused delay not expressly provided for in the contract, the Government will remove the necessity for any contingency. Thus, the added expense of paying for all such Government-caused delays should be compensated for by a reduction in prices in bids and proposals. More importantly, however, the clause modification would be a step toward a more equitable distribution of the risk of loss for Government-caused delays.

FOOTNOTES

1. Gaskins, Delays, Suspensions and Available Remedies under Government Contracts, 44 Minnesota Law Review 75 (1959).

2. Commerce Int'l Co. v. United States, 167 Ct. Cl. 529, 338 F.2d 81 (1964); Laburnum Construction Corp. v. United States, 163 Ct. Cl. 339, 325 F.2d 451 (1963).

3. A.S. Schulman Electric Co. v. United States, 145 Ct. Cl. 399 (1959).

4. Peter Kiewit Sons Co. v. United States, 138 Ct. Cl. 668, 151 F. Supp. 726 (1957).

5. Commerce Int'l Co. v. United States, supra n. 2.

6. Id.

7. Id. at 535-36.

8. Peter Kiewit Sons Co. v. United States, supra n. 4.

9. Robert E. Lee & Co. v. United States, 164 Ct. Cl. 365 (1964); Broome Construction, Inc. v. United States, 203 Ct. Cl. 521, 492 F.2d 829 (1974).

10. Commerce Int'l Co. v. United States, supra n. 2 at 542-43.

11. See Chapter III infra.

12. Parish v. United States, 120 Ct. Cl. 100, 98 F. Supp. 347 (1951).

13. United States v. Rice, 317 U.S. 61 (1942).

14. Chouteau v. United States, 95 U.S. 61 (1877).

15. United States v. Rice, supra n. 13 at 67.

16. United States v. Howard P. Foley Co., 329 U.S. 64 (1946). See also Crook Co. v. United States, 270 U.S. 4 (1926).

17. Reprinted in Nash & Cibinic, Federal Procurement Law, 644 (2d ed. 1969). See Easterwood, Pay for Delay, 1 Gov't Contract Review, No. 1, 5 (1957), for a brief history of this clause.

18. Basich Brothers Construction Co., Army BCA No. 1592 (1949).

19. Guerin Brothers, WDBCA 1551 (1948).

20. Id.

21. Broome Construction, Inc. v. United States, supra n. 9.

22. Kelly v. United States, 107 Ct. Cl. 594 (1947).

23. See generally Gaskins, supra n. 1.

24. See generally McClelland, The Proposal for a Work Suspension or Gov't Delay Clause, 18 Pittsburgh Law Review 754 (1957).

25. Id.

26. Comp. Gen. Dec. B-117480, Nov. 12, 1953, Unpub.

27. 36 Comp. Gen. 302 (1956) at 302-303.

28. See Clark, Gov't-Caused Delays in the Performance of Federal Contracts: The Impact of the Contract Clauses, 22 Military Law Review 1 (1963), at 847, for a history of the development of the optional Gov't-wide Suspension of Work clause.

29. Reprinted in Nash & Cibinic, supra n. 17, at 636.

30. For an explanation of the revisions incorporated in the 1968 clause, see 32 Fed. Reg. 16270, Nov. 29, 1967; see also Chapter III infra.

31. Defense Acquisition Regulation 7-602.46; Federal Acquisition Regulation 1-7.601-4. The Defense Acquisition Regulation, hereinafter referred to as DAR, is printed with identical numbering in Vol. 32 of the Code of Federal Regulations; the Federal Acquisition Regulations, hereinafter referred to as FAR, are printed with identical numbering in Vol. 40 of the Code of Federal Regulations.

See also DAR App. F, 100.23-A (Standard Form 23-A). DOD Directive 5500.35 (8 March 1978) redesignated the Armed Services Procurement Regulation (ASPR) System as the Defense Acquisition Regulation (DAR) System.

32. DAR 7-602.46(a).

33. Blasky, Delays, Suspension and Acceleration, 35 (George Washington Univ., Gov't Contracts Monograph No. 9, 1975).

34. ASPR 7-103.24 (1970 ed.) (superseded).

35. Id.

36. E.V. Lane Corp., ASBCA 7232, 1962 BCA 3327 (1962) at 17,143.

37. George A. Fuller Co., ASBCA 8524, 1962 BCA 3619 (1962); J.A. LaPorte, Inc., IBCA 1014-12-73, 75-2 BCA 11,486 (1975); Lee Electric Co., FHACAP 67-26, 67-1 BCA 6263 (1967).

38. J.A. LaPorte, Inc., supra n. 37 at 54,789.

39. Id.

40. DAR 7-602.46(c).

41. DAR 7-602.1. See also DAR App. F, 100.23-A (Standard Form 23-A).

42. Stamell Construction Co., DOT CAB 68-27J, 75-1 BCA 11,334 (1975).

43. M.A. Santander Construction, Inc., ASBCA 15882, 76-1 BCA 11,798 (1976).

44. Frank K. Blas Plumbing & Heating Co., ASBCA 16,563, 73-2 BCA 10,279 (1973) at 48,541.

45. DAR 7-602.46(b).

46. Guerin Brothers, supra n. 19.

47. T.C. Bateson Construction Co., ASBCA 5492, 60-1 BCA 2552 (1960) at 12,348, citing Seltzer & Gross, Federal Gov't Construction Contracts: Liability for Delays Caused by the Gov't, 25 Fordham Law Review 423 (1956).

48. DAR 7-602.46(b).

49. J.W. Bateson Co., GSBCA 3441, 73-2 BCA 10,098 (1973).

50. Guerin Brothers, supra n. 19.

51. Chaney & James Construction Co. v. United States, 190 Ct. Cl. 699, 421 F.2d 728 (1970) at 732.

52. 36 Comp. Gen. 302 (1956).

53. T.C. Bateson Construction Co., supra n. 47 at 12,348.

54. Case note, 52 Georgetown Law Journal 644 (1964), at 649.

55. Patti, Massman & MacDonald Construction Co., ASBCA 8423, 1964 BCA 4225 (1964); Keller Construction Co., Eng BCA 1276 (1959).

56. A.S. Schulman Electric Co. v. United States, supra n. 3.

57. George A. Fuller Co. v. United States, 108 Ct. Cl. 70 (1947), at 94.

58. Patti, Massman & MacDonald Construction Co., supra n. 55.

59. M.A. Santander Construction, Inc., supra n. 43; Hewitt Construction Corp., ASBCA 11321, 66-2 BCA 5758 (1966).

60. Patti, Massman & MacDonald Construction Co., supra n. 55 at 20,505.

61. Bonaco Construction Co., Inc., ASBCA 6627, 61-1 BCA 2916 (1961); Robert McMullan & Sons, Inc., ASBCA 19023, 76-1 BCA 11,728 (1976); DeMauro Construction Corp., ASBCA 12514, 73-1 BCA 9830 (1972).

62. Larco Painting Co., ASBCA 6005, 60-1 BCA 2655 (1960).

63. Maintenance Engineers, ASBCA 17474, 74-2 BCA 10,760 (1974).

64. Sydney Construction Co., ASBCA 21377, 77-2 BCA 12,719 (1977).

65. Robert McMullan & Sons, Inc., supra n. 61. See also Barnet Brezner, ASBCA 6207, 61-1 BCA 2895 (1960); R-M-R Construction Co., DOT CAB 68-16, 69-2 BCA 7911 (1969).

66. T.C. Bateson Construction Co. v. United States, 162 Ct. Cl. 145, 319 F.2d 135 (1963).

67. Id. at 186-187.

68. John A. Johnson & Sons v. United States, 180 Ct. Cl. 969 (1967), at 990.

69. C.W. Schmid Plumbing & Heating v. United States, 173 Ct. Cl. 302, 351 F.2d 651 (1965).

70. C.H. Leavell & Co., v. United States, 208 Ct. Cl. 776, 530 F.2d 878 (1976). See also Urban Plumbing & Heating v. United States, 187 Ct. Cl. 15, 408 F.2d 382 (1969), cert. denied 398 U.S. 958 (1970).

71. C.W. Schmid Plumbing & Heating v. United States, supra n. 69.

72. C.H. Leavell & Co. v. United States, supra n. 70 at 797.

73. Id. at 803.

74. Merritt-Chapman & Scott Corp. v. United States, 192 Ct. Cl. 848, 429 F.2d 431 (1970).

75. Id. at 852.

76. M.D. Funk, ASBCA 20287, 77-1 BCA 12,241 (1976).

77. Allied Contractors, Inc., ASBCA 5326, 59-2 BCA 2441 (1959).

78. Barnet Brezner, supra n. 65.

79. DeMauro Construction Co., supra n. 61; Allied Contractors, Inc., supra n. 77.

80. Drexler Construction Co., ASBCA 9776, 66-1 BCA 5389 (1966); R-M-R Construction Co., supra n. 65.

81. R-M-R Construction Co., supra n. 65 at 36,807-08.

82. Royal Painting Co., ASBCA 20034, 75-1 BCA 11,311 (1975).

83. Fryd Construction Corp., ASBCA 11017, 66-1 BCA 5553 (1966).

84. R-M-R Construction Co., supra n. 65.

85. M.A. Santander Construction, Inc., supra n. 43.

86. J.M. Brown Construction Co., ASBCA 3469, 57-2 BCA 1377 (1957).

87. Id. at 4505.

88. Altman-Wolfe Associates, ASBCA 8315, 1963 BCA 3960 (1963), at 19,606. See also Paccon, Inc., ASBCA 7890, 1963 BCA 3659 (1963).

89. M.A. Santander Construction, Inc., supra n. 43.

90. Chaney & James Construction Co., Inc. v. United States, supra n. 51.

91. Patti, Massman & MacDonald Construction Co., supra n. 55.

92. T.C. Bateson Construction Co. v. United States, supra n. 66.

93. M.A. Santander Construction, Inc., supra n. 43.

94. Proctor Co., ASBCA 9671, 1964 BCA 4212 (1964).

95. Ardini & Pfau, Inc., ASBCA 8602, 1964 BCA 4237 (1964), at 20,548.

96. Howard B. Nilsen, ASBCA 5343, 59-2 BCA 2290 (1959); Lucarelli & Co., Inc., ASBCA 8422, 65-1 BCA 4523 (1965).

97. Eldridge Construction Co., ASBCA 6926. 1963 BCA 3776 (1963).

98. Howard B. Nilsen, supra n. 96 at 10,300.

99. Ames & Denning, Inc., ASBCA 6956, 1962 BCA 3406 (1962).

100. M.J. Newsom, ASBCA 9799, 1964 BCA 4444 (1964) at 21,408. See also M.A. Santander Construction, Inc., supra n. 43.

101. Warrior Constructors, Inc., Eng BCA 3134, 71-1 BCA 8915 (1971).

102. Asheville Contracting Co., DOT CAB 74-6, 76-2 BCA 12,027 (1976).

103. Dravo Corp., Eng. BCA 2950, 71-1 BCA 8676 (1971); Fred A. Arnold, Inc., ASBCA 16506, 72-2 BCA 9608 (1972); T.C. Bateson Construction Co. v. United States, supra n. 66.

104. Fred A. Arnold, Inc., supra n. 103.

105. T.C. Bateson Construction Co. v. United States, supra n. 66; Dravo Corp., supra n. 103.

106. Robert McMullan & Sons, Inc., supra n. 61; Barnet Brezner, supra n. 65; DeMauro Construction Corp., supra n. 61.

107. Minmar Builders, Inc., GSBCA 3430, 72-2 BCA 9599 (1972); Patti, Massman & MacDonald Construction Co., supra n. 55; Lewis Construction Co., ASBCA 5509, 60-2 BCA 2732 (1960); Stagg Construction Co., GSBCA 2664, 70-1 BCA 8241 (1970).

108. Utilities Contracting Co., ASBCA 9723, 65-1 BCA 4582 (1964), at 21,913.

109. Lea County Construction Corp., ASBCA 10093, 67-1 BCA 6243 (1967); Merritt-Chapman & Scott Corp. v. United States, supra n. 74; John A. Johnson & Sons v. United States, supra n. 68.

110. T.C. Bateson Construction Co., ASBCA 6028, 1963 BCA 3692 (1963).

111. United States v. Howard P. Foley Co., supra n. 16; John A. Johnson & Sons, Inc., ASBCA 4403, 59-1 BCA 2088 (1959).

112. Patti, Massman & MacDonald Construction Co., supra n. 55; Keller Construction Co., supra n. 55.

113. Id.

114. Ben C. Gerwick, Inc. v. United States, 152 Ct. Cl. 69 (1961).

115. W.E. Barling v. United States, 126 Ct. Cl. 34 (1953).

116. Larco Painting Co., supra n. 62; Adrian L. Roberson, ASBCA 5939, 60-2 BCA 2735 (1960).

117. Sydney Construction Co., supra n. 64; Shiff Construction Co., ASBCA 9020, 1964 BCA 4478 (1964).

118. C.H. Leavell & Co. v. United States, supra n. 70; Drexler Construction Co., ASBCA 12249, 69-1 BCA 7572 (1969); S.A. Healy Co. v. United States, No. 328-76 (Ct. Cl., April 19, 1978).

119. Stamell Construction Co., supra n. 42.

120. D.H. Dave & Gerben Contracting Co., ASBCA 6257, 1962 BCA 3493 (1962).

121. Maintenance Engineers, supra n. 63; Snyder-Lynch Motors, Inc. v. United States, 154 Ct. Cl. 476 (1961).

122. Piracci Construction Co., GSBCA 3477, 74-1 BCA 10,647 (1974).

123. Urban Plumbing & Heating Co. v. United States, supra n. 70.

124. Rottau Electric Co., ASBCA 20283, 76-2 BCA 12,001 (1976).

125. Royal Painting Co., supra n. 82.

126. Kraft Construction Co., ASBCA 4976, 59-2 BCA 2347 (1959); L.O. Brayton & Co., IBCA 641-5-57, 70-2 BCA 8510 (1970); DeMatteo Construction Co., PSBCA 187, 76-2 BCA 12,172 (1976); ABC Demolition Corp., GSBCA 2289, 68-2 BCA 7166 (1968).

127. Smyth Plumbing & Heating, ASBCA 6098, 1962 BCA 3420 (1962).

128. Cimarron Construction Co., Eng BCA 2862, 69-2 BCA 8003 (1969).

129. E.R. McKee, Eng BCA 3227, 73-2 BCA 10,141 (1973).

130. Kimberly Construction Co., ASBCA 10806, 67-2 BCA 6434 (1967).

131. Davho Co., VACAB 1005, 72-2 BCA 9683 (1972).

132. M.D. Funk, supra n. 76.

133. DAR 7-602.46(b).

134. 32 Fed. Reg. 16270, Nov. 29, 1967, reprinted in Nash & Cibinic, supra n. 17, at 650.

135. DAR 7-602.46(b). See also Chapter V.

136. M.A. Santander Construction Co., supra n. 43.

137. Reliance Enterprises, ASBCA 20808, 76-1 BCA 11,831 (1976).

138. For fixed-price construction contracts, the current Changes clause is found at DAR 7-602.3. See also DAR App. F, 100.23-A (Standard Form 23-A).

139. Kraft Construction Co., supra n. 126.

140. Pan Arctic Corp., ASBCA 20133, 77-1 BCA 12,514 (1977).

141. Hensel-Phelps Construction Co., Eng. BCA 3368, 74-2 BCA 10,728 (1974).

142. Warrior Constructors, Inc., supra n. 101.

143. Id.

144. Hensel-Phelps Construction Co., supra n. 141 at 51,022.

145. Minmar Builders, Inc., supra n. 107.

146. Id. at 44,857.

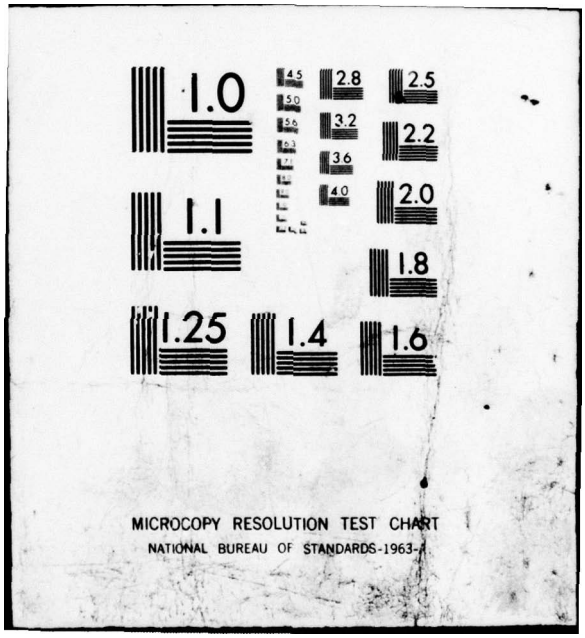
147. Weaver Construction Co., ASBCA 12577, 69-1 BCA 7455 (1968); Fred A. Arnold, Inc., ASBCA 18915, 75-2 BCA 11,496 (1975); see also Nash, Gov't Contract Changes, 405 (1975).

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MICROCOPY RESOLUTION TEST CHART
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148. For fixed-price construction contracts, DAR 7-603.22.

149. Id.

150. Patti, Massman & MacDonald Construction Co., supra n. 55.

151. For fixed-price construction contracts, DAR 7-602.4. See also DAR App. F, 100.23-A (Standard Form 23-A).

152. 32 Fed. Reg. 16269, Nov. 29, 1967. See generally Laedlein, Differing Site Conditions, 19 A.F. L.Rev. 5 (Spring 1977).

153. DAR 7-602.46(b).

154. Broome Construction, Inc. v. United States, supra n. 9.

155. See generally Delay in Changed Work, 6 Public Contract Law Journal # 1, (May 1973), at 158.

156. Hardeman-Monier-Hutcherson, ASBCA 11869, 67-2 BCA 6522 (1967).

157. Id. at 30,312.

158. Acme Missiles & Construction Corp., ASBCA 11794, 68-1 BCA 6734 (1967).

159. William Passalacqua Builders, Inc., GSBCA 4205, 77-1 BCA 12,406 (1977).

160. Id. at 60,093.

161. Fishbach & Moore Int'l Corp., ASBCA 18146, 77-1 BCA 12,300 (1976).

162. Id. at 59,224.

163. Raymond Constructors of Africa, Ltd. v. United States, 188 Ct. Cl. 147, 411 F.2d 1227 (1969). Circle Electric Contractors, Inc., DOTCAB 76-27, 77-1 BCA 12,339 (1977).

164. E.H. Marhoefer, Jr. Co., DOTCAB 70-17, 71-1 BCA 8791 (1971).

165. Id. at 40,847.

166. Priebe & Sons, Inc. v. United States, 332 U.S. 407 (1947).

167. Horowitz v. United States, 267 U.S. 458 (1925).

168. Wunderlich Contracting Co. v. United States, 173 Ct. Cl. 180, 351 F.2d 956 (1965).

169. Jones v. United States, 1 Ct. Cl. 383 (1865), reprinted in Latham, The Sovereign Act Doctrine in the Law of Gov't Contracts: A Critique and Analysis, 7 U. Toledo Law Review 29 (1975), at 31.

170. Latham, supra n. 169 at 34-35.

171. John A. Johnson & Sons, Inc., supra n. 111.

172. Frank K. Blas Plumbing & Heating, supra n. 44.

173. Id. at 48,451.

174. Wunderlich Contracting Co. v. United States, supra n. 168.

175. Goodfellow Brothers, Inc., AGBCA 75-140, 77-1 BCA 12,336 (1977).

176. Amino Brothers Co. v. United States, 178 Ct. Cl. 515, 372 F.2d 485 (1967).

177. Dunbar & Sullivan Dredging Co., Eng BCA 3165, 73-2 BCA 10,285 (1973).

178. E.V. Lane Corp., ASBCA 9741, 65-2 BCA 5076 (1965).

179. Granite Construction Co., IBCA 947-1-72, 72-2 BCA 9762 (1972).

180. Lane Construction Corp., Eng BCA No. 1977 (Sept. 1961); Goodfellow Brothers, Inc., supra n. 175.

181. Empire Gas Engineering Co., ASBCA 7190, 1962 BCA 3323 (1962).

182. Id. at 17,128.

183. See generally Latham, supra n. 169 at 50.

184. Comp. Gen. Dec. B-15383, June 17, 1964, Unpub.

185. Lane Construction Corp., supra n. 180.

186. Gerhardt F. Meyne Co. v. United States, 110 Ct. Cl. 527 (1948), at 550.

187. E.V. Lane Corp., supra n. 178; Goodfellow Brothers, Inc., supra n. 175.

188. L.S. Matusek, Eng BCA 3080, 72-2 BCA 9625 (1972).

189. Goodfellow Brothers, Inc., supra n. 175.

190. Id. at 44,964.

191. M.D. Funk, supra n. 76.

192. Id. at 58,221.

193. DAR 7-602.46(c).

194. The Changes clause for fixed-price construction contracts (DAR 7-602.3) also incorporates the 20-day notice provision, except for claims based on defective specifications. Consequently, cases interpreting the 20-day notice provision of the Changes clause can be helpful in interpreting the notice provision of the Suspension of Work clause.

195. FPR Circular 5, Jan. 20, 1968.

196. Structural Restoration Co., ASBCA 8747, 65-2 BCA 4975 (1965); Cameo Bronze, Inc., GSBCA 3646, 73-2 BCA 10,135 (1973); Paul Hardeman, Inc., Eng BCA 2889, 69-2 BCA 7833 (1969).

197. Cameo Bronze, Inc., supra n. 196.

198. Id. at 47,655-56.

199. Structural Restoration Co., supra n. 196.

200. Id. at 23,477.

201. Lane-Verdugo, ASBCA 16,327, 73-2 BCA 10,271 (1973).

202. Id. at 48,514.

203. Hoel-Steffen Construction Co. v. United States, 197 Ct. Cl. 561, 456 F.2d 760 (1972).

204. Id. at 572.

205. Id. at 573.

206. GMC Contractors, GSBCA 3730, 75-1 BCA 11,200 (1975).

207. Hoel-Steffen Construction Co. v. United States, supra n. 203 at 572.

208. John F. Cleary Construction Co., GSBCA 3158, 71-2 BCA 9127 (1971).

209. Nash, supra n. 147 at 405-406.

210. J.A. LaPorte, supra n. 37.

211. Id. at 54,780.

212. Ionics, Inc., ASBCA 16094, 71-2 BCA 9030 (1971).

213. Hewitt Construction Corp., ASBCA 11321, 66-2 BCA 5758 (1966).

214. Id. at 26,825.

215. Southwest Engineering Co., Inc., DOT CAB 70-26, 71-1 BCA 8818 (1971).

216. Missouri Research Laboratories, Inc., ASBCA 12355, 69-1 BCA 7762 (1969); Discon Corp., ASBCA 15981, 71-2 BCA 9069 (1971).

217. Onsrud Machine Works, Inc., ASBCA 14800, 71-2 BCA 9013 (1971).

218. DAR 7-602.46(b).

219. Maintenance Engineers, supra n. 63; C.H. Leavell & Co. v. United States, supra n. 70.

220. Blasky, supra n. 33 at 30.

221. J. Hilbert Sapp, Inc., Eng BCA 1349 (22 Sept. 1958).

222. Id.

223. Clark, supra n. 28 at 44.

224. Id.

225. Maintenance Engineers, supra n. 63; C.H. Leavell & Co. v. United States, supra n. 70.

226. E.V. Lane Corp., ASBCA 7232, 1962 BCA 3327 (1962).

227. Delaware Tool & Die Works, Inc., ASBCA 14033, 71-1 BCA 8860 (1971).

228. Paccon, Inc., ASBCA 7890, 1963 BCA 3659 (1963), at 18,355-56.

229. Needles v. United States, 101 Ct. Cl. 535 (1944).

230. Chandler v. United States, 127 Ct. Cl. 549 (1954).

231. Davho Co., supra n. 131.

232. Id. at 45,216-17. See also Dale Construction Co. v. United States, 168 Ct. Cl. 692 (1964).

233. Robert McMullan & Sons, Inc., supra n. 61.

234. Id.

235. Id. at 57,962.

236. Howard B. Nilsen, supra n. 96.

237. Roten Construction Co., ASBCA 6268, 61-1 BCA 3093 (1961).

238. Barnet Brezner, ASBCA 6194, 1962 BCA 3381 (1962).

239. Id.

240. T.C. Bateson Construction Co., supra n. 110.

241. Wikel Construction Co., FAACAP 67-30, 67-2 BCA 6475 (1967).

242. James F. Seger v. United States, 199 Ct. Cl. 766, 469 F.2d 292 (1972).

243. Severin v. United States, 99 Ct. Cl. 435, cert. denied 322 U.S. 733 (1943).

244. Davho Co., supra n. 131.

245. Eldridge Construction Co., supra n. 97.

246. T.C. Bateson Construction Co., supra n. 110.

247. Id.

248. James Julian, Inc., ASBCA 10,802, 67-1 BCA 6145 (1967).

249. Henry Ericsson Co. v. United States, 104 Ct. Cl. 397, 62 F. Supp. 312, cert. denied 327 U.S. 784 (1945), at 427.

250. Davho Co., supra n. 131 at 45,216. See also DeMauro Construction Co., supra n. 61.

251. See generally Solimine, Price Adjustments for Contractor Owned Construction Equipment, 11 AFJAG L.Rev. 315 (Summer 1969).

252. Eichleay Corp., ASBCA 5183, 60-2 BCA 2688 (1960).

253. Id. at 13,568. See also Robert McMullan & Sons, Inc., supra n. 61.